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September 20, 2002

David M. Boyers
Staff Counsel
Office of the Chief Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Re: In the Mater of the Petition of: MEHDI MOHAMMADIAN for Review of Alameda County's Notice of Revision to Responsible Party Desgination

ChevronTexaco's Objections and Comments to the SWRCB's Draft Order of August 1, 2002.

Dear Mr. Boyers:

Please find enclosed the Objections and Comments of ChevronTexaco Corporation, filed on behalf of its predecessor entity Texaco Inc. in the above-referenced proceedings.

If you have any questions regarding the positions taken by ChevronTexaco in this matter, please give me a call.

Very truly yours,

Jon N. Robbins

JNR:me
Encl.

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ChevronTexaco Corporation Successor to Texaco Inc.

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 TEXACO INC. TO THE SWRCB'S DRAFT ORDER OF AUGUST 1, 2002** **Order: WQO 2002-**

CHEVRONTEXACO CORPORATION, as the successor to **TEXACO INC.** by merger (hereinafter "Texaco"), respectfully submits the following objections and comments to the Draft Order prepared by the State Water Resources Control Board ("SWRCB") remanding the determination made by Alameda County de-designating Texaco Inc., Jessen Calleri and Agnes Calleri, husband and wife, as Responsible Parties ("RPs") for the cleanup of hazardous substances released from underground storage tanks located on property at 15595 Washington Avenue, in San Lorenzo, California (the "Property").

SUMMARY OF CHEVRONTEXACO'S OBJECTIONS

CHEVRONTEXACO objects to the Draft Order prepared by the SWRCB on three separate and independent grounds.

First, CHEVRONTEXACO maintains that the Act and Regulations adopted to implement the Act should not have been retroactively applied to it. Further, CHEVRONTEXACO maintains that Alameda County in 1995 and the SWRCB upon its recent review, should have determined that CHEVRONTEXACO did not satisfy the enumerated tests applicable to an ultimate RP determination.

Secondly, CHEVRONTEXACO disagrees with the findings of the SWRCB at Page 7. of the Draft Order, that it was properly named as an RP initially by Alameda County in 1995 under the Barry Keene Underground Storage Tank Cleanup Trust Fund Act and 23 California Code of Regulations, Section 2720.

Thirdly, CHEVRONTEXACO maintains that in making its May 28, 1999 determination to de-designate the Calleris and Texaco Inc. as RP's, Alameda County did make the ultimate determination that contamination present on the Property from the pre-1983 release, did not contribute to the need for cleanup. The determination made and action taken by Alameda County de-designating the Calleris and Texaco Inc. as RP's should be affirmed.

I. THE CORRECTIVE ACTION PROVISIONS OF THE BARRY KEEN ACT DOES NOT APPLY RETROACTIVELY TO TEXACO INC.

CHEVRONTEXACO adopts and incorporates herein by this reference the arguments advanced by the Calleris as contained in their filed Objections set forth at Pages 2. through 6. thereof, objecting to the retroactive application of the Barry Keene Act (the "Act") to Texaco in this matter.

Texaco purchased the Property in 1983 and sold it in August of 1986, more than three years prior to the Act's October 2, 1989 enactment, and more than five years before SWRCB adopted the implementing regulations. (See C.C.R. Section 2720 et seq.)

The Act and the applicable implementing regulations should not be applied retroactively to either the Calleris or Texaco because the Act does not expressly utilize clear language directing a retroactive application of its provisions, but does indicate a legislative intent that the provisions of the Act be applied prospectively to sites where underground storage tanks are present and may be leaking.

II. TEXACO INC. WAS NOT PROPERLY NAMED AS A RESPONSIBLE PARTY.

A. In order for the SWRCB to hold either Texaco or the Calleris responsible for contamination that is currently present on the Property, substantial, credible and reasonable evidence must exist to support a finding that Texaco and/or the Calleris were responsible for the pre-1983 release of contamination that occurred on the Property. (See Draft Order at Page 8, citing Board Order WQ 85-7, In the Matter of Petition of Exxon Company, U.S.A. et al.)

SWRCB acknowledges that the service station operated by the Calleris was closed in 1982, and that "*Texaco purchased the facility at the foreclosure sale in August of 1983, but never operated the service station.*" (See Draft Order at Page 3.) No evidence exists that indicates that Texaco discharged, caused, or permitted the discharge of any waste or contamination on the Property, a finding that must be made before Texaco can correctly be named as an RP under Section 13304 of the California Water Code. If Texaco did not conduct service station operations on the Property, such contamination must have been released prior to its purchase of the Property. No evidence

exists that supports the conclusion that Texaco either discharged contamination or caused the discharge of contamination on the Property.

Calleris opine that the contamination discovered to be present in 1986, could have been released on the Property during Gulf's tenure prior to 1974, based upon the observation that Gulf replaced its original set of tanks after less than five (5) years of use, and the conclusion that parties do not remove tanks with a useful life of at least twenty (20) years unless the tanks were problematic. The fact is that tanks are often replaced when they are not of a sufficient size to accommodate the throughput volume requirements for gasoline sales at a service station site. There is nothing to indicate that a release of product ever occurred at the site from any of the tanks used by Gulf.

B. At Page 8. of the Draft Order, the Board finds that "*it is appropriate for any agency participating in the LOP to designate a person as a responsible party for cleanup at a site if its has 'credible and reasonable evidence' to indicate that the person has responsibility....Credible and reasonable evidence that a person has responsibility at an LOP site exists if the person meets the definition of 'responsible party', as the term is defined in Section 2720 of the California Code of Regulations.*"

The first test of whether a party should be designated as an RP is the determination of whether that person "owned" or "operated" the underground storage tank "used for the storage of any hazardous substance". The Draft Order at Page 9. acknowledges that Texaco "*never operated the second generation UST's*". The last owners and operators of the tanks were the Longs and the Calleris. Texaco never conducted service station operations on the Property and never operated the tanks nor used them for the storage of hazardous substances on the site. While Texaco may have owned the tanks, the tanks were never used by it for the storage of any

hazardous substances and simple ownership of tanks that were unused during Texaco's tenure on the site is not a sufficient basis for a finding that Texaco should have been named as an RP.

The second test under Section 2720 of the Regulations of whether a party should be designated as an RP relating to tanks no longer in service, is that the RP must have "*owned or operated the underground storage tank immediately before the discontinuance of its use.*" The Draft Order at Page 3. recognizes that the service station was closed in 1982, and that "*Texaco purchased the facility at the foreclosure sale in August of 1983, but never operated the service station.*" As recognized by the Board, the use of the UST's was discontinued prior to Texaco's purchase of the site, such that the facts responsive to the second test under Section 2720 do not support a conclusion that Texaco was properly named as an RP by Alameda County.

The third test under Section 2720 requires that a party be an "*owner of property at the time that an unauthorized release occurs.*" As is set forth above, Texaco did not operate the site and although the site may have been contaminated at the time of its purchase, Texaco was not an owner of the property at the time the pre-1983 release occurred and should not have been named as an RP.

The fourth test under Section 2720 requires that a party "*had or has control over an underground storage tank at the time or following an unauthorized release of a hazardous substance.*" While it is clear that a set of underground storage tanks was present on the site at the time Texaco purchased the site, no evidence has been proffered to my knowledge in this matter which substantiates that a release occurred from those tanks during the ownership of the tanks by Texaco's predecessor Calleris or during Texaco's brief 2 ½ year period of ownership. While data was developed by GTI in 1986 indicating that contamination was present on the site, no evidence conclusively

demonstrates that the release occurred from the UST system operated by the Calleris prior to the purchase of the site by Texaco or during the period of Texaco's ownership of the Property.

C. Texaco has previously argued that it should not have been designated by Alameda County as an RP, based upon the holding of the Board's Decision, *In re the Matter of the Petitions of Wenwest et al.* (SWRCB Order WQ 92-13). The Draft Order finds that Texaco's argument that the facts of its relationship to this site is analogous to Wendy's position in the above-referenced Wenwest matter is misplaced because the issue in for review by the Board is not whether Alameda County appropriately named Texaco and the Calleris as RPs, but whether it appropriately removed them as RPs in the first instance. We respectively disagree. The Wenwest decision deals directly with the removal of Wendy's as an RP, and while the Petition in this matter directly challenges Alameda County's decision to remove Texaco and the Calleris as RP's, the Board's Draft Order evidences the need to first review whether the original designation of Texaco and the Calleris as RPs was proper, just as the same issue was reviewed by the Board in the *Wenwest* matter.

The *Wenwest* decision at Page 5. confirms the Board's past position that no responsibility for a cleanup should lie for *"a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place."* The Board also acknowledged its practice to require current owners to address contamination even if they had nothing whatsoever to do with putting it there, but the Board acknowledged that that the "*same policy and legal arguments do not necessarily apply to former landowners.*" Like Wendy's, the contamination that was discovered at this site by GTI in 1986 was

already in place at the time Texaco purchased the site in 1983. Further, like Wendy's Texaco did not operate at the site and did nothing to aggravate the situation. The Board further states, that *"had a cleanup been ordered while Wendy's owned the site, it would have been proper to name them as a discharger."* Like Wendy's, no cleanup had been ordered by any agency during the period of Texaco's ownership of the site from 1983-1986.

Page 6. of the *Wenwest* decision sets forth a series of nine factors that were found to be unique to the Wendy's facts. The following response to those factors demonstrates that the facts of the Wendy's case are in fact comparable and parallel to the Texaco facts and support our assertion that Texaco should not have been named by Alameda County as an RP.

- ***Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.*** In this instance Texaco did not purchase the site simply for the purpose of selling it to a dealer, but quickly determined that the square footage size of the site was not consistent with the site requirements for its operations. Texaco never conducted service station operations on the site.

- ***Wendy's owned the site for a very short period of time.*** Wendy's owned the site for approximately one year before selling it. Texaco owned the site for a period of less than three years before selling it. An additional ownership period of two years should not be a compelling factor supporting a determination that the findings in the *Wenwest* matter have no application to the facts of this case.

- ***The franchisee who bought the property from Wendy's is named in the order.*** The cleanup Order in this matter includes Mohammadian, the operator of the original underground storage tanks installed subsequently to the sale of the site by Texaco.

- ***Wendy's had nothing to do with the activity that caused the leaks.*** The draft Order confirms at Page 3. that Texaco never operated the service station and therefore had nothing to do with the use of the underground storage tanks system that caused the original release detected in 1986.

- ***Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.*** While Texaco through GTI performed soil and groundwater investigatory activities on the site in 1986 prior to the sale of the site, there is no data which demonstrates that those activities exacerbated conditions on the site.

- ***While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.*** The 1986 GTI Report as set forth at Page 4. of the Draft Order states that "*....concentrations of petroleum hydrocarbons in the groundwater samples were the result of an 'older' pre-1986 release, caused by a 'small localized loss [that] likely occurred at the pump island.'* Therefore, the focus of the contamination was on a single spill in a specific location that like in the Wendy's matter, was not an on-going leak.

- ***Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.*** The contamination discovered at this site was discovered during a similar early period of underground storage tank regulation.

- ***There are several responsible parties who are properly named in the order.*** The draft Order discloses that a later significant release occurred at this site. The currently named RP Mehdi Mohammadian will be remediating not only the Mtbe and BETX contamination that is present on the site as the result of a release which occurred during his tenure on the site, but Mr. Mohammadian's remediation will also remediate any residual contamination that was released on the site prior to 1986.

- ***The cleanup is proceeding.*** The site is being kept in compliance with remedial requirements by Mohammadian.

III. ALAMEDA COUNTY DID FIND THAT THE PRE-1983 RELEASE OF CONTAMINATION DID NOT CONTRIBUTE TO THE NEED FOR CLEANUP.

While it is apparent that the County of Alameda in taking the action de-designating Texaco and the Calleris as RP's relied in part upon a determination that a more recent release of contamination had occurred than the apparent pre-1983 release, the County in its letter to SWRCB of September 3, 1999, substantiated that it considered four additional factors in its decision to de-designate Texaco Inc. as an RP which are material to the threshold question of whether the pre-1983 contamination is contributing

to the need for remediation on the Property today.

> *"Nevertheless, it is not anticipated that the historic release was either necessarily large in extent or would pose a risk to nearby potential receptors. The opinion is based on: 1] the underlying geology at the site, 2] the chemistry from fuel releases from that era, 3] the intrinsic attenuation factors that would have acted upon this release over the years, and 4] an understanding that the historic release occurred a minimum of 16 years ago. Although difficult to clearly contemplate now, it is not expected that the investigation of the historic release would have expanded greatly in scope."*

Alameda County clearly considered the magnitude of the pre-1983 hydrocarbon release in making its determination that the contamination would not pose a risk to nearby receptors. The County's recognition that the pre-1983 release was limited in scope and its conclusion that it would not require Texaco to perform additional assessment activities to define the scope of the release indicates that the County had determined that the risk was adequately defined such that no further remediation should be required of Texaco on the Property. It has now been more than sixteen (16) years since the pre-1983 release was discovered. Groundwater analytical data collected during the groundwater investigation performed by Enviro Soil Tech Consultants indicates that hydrocarbons were not detected in groundwater approximately 100 feet west of the Property. This data confirms that the underlying low permeability site geology combined with natural attenuation factors have joined in concert to limit the extent of the migration of the hydrocarbon plume thereby further substantiating the validity of the County's original conclusion that no risk was presented by the pre-1983 release, at the time of the de-designation of Texaco Inc. as an RP in 1999.

Based upon the assessment data secured in 1986, it appears that the pre-1983 release occurred north of the pump islands on the Property. The impacts from the release appear to have remained limited to the northern portion of the Property from

1986-1994, consistent with the County's conclusion that the pre-1983 release was not large in scope and that it was unlikely that further assessment would broaden the scope of the impacts from the release. The April 1999 monitoring data demonstrates that groundwater concentrations of dissolved TPg and benzene in monitor wells MW-4 and MW-5 located south of the source point of the pre-1983 release had reached their highest level of concentrations. Alameda County could reasonably assume as it did, that concentrations of TPHg and benzene in groundwater would not continue to increase, but would rather decrease as the result of ongoing natural attenuation occurring over more than nineteen (19) years after the pre-1983 release. Any increases in the concentrations of TPHg, and benzene, and Mtbe in monitor wells MW-1, MW-2 and MW-3 after April of 1999 have been attributed to the second release and commingling with the contamination from the pre-1983 release.

The County of Alameda did properly conclude from the available data at the time of its decision to de-designate Texaco as an RP in 1999, that the plume from the pre-1983 release did not pose a risk because the plume was stable, would have significantly attenuated but for the subsequent releases of hydrocarbons, was not a threat to potential down gradient receptors or beneficial uses of groundwater in the vicinity of the Property, and therefore that the pre-1983 contamination did not necessitate remedial action at that time.

CONCLUSION

Texaco Inc. was not properly named as RP's by Alameda County under the Barry Keene Underground Storage Tank Cleanup Trust Fund Act, California Health and Safety Code Sections 25280-25299.7, California Water Code Section13304, and/or California

Code of Regulations Section 2720, because no credible, substantial and reasonable evidence exists which would support a finding that Texaco caused or permitted a discharge of contamination on the Property. Further, application of the above-referenced Codes and Regulations was not intended by the legislature to be applied retroactively as it has been by naming Texaco as an RP.

SWRCB has determined that the basis for Alameda County's decision to de-designate Texaco Inc. as an RP was insufficient because the County failed to make a finding that the pre-1983 contamination was not contributing to the current need for corrective action. To the contrary, Alameda County made a risk determination which concluded that the pre-1983 plume of contamination was stable, attenuating and did not pose a risk to nearby potential receptors. Based upon those conclusions it took its action to de-designate Texaco as an RP thereby implicitly finding that the pre-1983 contamination present on the site did not present a separate condition requiring remediation.

Therefore, CHEVRONTEXACO CORPORATION, as successor to Texaco Inc. respectfully requests that the SWRCB amend its Draft Order to deny, outright the Petitioner's request to reinstate Texaco Inc. and the Calleris as responsible parties at the Property located at 15595 Washington Avenue, San Lorenzo, California.

Respectfully submitted,

9/20/02

Jon N. Robbins
Counsel for ChevronTexaco Corporation
as successor to Texaco Inc.

PROOF OF SERVICE

I, JON N. ROBBINS, am employed in Contra Costa County, California : I am over the age of eighteen (18) years and not a party to the within action; my business address is: is 6000 Bollinger Canyon Road, San Ramon, CA 94583.

On September 20, 2002, I served the OBJECTIONS AND COMMENTS OF TEXACO INC. TO THE SWRCB'S DRAFT ORDER OF AUGUST 1, 2002, 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 State mail in San Ramon, 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 September 20, 2002, in San Ramon, California.

JON N. ROBBINS

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