Mary S. Taylor, Esq. SBN 100341
LAW OFFICE OF MARY S. TAYLOR
77 Solano Square #330
Benicia, California 94510-2712

Telephone: (707) 746-8200
Facsimile: (707) 746-0633

Attorney for Petitioner
Agnes Calleri

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In Re: Alameda County Health Care Services Agency Record ID: RO000374 Letter dated July 7, 2003, issued to Agnes Calleri re 15595 Washington Avenue, San Lorenzo, California	AGNES CALLERI'S PETITION FOR REVIEW OF THE ALAMEDA COUNTY HEALTH CARE SERVICES AGENCY'S JULY 7, 2003 DESIGNATION OF HER AS SECONDARY RESPONSIBLE PARTY (Review Pursuant to Health & Safety Code §25297.1(h) and SWRCB Resolution No. 88-23)

Mrs. Agnes Calleri (**"Mrs. Calleri"**) hereby petition the State Water Resources Control Board (**"SWRCB"** or **"Board"**) for review of the Alameda County Health Care Services Agency's (**"Local Agency's"**) designation of her as secondary responsible party for investigation and cleanup of the soil and groundwater at, and in the vicinity of, 15595 Washington Avenue, San Lorenzo, California 94580 (the **"Site"**). This petition is submitted in accordance with Health and Safety Code §25297.1(h) and SWRCB Resolution No. 88-23.

PETITION FOR REVIEW

1. **Name and Address of Petitioner:**

Agnes Calleri
2476 Wimbleton Lane
San Leandro, California 94577

2. **The specific action of the Local Agency which the State Board is requested to review:**

Mrs. Calleri requests that the SWRCB review the Local Agency's designation of her as a secondary responsible party for investigation and cleanup of the soil and ground water at, and in the vicinity of, the Site; as set forth in the Local Agency's letter of July 7, 2003 to Ms. Karen Streich of ChevronTexaco. (See Exhibit A).

3. **The date on which the Local Agency acted:**

The Local Agency is believed to have acted on July 7, 2003, when it mailed its Notice of Responsibility to those identified as responsible parties. However, since Mrs. Calleri's copy of the notice was sent to the wrong address, she never received it. Her attorney first learned of the action on July 23, 2003, when she was contacted by one of the other designated responsible parties. A copy of the Notice sent to ChevronTexaco is attached hereto as Exhibit A and incorporated by reference.

4. **A full and complete statement of the reasons the action was inappropriate or improper:**

The Local Agency's designation of Mrs. Calleri as a secondary responsible party is inappropriate and improper for two separate, and independent, reasons.

First, in taking the action it did, the Local Agency blatantly failed to comply with the SWRCB's express Order that it *reconsider* "the issue of whether Texaco and the Calleris should have been removed as responsible parties for cleanup at the site". See SWRCB Order WQO 2002-0021 (the **"Remand Order"**). In its Remand Order, the SWRCB set forth a new test for the Local Agency to use in determining when a party from an earlier unauthorized release may be removed as a responsible party following a subsequent unauthorized release at a site. Under that test, the Board found that it would *only* be appropriate for the Local Agency to remove a person who has been properly named as a responsible party for cleanup of an unauthorized release at a site if it found:

> ". . . *by a preponderance of the evidence*, that constituents from that party's release, when taken in conjunction with commingled constituents from another release(s) that

have similar effects on beneficial uses, do *not* contribute to the need for cleanup at the site."

Remand Order, page 16, item 2 (emphasis added). Had the Local Agency done as it was ordered to do, and reconsidered the existing and supplemental evidence that constituents from the original unauthorized release were no longer impacting the Site, it would have concluded that its original decision to remove both Texaco (now ChevronTexaco) and the Calleris as responsible parties was supported by *more than* a preponderance of the evidence.

Second, by not addressing the issues set forth in the SWRCB's Remand Order, and simply naming Mrs. Calleri as a responsible party as though she had never been named before, Mrs. Calleri respectfully submits that the Local Agency has re-opened the issue of whether Mrs. Calleri can properly be named as a responsible party to the original unauthorized release. She contends she cannot be so named.

In this regard, Mrs. Calleri renews her earlier argument that the corrective action provisions of Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (the **"Barry Keene Act"**) do not apply retroactively to her. While, in its Remand Order, the SWRCB rejected this argument on the grounds that, even before the enactment of the Barry Keene Act, Water Code section 13304 provided for the issuance of cleanup and abatement orders to "dischargers" (see Remand Order, page 13), the definition of a "discharger" was much narrower under Water Code §13304 than under the Barry Keene Act. As a result, under the Water Code's narrower definition, Mrs. Calleri would not have been identified as a "discharger". To hold her liable under the Barry Keene Act, when she would not have been liable under the Water Code or any other laws, substantially changes the legal effect of past events, at least, *as to her*. Therefore, the application of the Barry Keene Act retroactively to Mrs. Calleri is not only improper, but completely impermissible.

5. **The manner in which the petitioner is aggrieved:**

Mrs. Calleri is not responsible for the contamination which exists at the Site, and so she should not be made to participate in the investigation and clean up related thereto. Even if she were properly named as a responsible party with respect to the original unauthorized release (which she disputes), there is overwhelming evidence that any contamination resulting from operations of the Site as a service station prior to 1986 do not contribute to the current need for corrective action. Indeed, the environmental case at the Site would have been closed long ago had it not been for the existence of a more recent unauthorized release at the Site in the early-1990s, involving high levels of MTBE.

6. **The specific action by the State Board or the local agency which the petitioner requests:**

Mrs. Calleri requests that the Local Agency's designation of her as a responsible party be reversed (or declared void) and that the Local Agency be directed to issue a site closure notice with respect to any unauthorized release which may have occurred at the Site prior to 1986.

7. **A statement of points and authorities in support of legal issues raised in the petition:**

See attached Memorandum of Points and Authorities.

8. **A list of persons, if any, other than the petitioner, known by the local agency to have an interest in the subject matter of the petition:**

Mehdi Mohammadian
Cal Gas
15595 Washington Avenue
San Lorenzo, CA 94580

Marjorie Kayner
Bertram Kubo Trust
20321 Via Espana
Salinas, CA 93908-1261

Karen Streich
ChevronTexaco
6001 Bollinger Canyon Road
P.O. Box 6012
San Ramon, CA 94583-2324

Jeffrey L. Podawiltz, Esq.
Glynn & Finley, LLP
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596

Barney Chan
Hazardous Material Specialist
Alameda County Health Care
Services Agency
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577

Jennifer Jordan
SWRCB
P.O. Box 944212
Sacramento, CA 95814

Loretta K. Barsamian
San Francisco Bay Reg. Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Stephen Morse
San Francisco Bay Reg. Water
Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Mr. Ariu Levi
Chief Project Director
Alameda County Envir. Health Services
Environmental Protection
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577

Agnes Calleri
2476 Wimbleton Lane
San Leandro, CA 94577

9. **A statement that the petition has been sent to the local agency, the appropriate Regional Board, and to any reponsible parties other than the petitioner, known to the petitioner or the local agency:**

See attached proof of service.

10. **A copy of the request to the local agency for preparation of the local agency record:**

See attached request for preparation of record.

11. **Request for Hearing:**

Since it is Mrs. Calleri's understanding that the Local Agency refused to consider (or even review) certain technical reports obtained by ChevronTexaco from Cambria Environmental Technology, Inc. relevant to the issues on remand to the Local Agency under SWRCB Order WQO 2002-0021, she requests a hearing for the purpose of presenting that evidence.

LAW OFFICE OF MARY S. TAYLOR

By _____
Mary S. Taylor, Esq.
Attorney for Petitioner
Mrs. Agnes Calleri

MEMORANDUM OF POINTS AND AUTHORITIES

Mrs. Calleri respectfully submits the following Memorandum of Points and Authorities in Support of her Petition for Review of the Alameda County Health Care Services Agency's (**"Local Agency's"**) designation of her as a responsible party at the site located at 15595 Washington Avenue, San Lorenzo, California (the **"Site"**).

STATEMENT OF RELEVANT FACTS

While the facts in this matter should be familiar to the State Water Resources Control Board (**"SWRCB"** or **"Board"**) from its earlier review of related issues, a brief overview of the chronology is necessary to put the arguments set forth in this Memorandum in context.

From 1964 and 1974, the subject Site was owned by Gulf Oil (**"Gulf"**). Gulf installed the first generation underground storage tanks (**"USTs"**) in 1965. In 1969, Gulf replaced the first generation USTs with a second generation of USTs.

In August 1974, Golf sold the property to Mr. and Mrs. Calleris and Mr. and Mrs. Long. In early 1979, the Longs conveyed their interest in the property to the Calleris.

In late 1982, the Calleris' lender, The Bank of California, instituted foreclosure proceedings against them and the service station was closed.

On June 21, 1983, the property was sold at public auction to Texaco, Inc. and, shortly thereafter, on August 8, 1983, a Trustee's Deed Upon Sale was recorded in Texaco's favor with the Alameda County Recorder's office.

According to Texaco, from 1983 to 1986, it neither stored nor dispensed gasoline at the site. Instead, Texaco listed the site as a surplus facility and marketed the property for resale.

In late 1986, Texaco sold the site to Bertram Kubo. Prior to that sale, Texaco hired for Groundwater Technology, Inc. (**"GTI"**) to conduct an environmental site assessment to facilitate the sale. The report prepared by GTI indicated that hydrocarbon odors were detected in soil, and minor amounts of hydrocarbon constituents were found in groundwater at the site. (GTI Report (Oct. 17, 1986), pp.8-10).

While there is no record of it, it is believed that the second generation of USTs were removed sometime between October 1986 and February 1987. In February 1987, Mr. Kubo installed a third generation of USTs. Mr. Kubo then reopened the service station.

In June of 1990, Mr. Kubo sold the property to its current owner, Medhi Mohammadian. Mr. Mohammadian has continued to operate the Site as a service station since that time.

In January of 1993, the Local Agency became aware that an unauthorized release had occurred at the property when it received an unsolicited groundwater sampling report dated December 1992, produced by GTI.

In 1995, the California Regional Water Quality Control Board for the San Francisco Bay Region designated the Calleris, Texaco, Mr. Kubo and Mr. Mohammadian as responsible parties for soil and groundwater contamination at the site.

In May 1999, following extensive monitoring, analysis and discussion, the Local Agency, under the authority of the Underground Storage Tank Pilot Program, de-designated Texaco and the Calleris as responsible parties because the evidence showed that the investigation and cleanup required at the site was not caused by the release of hydrocarbons prior to 1986, but was instead the direct result of the release of MTBE bearing hydrocarbons in the 1990's from a third generation of USTs installed by Mr. Kubo and used by Messrs. Kubo and Mohammadian.

In June 1999, Mr. Mohammadian petitioned the SWRCB for review of the Local Agency's decision to de-designate Texaco and the Calleris.

In August 1999, the Local Agency removed Mr. Kubo from the list of responsible parties. No petition was filed with the Board challenging this action.

On December 29, 1999, Mr. Calleri died. He is survived by his wife, who will be 88 years old in November of this year.

At the November 19, 2002 hearing on Mr. Mohammadian's Petition for Review of the Local Agency's de-designation of Texaco and the Calleris, the SWRCB found that the issue presented by the petition was one of first impression, i.e., when should a properly named responsible party be removed from designation as a responsible party. Shortly thereafter, on November 22, 2002, the

SWRCB issued Order WQO 2002-0021 (the **"Remand Order"**). In that Order the SWRCB remanded the matter to the Local Agency for a determination of:

> ".. [W]hether the constituents attributable to the release that occurred during or prior to the Calleris' ownership and which persisted at the site while Texaco owned the property, taken in conjunction with the other constituents at the site having similar effects on beneficial uses, are contributing to the current need for corrective action."

Remand Order, pp. 11. The Board held that "If the County determines that the constituents from the first release do not contribute to the need for cleanup at the site, it may remove Texaco and the Calleris' designation as responsible parties." Id.

On or about July 7, 2003, without ever addressing the SWRCB's Remand Order, the Local Agency issued a Notice of Responsibility naming Mohammadian as the primary or active responsible party, and Mrs. Calleri, ChevronTexaco and the Bertram Kubo Trust as secondary responsible parties at the Site. This Petition for review is in response to that action.

I.

THE LOCAL AGENCY'S ACTION IN DESIGNATING MRS. CALLERI AS A RESPONSIBLE PARTY WAS IMPROPER BECAUSE IT WAS TAKEN IN BLATANT DISREGARD OF THE SWRCB'S REMAND ORDER

As a preliminary matter, the Local Agency's action in designating Mrs. Calleri as a responsible party was improper in that it was taken in blatantly disregard of the SWRCB's express Order that the Local Agency *reconsider* "the issue of whether Texaco and the Calleris should have been removed as responsible parties for cleanup at the site". See SWRCB Order WQO 2002-0021.

While obviously the Local Agency's action is taken in an administrative context, the general rule applicable to the power of the trial court on remand is well established. In Hampton v. Superior Court (1952) 38 Cal.2d 652, 655 [242 P.2d 1], it was stated that "[when] there has been a decision upon appeal, the trial court is reinvested with jurisdiction of the cause, but only such jurisdiction as

is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void." Id. (emphasis added). A more recent expression of the principle is found in Butler v. Superior Court (2002) 104 Cal.App.4th 979. There the court held that: "When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, ***those directions are binding on the trial court and must be followed. Any material variance from the directions is unauthorized and void.*** [citation omitted]" Id. at 982 (emphasis added).

Based on the same principles, Mrs. Calleri respectfully submits that, on remand, the Local Agency was bound to follow its reviewing body's direction, i.e. the direction set forth in the SWRCB Order WQO 2002-0021. Having failed to do so, the Local Agency's action in designation Mrs. Calleri and the other petitioners as responsible parties was unauthorized and should be declared void by the Board.

II.

HAD THE LOCAL AGENCY COMPLIED WITH THE SWRCB'S REMAND ORDER, IT WOULD HAVE CONCLUDED THAT BOTH TEXACO & THE CALLERIS WERE PROPERLY REMOVED AS RESPONSIBLE PARTIES AND WOULD HAVE ISSUED A CLOSURE LETTER WITH RESPECT TO THE PRE-1986 UNAUTHORIZED RELEASE

Had the Local Agency done as it was ordered to do, and reconsidered the evidence before the SWRCB – or the supplemental evidence propounded by ChevronTexaco since the November 19, 2002 SWRCB hearing – that constituents from the original unauthorized release were no longer impacting the Site, it would have concluded that its original decision to remove both Texaco and the Calleris as responsible parties was supported by *more than* a preponderance of the evidence. It would also have found good cause to issue a closure letter pursuant to Health and Safety Code §25299.37(h) with respect to any pre-1986 unauthorized releases.

A. Evidence Existing Prior to Local Agency's Action Supports Not Only Texaco and Mrs. Calleri's Removal as Responsible Parties, but Closure of the Site with respect to any Pre-1986 Unauthorized Release:

Based simply on the technical information referred to in the SWRCB's Remand Order,

sufficient evidence existed prior to the Local Agency taking action, on or about July 7, 2003, to support a finding *by the preponderance of evidence* that the constituents from the first release do not contribute to the need for cleanup at the site now.

The GTI Report from 1986 indicates that only two samples, SB-1 and MW-1 (which were located in the vicinity of the pump island) contained *minor* amounts of hydrocarbon contamination. To the extent the samples reflected levels above the maximum contaminant levels now prescribed under California Code of Regulation, Title 22, Section 64444, it is significant to note that even at the time, GTI cast some doubt on the *reliability* of those levels when it noted in its report that: "this sample was drawn prior to developing a good hydraulic communication with the aquifer. Although minor contamination does occur in this location, additional contamination *could have been introduced during drilling*." (See 1986 GTI Report, pp.9). Since the subsequent 1992 GTI Report indicated that benzene was detected in groundwater samples collected from site monitor wells in concentrations ranging from <0.3 to 3 ppb, toluene ranging from <0.3 to 0.5 ppb, ethylbenzene ranging from <0.3 to 1 ppb, and total xylenes ranging from <0.5 to 1 ppb; the levels from 1986 either diminished significantly, *or were never as high as originally indicated.* Given the reduction in the detection levels between October 1986, when the first GTI Report was dated, and December 1992, when the second GTI Report is dated, it is extremely unlikely that any of the original contaminates are still present in detectible levels today (almost eleven (11) years later). For this reason, even without taking into consideration any of ChevronTexaco's supplemental evidence, a preponderance of evidence exists to support the Local Agency removing ChevronTexaco and the Calleris as responsible parties. At the same time, Mrs. Calleri respectfully submits that the Local Agency should find good cause exists to issue a closure report with respect to any pre-1986 unauthorized releases.

B. Evidence Presented by ChevronTexaco Since Local Agency's Action Supports Texaco and Mrs. Calleri's Removal as Responsible Parties and Closure of the Site with respect to any Pre-1986 Unauthorized Release:

In addition to the evidence already before the Local Agency at the time the SWRCB issued its Remand Order, ChevronTexaco has recently tendered even more evidence to support a finding

that Texaco and the Calleris should be removed as responsible parties. This evidence is in the form of a October 1, 2003 Report from Cambria Environmental Technology, Inc. The Cambria Report, which will be attached to ChevronTexaco's Petition for Review, and is incorporated herein by reference, finds, in pertinent part, that:

> ". . .in the absence of the recent oxygenated fuels release(s) [from the current generation of tanks], the site would not only pass [environmental screening levels], but would qualify for case closure because of the lack of sensitive receptors in the site vicinity. The low benzene, toluene and xylenes concentrations detected in 1986 do not have a similar effect on beneficial use as the high concentrations of MTBE from the more recent release(s) and do not contribute to the need for cleanup at the site. . . . In addition, analysis of concentration trends previously prepared by Cambria . . . indicates that the benzene and toluene concentrations detected in 1986 would now be near or below maximum contaminant levels for drinking water (MCLS) and, therefore, warrant no remediation. Xylenes concentrations were already below MCLs in 1986."

Cabria Report, dated October 1, 2003.

Mrs. Calleri respectfully submits that the Cabria Report only further bolsters the evidence already before the Local Agency supporting her removal, and the removal of ChevronTexaco, as responsible parties at the Site. The evidence should be considered in any future hearing on the matter.

III.

THE CORRECTIVE ACTION PROVISIONS OF THE BARRY KEENE UNDERGROUND STORAGE TANK CLEANUP TRUST FUND ACT OF 1989 DO NOT APPLY RETROACTIVELY TO THE CALLERIS

By not addressing the issues set forth in the SWRCB's Remand Order, and simply naming Mrs. Calleri as a responsible party as though she had never been named before, Mrs. Calleri respectfully submits that the Local Agency has re-opened the issue of whether Mrs. Calleri can properly be named as a responsible party to the original unauthorized release. She contends she cannot be so named. In this regard, she renews her earlier argument that the corrective action provisions of the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (the **"Barry Keene Act"**) do not apply retroactively to her.

While Mrs. Calleri acknowledges that in its Remand Order, the SWRCB rejected this argument on the grounds that, even before the enactment of the Barry Keene Act, Water Code section 13304 provided for the issuance of cleanup and abatement orders to "dischargers" (see Remand Order, page 13), she respectfully submits that in reaching its conclusion, the SWRCB failed to consider that the definition of a "discharger" was much narrower under Water Code §13304 than under the Barry Keene Act. As a result, under the Water Code's narrower definition, Mrs. Calleri would not have been identified as a "discharger" and held liable for any cleanup of the Site. To hold her liable under the Barry Keene Act, when she would not have been liable under the Water Code or any other laws, substantially changes the legal effect of the unauthorized release that occurred prior to 1986, at least *as to her.* Therefore, the application of the Barry Keene Act retroactively to Mrs. Calleri is not only improper, but completely impermissible.

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

[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."

address the retroactivity of the Act,[2] similar underground storage acts in other states, under less compelling circumstances, have been held not to apply 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 Remand Order, page 13), 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 Remand Order, page 8, citing Board Order WQ 85-7, In the Matter of Petition of Exxon Company, U.S.A. et al.).

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[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).

(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 Remand 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 Remand

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, GTI'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 Remand 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 Local Agency Acted Improperly in Naming Mrs. Calleris as a Responsible Party:

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 respectfully submits that neither the Act, nor the corrective action provisions contained therein, should be applied retroactively to her (or 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.

CONCLUSION

For the foregoing reasons, Mrs. Calleri respectfully requests that the Local Agency's designation of her as a responsible party be reversed (or declared void) and that the Local Agency be directed to issue a site closure notice with respect to any unauthorized release which may have occurred at the Site prior to 1986.

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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].

LAW OFFICE OF MARY S. TAYLOR

By: _____
Mary S. Taylor, Esq.
Attorney for Petitioner
Mrs. Agnes Calleri

ALAMEDA COUNTY
HEALTH CARE SERVICES
AGENCY
DAVID J. KEARS, Agency Director

RECEIVED
JUL 14 2003
BY: K Streich

Certified Mail # 7001 1940 0005 5777 8340
July 7, 2003

Notice of Responsibility

ENVIRONMENTAL HEALTH SERVICES
ENVIRONMENTAL PROTECTION
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577
(510) 567-6700
FAX (510) 337-9335

Record ID: RO0000374
Cal Gas
15595 Washington Ave
San Lorenzo, CA 94580

SITE

Date First Reported: 08/28/1986
Substance: Gasoline
Funding (Federal or State): F
Multiple RPs?: Y

Ms. Karen Streich
ChevronTexaco
P.O. Box 6012
San Ramon, CA 94583

Responsible Party (RP)#2
(list of all RPs attached)

Pursuant to sections 25297.1 and 25297.15 of the Health and Safety Code, you are hereby notified that the above site has been placed in the Local Oversight Program and the individual(s) or entity(ies) shown above, or on the attached list, has (have) been identified as the party(ies) responsible for investigation and cleanup of the above site. Section 25297.15 further requires the primary or active Responsible Party to notify all current record owners of fee title before the local agency considers cleanup or site closure proposals or issues a closure letter. For purposes of implementing section 25297.15, this agency has identified Medhi Mohammadian as the primary or active Responsible Party. It is the responsibility of the primary or active Responsible Party to submit a letter to this agency within 20 calendar days of receipt of this notice which identifies all current record owners of fee title. It is also the responsibility of the primary or active Responsible Party to certify to the local agency that the required notifications have been made at the time a cleanup or site closure proposal is made or before the local agency makes a determination that no further action is required. If property ownership changes in the future, you must notify this local agency within 20 calendar days from when you are informed of the change.

Any action or inaction by this local agency associated with corrective action, including responsible party identification, is subject to petition to the State Water Resources Control Board. Petitions must be filed within 30 days from the date of the action/inaction. To obtain petition procedures, please FAX your request to the State Water Board at (916) 341-5808 or telephone (916) 341-5700.

Pursuant to section 25299.37(c) (7) of the Health and Safety Code, a responsible party may request the designation of an administering agency when required to conduct corrective action. Please contact Barney Chan, Hazardous Materials Specialist, at this office at (510) 567-6765 for further information about the site designation process.

Date: 7/3/03

Ariu Levi, Chief
Contract Project Director

Please Circle One (Add) Delete Change
Reason: Re-Name RPs

c: Jenniffer Jordan, SWRCB
Barney Chan, Hazardous Materials Specialist

NOR1 4/01

ALAMEDA COUNTY - DEPARTMENT OF ENVIRONMENTAL PROTECTION
HAZARDOUS MATERIALS DIVISION

July 7, 2003

LIST OF RESPONSIBLE PARTIES FOR

SITE

Record ID: RO000374
Cal Gas
15595 Washington Ave
San Lorenzo, CA 94580

Date First Reported 08/28/1986
Substance: Gasoline
Petroleum (X) Yes
Source: F

Mr. Mehdi Mohammadian
Cal Gas
15595 Washington Ave
San Lorenzo, CA 94580

Responsible Party #1
Property Owner, UST Owner, Operator

Mrs. Agnes Calleri
10901 Cliffland Ave
Oakland,CA 94605

Responsible Party #2
Past Property Owner, Past UST Owner/Operator

Ms. Karen Streich
ChevronTexaco
P.O. Box 6012
San Ramon, CA 94583-2324

Responsible Party #3
Past Property Owner and Past UST Owner

Ms. Marjorie Kayner
Bertram Kubo Trust
20321 Via Espana
Salinas, CA 93908-1261

Responsible Party #4
Past Property Owner, Past UST Owner/Operator

LAW OFFICE OF

MARY S. TAYLOR

77 SOLANO SQUARE #330
BENICIA, CALIFORNIA 94510-2712

TELEPHONE: (707) 746-1672 FACSIMILE: (707) 746-8200

October 4, 2003

VIA FACSIMILE & U.S. MAIL

Mr. Ariu Levi
Chief Project Director
Alameda County Environmental Health Services
Environmental Protection
1131 Harbor Bay Parkway, Suite 250
Alameda, California 94502-6577

Re: Id. RO000374
15595 Washington Avenue
San Lorenzo, California

Dear Mr. Levi:

I represent Agnes Calleri in the above referenced matter.

Pursuant to State Water Resources Control Board Resolution No. 88-23, I hereby request that Alameda County Health Care Services Agency (the "Agency") prepare the Agency's record concerning the above-referenced site and the Agency's letter dated July 7, 2003 designating ChevronTexaco and Mrs. Calleri as secondary responsible parties for the investigation and remediation activities at 15595 Washington Avenue, San Lorenzo. This request is made because Mrs. Calleri is filing, concurrently herewith, a Petition for Review with the State Water Resources Control Board of the Agency's July 7, 2003 action.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Mary S. Taylor

cc: All interested parties (as Exhibit to Mrs. Calleri's Petition for Review)

PROOF OF SERVICE

I, Mary Swanson Taylor, am employed in Solano County, California; I am over the age of 18 years and not a party to the within action; my business address is: 77 Solano Square #330, Benicia, California 94510-2712.

On October 4, 2003, I served the AGNES CALLERI'S PETITION FOR REVIEW OF THE ALAMEDA COUNTY HEALTH CARE SERVICES AGENCY'S JULY 7, 2003 DESIGNATION OF HER AS SECONDARY RESPONSIBLE PARTY on all interested parties by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Mehdi Mohammadian
Cal Gas
15595 Washington Avenue
San Lorenzo, CA 94580

Marjorie Kayner
Bertram Kubo Trust
20321 Via Espana
Salinas, CA 93908-1261

Karen Streich
ChevronTexaco
6001 Bollinger Canyon Road
P.O. Box 6012
San Ramon, CA 94583-2324

Jeffrey L. Podawiltz, Esq.
Glynn & Finley, LLP
100 Pringle Avenue, Suite 500
Walnut Creek, CA 94596

Barney Chan
Hazardous Material Specialist
Alameda County Health Care
Services Agency
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577

Jennifer Jordan
SWRCB
P.O. Box 944212
Sacramento, CA 95814

Loretta K. Barsamian
San Francisco Bay Reg. Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Stephen Morse
San Francisco Bay Reg. Water
Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Mr. Ariu Levi
Chief Project Director
Alameda County Envir. Health Services
Environmental Protection
1131 Harbor Bay Parkway, Suite 250
Alameda, CA 94502-6577

Agnes Calleri
2476 Wimbleton Lane
San Leandro, CA 94577

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 October 4, 2003in Benicia, California.

Mary S. Taylor