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AUG 30 2002

See Enclosed Interested Persons List

CERTIFIED MAIL

Dear Interested Persons:

IN THE MATTER OF THE PETITION OF MEHDI MOHAMMADIAN FOR REVIEW OF ALAMEDA COUNTY'S NOTICE OF REVISION TO RESPONSIBLE PARTY DESIGNATION: **REQUEST FOR CONTINUANCE**

On August 26, 2002, the State Water Resources Control Board (SWRCB) received a request from ChevronTexaco to continue the above-referenced matter. ChevronTexaco's request is based on the fact that, due to a merger between Chevron Corporation and Texaco Inc., there was a delay in the transmission of the Workshop Notification and Draft Order. Because ChevronTexaco is one of the parties directly affected by the order, the SWRCB has granted its request and will reschedule the matter to be heard at the SWRCB's October workshop, which is currently set for October 3, 2002. ChevronTexaco has been given until 5:00 pm, September 20, 2002 to submit written comments on the Draft Order.

Because ChevronTexaco's request was received after the September 4, 2002 workshop agenda had been finalized, the above-referenced item still appears on the agenda. However, the SWRCB *will not* consider this item at that workshop.

You will receive official notice no less than 10 days prior to the October workshop specifying the exact date when this matter will be considered by the SWRCB.

If there are any questions or comments, please call me at (916) 341-5182.

Sincerely,

David M. Boyers

David M. Boyers
Staff Counsel

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Petition of
MEHDI MOHAMMADIAN
for Review of Alameda County's Notice of Revision to Responsible Party Designation
SWRCB/OCC File UST-XXXX

SWRCB
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AUG 27 2002

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of MEHDI MOHAMMADIAN For Review of Alameda County's Notice of Revision To Responsible Party Designation	OBJECTIONS AND COMMENTS OF MRS. CALLERI TO THE SWRCB'S DRAFT ORDER, DATED AUGUST 1, 2002

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OBJECTIONS AND COMMENTS OF MRS. CALLERI TO THE STATE WATER RESOURCES CONTROL BOARD'S <u>DRAFT ORDER, DATED AUGUST 1, 2002</u>

Mrs. Agnes Calleri respectfully submits the following objections and comments, on behalf of herself and her late husband, Jessen Calleri, to the Draft Order prepared by the State Water Resources Control Board (**"SWRCB"**) in response to the petition for review filed by Mehdi Mohamadian (the **"Petitioner"**) with respect to Alameda County's Notice of Revision to Responsible Party Designation.

<u>SUMMARY OF MRS. CALLERI'S OBJECTIONS TO DRAFT ORDER</u>

Mrs. Calleri objects to the Draft Order prepared by the SWRCB on two separate and independent grounds.

<u>First</u>, Mrs. Calleri disagree with, and object to, the SWRCB's findings that she and her late husband were properly named as a responsible parties under the Barry Keene Underground Storage Tank Cleanup Trust Fund Act (hereinafter the **"Barry Keene Act"** or **"Act"**) in September of 1995. Upon reviewing applicable law, Mrs. Calleri maintains that the enactment of the Barry Keene Act substantially changed the legal effect of past events for her and her late husband with respect to the cleanup of the subject property, and consequently, it should <u>not</u> have been retroactively applied to them.

<u>Second</u>, Mrs. Calleris disagrees with, and objects to, the burden of proof proposed by the SWRCB in its Draft Order regard-

ing the removal of previously named responsible parties following a subsequent unauthorized release. The burden of proof proposed is both unreasonable and inequitable. As discussed at more length below, Mrs. Calleri proposes an alternative approach be adopted, which is more in keeping with the SWRCB's expressed policies, goals and principles.

I.

THE CORRECTIVE ACTION PROVISIONS OF THE BARRY KEENE ACT DO NOT APPLY RETROACTIVELY TO THE CALLERIS

Initially, Mrs. Calleri contends that since the corrective action provisions of Barry Keene Act were enacted over six years after the Calleris lost their interest in the subject property, and neither the corrective action provisions, nor the Act itself, expressly or implicitly provide for retroactive application, the corrective action provisions should never have been applied to her and her late husband. Therefore, the finding in the SWRCB's Draft Order that Mrs. Calleri and her late husband were properly named as responsible parties is in error, and should be amended. (See Draft Order, pages 13-14).

A. History of Statutory Provisions:

The Underground Storage of Hazardous Substances Act was enacted on September 23, 1983 -- a little over a month and a half after the Calleris' lost their interest in the subject property. (See Health & Safety Code §§25280-25299.7). Over six years

later, on October 2, 1989, the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 was enacted, authorizing the establishment and enforcement of corrective action requirements with respect to underground storage tanks then in the state containing petroleum. (See Health & Safety Code §§25299.10-25299.81). It took another two years -- until December 2, 1991 -- before the State Water Resources Control Board adopted regulations implementing the corrective action provisions. (See C.C.R. §§2720 et seq.)

B. Presumption Against Retroactivity:

A statute is retroactive if it affects rights, obligations, acts, transactions and conditions performed or existing prior to adoption of the statute and substantially changes the legal effect of those past events. (See Kizer v. Hanna (1989) 48 Cal.3d 1, 7 [255 Cal.Rptr. 412]).

As a general rule, statutes are not to be given retroactive effect unless the intent of the legislature cannot be otherwise satisfied. (See Balen v. Peralta Junior College District (1974) 11 Cal.3d 821, 828 [114 Cal.Rptr. 589]). "The Legislature, of course, is well acquainted with this fundamental rule, and when it intends a statute to operate retroactively it uses clear language to accomplish that purpose." (See DiGenova v. State Board of Equalization (1962) 57 Cal.2d 167, 176 [18 Cal.Rptr. 369]).

A statute's silence as to retroactivity is an authoritative indication the Legislature intended a prospective application. (See Nelson v. A.H. Robins Co. (1983) 149 Cal.App.3d 862, 870 [197 Cal.Rptr. 179]). Consequently, if a statute does not expressly provide that it is to be given retroactive effect, there is a strong presumption that the statute is to operate prospectively. This presumption is only overcome by a clear indication from the language used in the statute, or, in some cases, from the legislative history of the statute, that the Legislature intended for the statute to apply retroactively. (See In re Marriage of Reuling (1994) 23 Cal.App.4th 1428, 1439 [28 Cal.Rptr.2d 726]). This long-established presumption applies particularly to laws creating new obligations, imposing new duties or exacting new penalties because of past transactions. (See Pignaz v. Burnett (1897) 119 Cal. 157, 160 [51 P. 48]; Wienholz v. Kaiser Foundation Hospitals (1989) 217 Cal.App.3d 1501, 1505 [267 Cal.Rptr. 1]).

C. Application of Statutory Construction to the Barry Keene Act:

Neither the Barry Keene Act, nor the corrective action provisions set forth therein, contain any specific statement regarding retroactivity. (See Health & Safety Code §§25299.10 et seq.) While this fact alone raises a strong presumption that the Act was intended to apply prospectively, rather than retrospectively, this construction is also supported by both the language

and legislative history of the Act. (Id).

The language used in the Act clearly indicates that the Legislature intended for the provisions to apply **prospectively**. After finding that "approximately 90 percent of the underground storage tanks in the state contain petroleum", and that "a significant number of the underground storage tanks containing petroleum in the state may be leaking", and that "[i]n recent years, owners or operators of underground storage tanks have been unable to obtain affordable environmental impairment liability insurance coverage to pay for corrective action . . .", the Legislature declared, among other things, that:

> "(6) It is in the best interest of the health and safety of the people of the state to establish a fund to pay for corrective action where coverage is not available.
>
> . . . .
>
> "(10) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government . . . to authorize the state to implement the provisions of [the federal act] . . . [and]
>
> "(11) It is in the public interest for the state to provide financial assistance . . ., to ensure timely compliance with the law governing underground storage tanks, and to ensure the adequate protection of groundwater."

(Health & Safety Code §25299.10). The operative language used by the Legislature is in the future tense, not the past tense.

Furthermore, it is clearly and unambiguously directed to addressing the problems created by the underground storage tanks currently "in the state" which "may be leaking", and not to tanks that have been long since removed and are no longer either "in the state" or in existence. Significantly, this prospective intent is also articulated in the implementing regulations adopted by the SWRCB. Section 2620 of the California Code of Regulations provides, for example, that: "The regulations in this chapter are intended to protect waters of the state from discharges of hazardous substances from underground storage tanks. . . ." (See C.C.R. §2620 (emphasis added)).[1]

While there do not appear to be any civil or SWRCB cases in California which specifically address the retroactivity of the Act,[2] similar underground storage acts in other states, under less compelling circumstances, have been held not to apply

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[1] The language of the Code of Regulations is also consistent with a legislative intent that the Act and implementing regulations apply only to existing and future tanks, not tanks which have been physically removed before the enactment of the Act. This can be seen, for example, in the way in which the Board has chosen to define the term "decommissioned tank". One would logically assume that if a tank is no longer in existence, and cannot therefore be included under the definition of an "existing underground storage tank", that it should fall within the definition of a "decommissioned tank". But Section 2611 limits the definition of a "decommissioned tank" to "an underground storage tank which cannot be used for one or more of the following reasons: 1) the tank has been filled with an inert solid, 2) the fill pipes have been sealed; or 3) the piping has been removed."

[2] But see Selma Pressure Treating Co. v. Osmose Wood Preserving Co. (1990) 221 Cal.App.3d 1601, 1607 [271 Cal.Rptr. 596] (in which reference is made to the lower court's finding that provisions of the Water Code and Health and Safety Code which provided the basis for the State's claims for civil penalties could not be applied retroactively to acts or conduct preceding their enactment).

retroactively. In Wilson v. Triangle Oil Company (1989) 566 A.2d 1016, for example, the Delaware Underground Storage Act was held not to apply retroactively to allow recovery of cleanup costs and civil penalties against company which had divested itself of all interest in the real property and underground storage tanks in question prior to enactment of statute. Unlike this case, however, in the Wilson case the underground storage tanks were still in the ground.

D. The Barry Keene Act Has Substantially Changed the Legal Effect of Past Events for the Calleris:

While it has been argued that the adoption of the Barry Keene Act has not substantially changed the legal effect of past events for the Calleris, since there were other laws in effect during their ownership of the property - such as Water Code §13304 - which would have given the SWRCB authority to name them as responsible parties and to require them to prepare technical reports (see Draft Order, page 14), this is untrue. Based on the evidence before the SWRCB, the Calleris could not have been found liable under either Water Code §13304 or the general nuisance statutes which predated the Barry Keene Act.

(i) Burden of Proof:

Whether under the Barry Keene Act or under prior law, in order for the SWRCB to hold the Calleris accountable for the contamination which currently exists at the site, they would have to be able to find that there was substantial evidence to support

a finding that the Calleris were responsible for the contamination. According to the SWRCB, this means "credible and reasonable evidence which indicates the named party has responsibility." (See Draft Order, page 8, citing Board Order WQ 85-7, In the Matter of Petition of Exxon Company, U.S.A. et al.).

(ii) Insufficient Evidence to Rely on Water Code §13304:

While Water Code §13304 was adopted prior to the date the Calleris lost the property in foreclosure, as discussed below, insufficient evidence exists on which to find the Calleris liable under Section 13304. That Section provides, in pertinent part, that:

> "(a) Any person who has discharged or discharges waste . . . or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects [thereof] . . . ."

Water Code §13304 (emphasis added). There is absolutely no evidence that the Calleris either discharged waste, or "caused" or "permitted" the discharge of any waste or contamination.

a) No Evidence the Calleris "Discharged" or "Caused" Contamination at the Site:

While there is evidence that small levels of contamination were present at the site three years after the Calleris lost it to foreclosure, there is no evidence that it arose during the

Calleris ownership of the property. The contamination could have arisen either prior to or after their ownership of the property.

While the SWRCB has apparently accepted Texaco's argument that it did not operate the station and was therefore not directly responsible for causing the contamination (see Draft Order, pages 3 and 13), little is known about the three year perior during which Texaco owned the property. Aerial photographs with Pacific Aerial Surveys indicate that there were cars parked at the pump station during Texaco's ownership of the property. An unauthorized leak (or dumping) clearly could have occurred during that time.

Even if one assumes, for the sake of argument, that the contamination occurred prior to Texaco acquiring title to the property in 1983, the contamination could easily have pre-dated the Calleris ownership of the property. This is a fact even the SWRCB acknowledges. (See Draft Order, page 9 ("Our review of the record, including the technical data available for the site, indicates that a release occurred at the property prior to or during the Calleris' ownership, . . ." (emphasis added)). While neither the County nor the SWRCB had to address this issue under 23 C.C.R. §2720 (which does not require a responsible party to be a "discharger"), it **is** an issue that would have to have been addressed under Water Code §13304 and the other laws in existence during the Calleris' ownership of the property. Mrs. Calleri

submits that if that issue had been addressed in 1995, the County and SWRCB would have to have concluded that they did not have enough evidence - and certainly not "substantial evidence" - to establish that the unauthorized release occurred during the Calleris' ownership of the property. While on the one hand, Groundwater Technology's 1986 report states that "[t]he contamination present at the site appears to be an older leak of gasoline from around the pump island," the 1986 Report does not speculate as to the age of the leak, and no other evidence of its age is in the record. What is in the record is evidence that the first generation of tanks and pumps on the property, which were installed by Gulf Oil in March of 1965, were removed less than four and a half (4½) years later on September 10, 1969. (See Draft Order, page 3). It appears that neither the County nor the SWRCB have ever determined (or even inquired) why the first generation of tanks and pumps - which should have had a useful life of at least 20 years - were removed and replaced in less than five years. A reasonable presumption is that Gulf Oil had a problem with those tanks and pumps. This presumption is bolstered by the fact that Gulf Oil continued to operate the site as a service station for an additional five years after installing the second generation of tanks and pumps before selling the property to the Calleris and the Longs. Significantly, the record establishes that there were no reports of unauthorized

releases or code violations with the County or Fire Department during the Calleris' ownership of the property; and that the Calleris never observed or became aware of any unauthorized release or contamination during their ownership of the property. In short, no evidence exists that the Calleris "discharged" or "caused" the contamination at the site.

b) **No Evidence the Calleris "Permitted" Contamination**:

Nor is there any evidence that they "permitted" the contamination. For one to "permit" a discharge or deposit of contamination, one must have some knowledge of it.

While the SWRCB has previously found that actual knowledge is not necessary for one to "permit" a discharge or deposit (see Petition of John Stuart, SWRCB Order No. 86-15, 1986 Cal. Env. Lexis 17 (9-18-86)), Mrs. Calleri contends that, nonetheless, sufficient facts must still exist to give the person being charged with "permitting" a discharge or deposit "reason to know" of the discharge or deposit of waste. Otherwise, the Legislature would not have used the word "permitted" - with all that it implies. The Legislature could easily have rewritten Section 13304 to remove any element of knowledge by providing that:

> "Any person who . . . has an interest in land on which any waste has been or is being discharged or deposited where it is, or will be, dischagred into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up such waste or abate the effects thereof . . .."

In the late 1970s and early 1980s, the problem with leaking underground tanks was not yet common knowledge, and absent some other evidence putting the Calleris on notice of the fact that the property was contaminated, substantial evidence does not exist that they "permitted" discharge or deposit of waste during their ownership of the subject property.

(iii) **Insufficient Evidence to Rely on Nuisance:**

Just as there is insufficient evidence for the SWRCB to establish liability against the Calleris under Water Code §13304, there is also insufficient evidence to establish a nuisance claim against the Calleris.

Since there is no evidence that the Calleris caused the contamination during their ownership of the property, their only exposure might have been as a subsequent owner under Civil Code §3483. That Section provided that:

> "Every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by the former owner, is liable therefor in the same manner as the one who first created it."

Significantly, it has been held that it is a prerequisite to the imposition of liability against a person who merely passively continues a nuisance created by another that he should have notice of the fact that he is maintaining a nuisance and be requested to remove or abate it, or at least that he should have

knowledge of the existence of the nuisance. (See Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal.App.2d 741, 746 [107 P.2d 501]; Shurpin v. Elmhirst (1983) 148 Cal.App.3d 105 [195 Cal. Rptr. 743]). There is no evidence that the Calleris had such knowledge in this case.

Accordingly, it is clear that the adoption of the Barry Keene Act did substantially change the legal effect of past events for the Calleris.

E. The Draft Order Should be Amended to Affirm the Removal of the Calleris as Responsible Parties:

Given that the Legislature did not expressly provide that the Barry Keene Act was to be given retroactive effect, and there is nothing in either the language of the statute, or its legislative history, which supports a finding that the Legislature clearly and unambiguously intended for the Act to be given retroactively effect, Mrs. Calleri respectively submits that neither the Act, nor the corrective action provisions contained therein, should be applied retroactively to her and her late husband.[3] Not only was the Barry Keene Act enacted over six years after the Calleris lost the property to foreclosure, but it was enacted over three years after the subject tanks were purportedly removed from the property.

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[3] This includes the provisions of Health & Safety Code §25299.19, which became effective, at the earliest, on October 2, 1989. See Legislative history and Caldo Oil Co. v. SWRCB (1996) 44 Cal.App.4th 1821 [52 Cal.Rptr.2d 609].

II.

THE BURDEN OF PROOF PROPOSED BY THE SWRCB FOR REMOVING A PREVIOUSLY NAMED PARTY FROM THE LIST OF RESPONSIBLE PARTIES AFTER A SUBSEQUENT RELEASE IS UNREASONABLE AND INEQUITABLE

At pages 8 and 9 of its Draft Order, the SWRCB places the burden of proof on Texaco and the Calleris to establish, by a preponderance of the evidence, that constituents from the unauthorized release for which they were originally named responsible parties (the **"Original Release"**), when taken in conjunction with commingled constituents from another release(s) (the **"Subsequent Release(s)"**) that has/have similar effects on beneficial uses, do not contribute to the need for cleanup at the site. Under the circumstances, Mrs. Calleri contends that this is not only an unreasonable burden of proof, but an inequitable burden of proof. Accordingly, Mrs. Calleri requests that the SWRCB's Draft Order be amended to change the burden of proof for removing/retaining a previously named responsible party after a Subsequent Release to that proposed by her, as discussed below.

A. **The Ant & the Elephant Parable - - Conceptualizing the Burden of Proof under the SWRCB's Draft Order:**

Perhaps the best way to visualize the flaw in the burden of proof proposed by SWRCB in its Draft Order is to imagine the Calleris and Texaco as an ant, and the Petitioner as an elephant.

One day, the ant decides to take a short-cut and cross over

another's land. As the authorities rush to charge him with trespassing, an elephant following close behind the ant steps on him and, as far as anyone can tell, smushes him into dust. When the ant's kin object to the authorities still holding the ant liable for trespassing, the authorities place the burden on the ant to lift the elephant from its shoulders to prove that it is no longer trespassing!

B. Continuing the Parable - The SWRCB's Proposed Burden of Proof is Unreasonable and Inequitable:

The SWRCB's proposed burden of proof for removing and/or retaining a responsible party after a Subsequent Release is completely unreasonable and inequitable. It is unreasonable because it is placing the burden of proof on the party least responsible for the existing trespass, and least able to do anything about it. Had the elephant not come along, the ant could have easily and expeditiously removed itself from the property, minimizing any damage claim against it by the authorities. However, once the elephant lumbered onto the ant, it made it virtually impossible for the ant either (i) to remove itself (if, indeed, there is anything left of it) from the property or (ii) to minimize or prevent the damage caused by the elephant's trespass on the property. The approach is inequitable because the ant is without any power to make the elephant step aside and it is to the elephant's advantage to keep its foot firmly in place so that it can share liability for the trespass

with the ant. Furthermore, the approach is likely to result in the ant being held liable for the trespass of the elephant, because the elephant refuses to lift its foot to determine whether the ant is still present.[4]

C. **A More Reasonable and Equitable Burden of Proof for <u>Removing/Retaining a Responsible Party is Available</u>:**

The more reasonable and equitable approach would be for the authorities to place the burden of proving that the ant was stepped on by the elephant on the ant's kin[5], and then **shifting the burden of proof** <u>to the elephant</u> to prove that the ant is still present under its massive foot. After all, it makes more sense to demand that the elephant lift its foot, than it does to demand that the ant lift the elephant!

If such an approach to the burden of proof was adopted by the SWRCB in this case, then the burden would be on Calleri and the Texaco's to present "credible and reasonable evidence" that the Petitioner (and possibly others) was responsible for a Subsequent Release(s). Once done, the burden would then **shift** to the Petitioner (and any others who were responsible for the

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[4] The financial and emotional impact on Mrs. Calleris in the SWRCB refusing to remove her and her late husband as responsible parties under the Subsequent Release will be devastating since she will not be eligible to seek reimbursement for cleanup cost unrelated to the Original Release.

[5] The SWRCB could require not only that the parties seeking to be removed as responsible parties prove that a subsequent release had occurred, but that they had nothing to do with that release. This would make it even more difficult to meet the burden, but it's a burden the Calleris and Texaco have already met.

Subsequent Release) to prove, by a preponderance of the evidence, that constituents from the Original Release were still present on their property, along with the constituents from the Subsequent Release, and that they contributed to the need for the cleanup at the site. The Petitioner would then be motivated to "move its foot" to prove whether or not the constituents from the Original Release were still present at the site.

D. **Mrs. Calleri's Proposed Burden of Proof is More in Keeping with the SWRCB's Policies, Principles & Goals:**

Contrary to what the SWRCB argues in its Draft Order, imposing a more stringent standard for **removing** an otherwise properly named responsible party than imposed in **naming** a responsible party is not consistent with the SWRCB's policy of "ensuring that, when there is reasonable evidence of responsibility, multiple parties be named in order to promote cleanup of a demonstrated water quality problem" (see Draft Order, pages 8-9) because it eliminates the prerequisite of finding "reasonable evidence of responsibility." Under the more stringent standard proposed by the SWRCB, liability is imposed even if no evidence of responsibility exists as to the party seeking to be removed as a responsible party. All that is necessary, is that he or she have been properly named as a responsible party in the past and he or she will be "presumed" responsible for the Subsequent Release on the "theory" that the releases must be commingled. To overcome the presumption, the

party is faced with the virtually impossible task of proving a negative - proving that constituents from the Original Release are not commingled with constituents from the Subsequent Release.

In this case, the burden is particularly inequitable given that virtually everyone concedes: (i) that the Original Release between 1964 and 1986 was limited in nature; (ii) that there has been a significant Subsequent Release between 1987 and 2002; (iii) that the constituents from that Subsequent Release are unique to it and are present in substantial quantities (i.e. MTBE); and (iv) that there is no evidence that any constituents from the Original Release are still on the property. Despite the equities weighing in favor of removing the Calleri and Texaco, under the SWRCB's proposed burden of proof, they will be "presumed" responsible for the existing condition of the property. This presumption will continue indefinitely until the Subsequent Release is cleaned up, regardless of whether the Petitioner cooperates with, or acts diligently to, clean up the site.

The bottom line is the presumption proposed by the SWRCB is unfair. If there is going to be any presumption at all, it should be that only the Petitioner is responsible, unless he can show that, following the Subsequent Release, there is still "reasonable evidence of responsibility" by the Calleris and Texaco. There are undoubtedly a number of cases where the facts and circumstances justify holding both the responsible parties

from the Original Release and the Subsequent Release responsible, but this is simply not such a case.

While the proposed order states, in pertinent part,

> ". . . a balancing of the equities dictates that, whenever possible, a responsible party should not be left to clean up constituents attributable to a different release for which that party is not responsible."

Draft Order, page 9, lines 5-7), that is <u>exactly</u> the outcome which will result if the SWRCB adopts the burden of proof outlined in its Draft Order. Mrs. Calleri and Texaco will be put in the untenable position of either proving a negative, or continuing on as a responsible party for an unauthorized release they had absolutely nothing to do with.

Again, the alternative burden of proof proposed by Mrs. Calleri is much more reasonable, and much fairer. If constituents from the Original Release are still present on the site, the responsible parties under the Subsequent Release will be motivated to obtain and present evidence of that fact.

E. <u>The Risks of Harm Under the SWRCB's Approach is Great</u>:

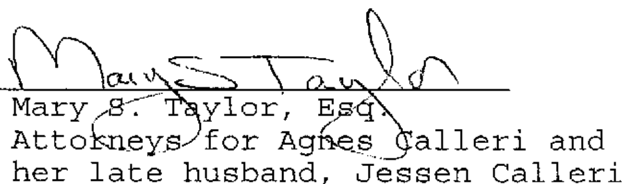
In closing, the risk of relieving a truly responsible party from liability under Mrs. Calleri's proposed alternative burden of proof is small compared to the extremely high risk under the SWRCB's proposed burden of proof that a party who is not responsible for an unauthorized release will be held responsible

for a Subsequent Release which it had nothing to do with (and occurred long after their involvement with the site ended). The risks are also high, in imposing the burden of proof on the responsible parties from the Original Release to come forward to prove a negative to be removed from a "dual release" site, that the parties who currently own or operate the site (and who are named as responsible parties under both the Original and Subsequent Release) will actively (and perhaps surreptitiously) work to frustrate any attempt by those seeking to be removed as responsible parties from doing what might be needed to acquire evidence to be removed. Indeed, there is a significant incentive for those responsible under a Subsequent Release to tamper with the site to prevent the removal of those named as responsible parties under the Original Release.

CONCLUSION

For the foregoing reasons, Mrs. Calleri respectfully requests that the SWRCB amend its Draft Order to deny, outright, the Petitioner's request to reinstate her and her late husband, Jessen Calleri, as responsible parties at the site located at 15595 Washington Avenue, San Lorenzo, California.

Respectfully submitted,



Mary S. Taylor, Esq.
Attorneys for Agnes Calleri and
her late husband, Jessen Calleri

PROOF OF SERVICE

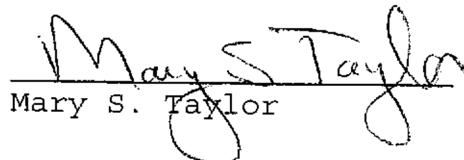
I, Mary Swanson Taylor, am employed in Contra Costa County, California; I am over the age of 18 years and not a party to the within action; my business address is: 100 Pringle Avenue, Suite 630, Walnut Creek, California 94596.

On August 23, 2002, I served the OBJECTIONS AND COMMENTS OF MRS. CALLERI TO DRAFT ORDER, DATED AUGUST 1, 2002 on all interested parties by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

SEE ATTACHED LIST

I caused such envelopes with postage thereon fully paid to be placed in the United States mail in Benicia, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 23, 2002, in Benicia, California.



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