

Sept. 6, 1995

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2 District Attorney
3 County of Alameda
4 LAWRENCE C. BLAZER (Bar No. 95598)
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

9 PEOPLE OF THE STATE OF CALIFORNIA,)
10)
11 Plaintiff,) No. 333269
12)
13 v.)
14)
15 ROBERT DEPPER,)
16 STUART DEPPER,) **DECLARATION OF**
17) **SCOTT SEERY**
18)
19 Defendants.)

15 I, Scott Seery declare as follows:

16 I am a Senior Hazardous Materials Specialist with the Alameda
17 County Environmental Health Department, Environmental Protection
18 Division. My job responsibilities have included conducting
19 inspections of underground storage tanks and hazardous materials
20 facilities and hazardous waste generators to ensure compliance with
21 applicable California laws and regulations. At present I oversee the
22 assessment and cleanup of underground storage tank leaks.

23 I have been with Alameda County for over six and one half years.
24 Previously, I was Environmental Geologist with PRC Environmental
25 Management, Inc., a private environmental consulting firm, a Research
26 Analyst with Bendix Environmental Research, Inc., another private
27

1 consulting firm, specialists in authoring Environmental Impact Reports
2 (EIR) and providing expert testimony in cases involving toxicological
3 and epidemiological studies. I have B.S. in Geology from California
4 State University, Hayward, and have completed one year of post
5 graduate study in the field of environmental geology at this same
6 institution. Further, I have well over 500 hours of specialized
7 training, including State, Department of Health Services, Office of
8 Emergency Services and USEPA certified training in, among others, such
9 areas as hazard appraisal and recognition planning, OSHA health and
10 safety training for hazardous waste workers, hazardous materials
11 incident response operations, and underground storage tank monitoring,
12 closure/removal, and cleanup. I have conducted training in inspection
13 of underground storage tanks, including a course sponsored by the
14 University of California, Riverside Extension program for regulators
15 around the state of California.

16 The Environmental Protection Division is the local implementing
17 agency charged with enforcing the California Underground Storage of
18 Hazardous Substances Act (Health and Safety Code Section 25280
19 et. seq.) in those portions of Alameda County where cities do not
20 administer the law.

21 The purpose of the law is to monitor and control the release
22 of contamination into soil and groundwater through leaks in
23 underground storage tank (UST) systems. (See Health and Safety Code
24 Section 25280) I have been actively involved in conducting tank
25 inspections and the permitting process for most of the last seven and
26 one half years. The Division is also the administering agency charged
27 with enforcing the Hazardous Materials Release Response Plans and
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1 Inventory Act. (Health and Safety Code Sections 25500 et. seq.) This
2 law requires handlers of hazardous materials, in excess of threshold
3 quantities (i.e. 55 gallons), to submit inventories of those materials
4 along with emergency contingency plans, (Hazardous Materials Business
5 Plans - HMBPs) to the local emergency response agencies, to be used
6 by them to minimize dangers in the event of any emergencies involving
7 the materials.

8 Underground storage tanks which contain petroleum products such
9 as stoddard solvent require a permit from our agency to operate. One
10 of the legally required conditions of the permit is that the tanks be
11 monitored in an approved fashion to detect leaks. My review of our
12 files indicates that the underground tanks located at 3815 Broadway
13 in Oakland have never been properly monitored pursuant to the
14 requirements of Title 23 of the California Code of Regulations.

15 It is my understanding that the owner of the tanks has said that
16 they are no longer in use. When tanks are taken out of use, it is
17 legally required that they be properly "closed" by way of a closure
18 plan submitted to and approved by our agency. A review of the record
19 indicates that no such closure plan has ever been approved (or even
20 submitted) for the tanks which exist at 3815 Broadway.

21 One of the purposes of a closure plan is to determine if a leak
22 has occurred so that it can be dealt with. If such a leak is
23 detected, either as part of a closure process or by conventional
24 monitoring, it becomes the obligation of the owner or operator to
25 conduct an investigation to determine the extent of the contamination
26 and the degree of cleanup required. The records in this case indicate
27 our knowledge (and that of the defendants) of extensive leakage from
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1 the tanks as early as 1990. In spite of repeated requests for a
2 workplan (which is legally required) to assess the damage caused by
3 the leakage, no plan has ever been submitted.

4 So, in spite of obvious evidence of gross groundwater pollution
5 beneath the building, over the past several years this facility has
6 refused to comply with even the most rudimentary underground tank
7 requirements.

8 To achieve compliance with California laws regarding USTS, this
9 is what must be done:

10 According to Article 7, Section 2670 et seq. of Title 23,
11 California Code of Regulations (CCR), tanks which are leaking and
12 cannot or will not be repaired, or those which are abandoned or
13 otherwise no longer in use, are to be permanently closed. Permanent
14 tank closure involves the removal of remaining liquids, and, among
15 other steps, either 1) removal of the tank, or 2) in-place
16 decommissioning by filling the tank with an inert solid. Either
17 method of tank closure requires the submittal of an application for
18 tank closure to our agency and, in this case, the Oakland Fire
19 Department, for approval. Tank closure permits are issued by the Fire
20 Department.

21 Permanent tank closure is required for this site. To facilitate
22 the pending closures, it is paramount to determine the exact number
23 and locations of the tanks. Therefore, engineering "as-built"
24 drawings, or, in the absence of such drawings, the use of remote
25 sensing techniques, such as ground penetrating radar, must be used to
26 determine tank locations.

27 Article 11 of 23CCR requires a soil and water investigation (SWI)

1 to be performed to determine the extent of soil and ground water
2 pollution as a result of the release from the leaking tanks. A SWI
3 work plan must be submitted to our agency which describes the proposed
4 scope of the required SWI. The SWI will include, among other tasks,
5 the construction of monitoring wells and drilling of soil borings and
6 collection and analysis of both soil and water samples. Once the
7 extent of the pollution has been determined by completing the SWI, a
8 corrective action plan (CAP) must be developed outlining the degree
9 of cleanup required.

10 In addition, Article 5, Section 2655, 23CCR, requires free-phase
11 (floating) product to be removed from the ground water to the extent
12 practical. The regulation provides that our agency determine the
13 appropriate method. This material must be properly treated,
14 discharged or disposed of in compliance with applicable local, state,
15 and federal regulations.

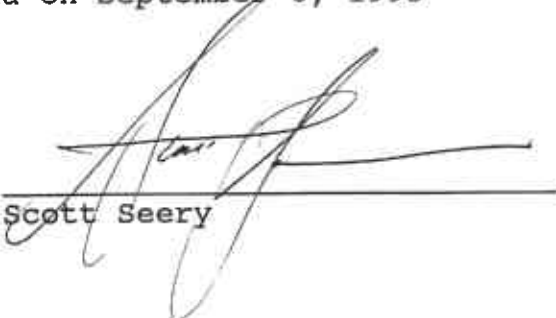
16 The regulations further require that technical reports describing
17 project status are to be submitted to our agency every 3 months until
18 the assessment and cleanup project has been completed. Lastly, an
19 *Underground Storage Tank Unauthorized Release (Leak) / Contamination*
20 *Site Report* is required to be submitted to our agency for
21 distribution.

22 This declaration has focused on the outstanding tank difficulties
23 at the site, without addressing the hazardous waste storage problems
24 which have apparently not been dealt with, in spite of repeated
25 requests to Stuart Depper by my colleagues, Gil Wistar and Larry Seto.

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27 I declare the foregoing to be true, to the best of my knowledge,
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1 under penalty of perjury.

2 Executed at Oakland, California on September 6, 1995

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6 Scott Seery
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1 Thomas J. Orloff
2 District Attorney
3 County of Alameda
4 LAWRENCE C. BLAZER (Bar No. 95598)
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6 Attorneys for Plaintiff

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA

8 PEOPLE OF THE STATE OF CALIFORNIA,)

9 Plaintiff,)

No. 116653

10 v.)

11)
12 ROBERT DEPPER,
13 STUART DEPPER)

14 Defendants)

ORDER FOR
TANK CLOSURE
AND PRELIMINARY
INVESTIGATION

15
16 The above entitled case having come before the court after the
17 filing of a petition to revoke probation, the defendant ROBERT DEPPER
18 appearing with his attorney, WILLIAM LINEHAN, the defendant STUART
19 DEPPER appearing with his attorney, KEVIN D. TAGUCHI, and the PEOPLE
20 FO THE STATE OF CALIFORNIA appearing through Deputy District Attorney
21 LAWRENCE C. BLAZER, and the matter having been submitted:

22 IT IS ORDERED, that defendants shall, by June 13, 1997,

23 1) complete the in-place tank closure requirements at the
24 site formerly known as "The Glovatorium" (at 38th and
25 Broadway in Oakland) acceptable to the Alameda County
26 Department of Environmental Health Services, Environmental
27 Protection Division, and

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2) initiate the environmental investigation to determine the extent of the contamination at the site, as set forth in the GEOSOLV workplan dated March 11, 1997, which is being supplemented pursuant to the direction of the Environmental Protection Division.

Approved as to form:

Dated: _____

William Linehan
Attorney for Robert Depper

Dated: _____

Kevin D. Taguchi
Attorney for Stuart Depper

Dated: _____

THOMAS J. ORLOFF
District Attorney

By: _____
Lawrence C. Blazer
Deputy District Attorney

ORDER

It is so ordered.

Dated: _____

Superior Court Judge

GLOVATORIUM

1
 2 JOHN J. MEEHAN
 District Attorney
 County of Alameda
 3 LAWRENCE C. BLAZER (Bar No. 95598)
 Deputy District Attorney
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7 Attorneys for Plaintiff

8 MUNICIPAL COURT FOR OAKLAND-PIEDMONT-EMERYVILLE JUDICIAL DISTRICT
 9
 10 COUNTY OF ALAMEDA, STATE OF CALIFORNIA

11 PEOPLE OF THE STATE OF CALIFORNIA,)
)
 12 Plaintiff,) No. 333269
)
 13 v.)
)
 14 ROBERT DEPPER,) PRELIMINARY
 STUART DEPPER,) EXAMINATION
) BRIEF
 15 Defendants.)
 16

17 I.

18 INTRODUCTION

19 The defendants, Robert Depper and Stuart Depper, are each
 20 charged with six felony and three misdemeanor violations of the
 21 Hazardous Waste Control Act (Health and Safety Code sections 25100
 22 et seq.). These include four violations of section 25189.5(b)
 23 (unlawfully disposing of hazardous wastes at non-permitted and
 24 unauthorized locations), one violation of section 25189.5(c)
 25 (unlawful transportation of hazardous waste), and one violation of
 26 section 25189.5(d) (unlawfully storing hazardous waste beyond the 90
 27 day limit). The misdemeanors relate to inappropriate handling of
 28 the hazardous wastes thus stored.

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2 The defendants are also charged with two felony violations of
3 Water Code section 13387, for unlawfully dumping wastes into the
4 sewer system in violation of federal pretreatment regulations. They
5 are further charged with five misdemeanor violations of those
6 regulations appurtenant to the Air Resources Division of the Health
7 and Safety Code (Division 26 - Health and Safety Code sections 39000
8 et seq.).

9 The evidence to be presented at the preliminary hearing will
10 show the following:

11 The defendants, Robert Depper and Stuart Depper, are father and
12 son. Together they own and operate a dry cleaning facility known as
13 the Glovatorium located at 3815 Broadway in Oakland. In September
14 ~~XXXXXX~~ Sgt. Alan Whitman of the Oakland Police Department spoke with
15 a former employee of the Glovatorium, Nicholas Evans, who had
16 earlier contacted the California Department of Health Services
17 "Toxic Tips Line". Evans' initial "tip" was that Bob (Robert)
18 Depper had dumped soil contaminated with dry cleaning solvent onto
19 the ground at his home in Orinda.

20 Evans told Whitman that he had been employed by the Glovatorium
21 as a maintenance man for several months, ending about seven months
22 prior to the interview. He said that, while he was working there,
23 dry cleaning waste filter powder was routinely dumped into the
24 facility dumpster for pick-up by the trash company. He also said
25 that dry cleaning fluids and waste water containing dry cleaning
26 fluids were routinely allowed to flow into the sanitary sewer system
27 through floor drains. This would typically occur at the time of
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2 frequent spills in the "dry cleaning room". Evans had seen both
3 defendants witness such spillage flowing into the floor drains.

4 Evans also said that the facility had several underground
5 storage tanks for dry cleaning solvent, and that at least one was
6 leaking, as it was continually filling with water. Stuart Depper
7 told him that there was an underground creek running near the tank,
8 and that, since it was filling with water, it needed to be pumped
9 out every other day. Evans' job was to pump out, using a sump pump,
10 the fluid near the tank into a drum. He would then skim off the
11 solvent floating on the top, reuse it, and throw the contaminated
12 water beneath the solvent into the sewer drain. The foul smelling
13 water was black and oily. Both defendants were aware of this
14 regular procedure.

15 Evans further explained that he was once told by Robert Depper
16 to dig up, by hand, soil beneath a floor near the leaking
17 underground tank, in the hopes of digging down to the end of the
18 contamination. Fifteen drums were filled with the soil, which was
19 literally dripping with solvent, before it was decided that, using
20 this method, the perimeter of the contamination could not be
21 reached. The concrete floor was replaced over the contamination and
22 the drums were placed open in the "drying room" to hopefully
23 evaporate (and pollute the air).

24 Later, Evans was instructed by Robert Depper to place five of
25 the drums in a company truck and take them to his home in Orinda.
26 There the contents of the drums were dumped in Depper's
27 backyard. Evans also gave Sgt. Whitman the name of another former
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2 employee, Andrew Wilson, who was contacted and corroborated Evans'
3 description of what had happened.

4 Having contacted the East Bay Municipal Utility District
5 (EBMUD) and determined that the Glovatorium had illegally allowed
6 dry cleaning waste into the sewers on prior occasions, Sgt. Whitman
7 obtained two search warrants, which were served on October 15, 1990.
8 At the Depper home in Orinda, soil consistent with that described by
9 the employees was sampled. Laboratory results indicated the
10 presence of chemicals similar to those within the Glovatorium.¹ At
11 the Glovatorium, the "sump pump" actually turned out to be a
12 monitoring well, near the underground tanks. Samples from a sump
13 adjacent to it showed practically pure solvent floating on top of
14 contaminated ground water. A similar mixture was found in the drum
15 beneath the pipe emanating from the well. Samples from the sewer
16 drains showed high levels of dry cleaning wastes, primarily stoddard
17 solvent. Samples from the dumpster (belonging to Oakland Scavenger)
18 showed extremely high levels of toxic perchloroethylene
19 (tetrachloroethylene or "perk") mingled with less exotic waste. The
20 drums of contaminated soil described by Evans were found in the
21 drying room.

22
23 ¹ The private commercial laboratory which analyzed the
24 1990 samples later discarded them, pursuant to a standard company
25 policy. This was done without the consent or knowledge of police
26 or prosecutors. Such failure to preserve evidence does not
27 violate due process of law, absent bad faith on the part of the
28 police (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58; *People v.*
Cooper (1991) 53 Cal.3d 771, 810). Moreover, courts have
consistently held that sanctions are inapplicable to the
destruction of evidence in the hands of third parties. (see, e.g.,
In re Michael L. (1985) 39 Cal.3d 81.)

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2 In August, 1992, in response to complaints from neighbors that
3 large dry cleaning machines were sitting unattended outside the
4 Glovatorium, Sgt. Whitman and a hazardous waste specialist from the
5 County Health Department went to the rear of the facility. There
6 they found the machines concerning the neighbors, finding toxic
7 perchloroethylene within them, on the sidewalk, and also inside the
8 full dumpster sitting nearby.

9 Another search warrant was served on the facility on October
10 16, 1992. The probable cause included the fact that according to
11 county records the defendants had done nothing, in spite of explicit
12 instructions, about the underground tanks which were continuously
13 polluting the groundwater beneath their facility.

14 Remarkably, the same conditions found during the service of the
15 first search warrant still existed. The open floor drains were
16 again contaminated with dry cleaning waste, (some was even dumped
17 during the warrant service). These floor drains, which Stuart
18 Depper had assured EBMUD had been sealed, were not sealed in any
19 way. Drums of hazardous waste were everywhere, much of it obviously
20 stored beyond the 90-day limit, (some of the drums from 1989 were
21 still there) and improperly labeled and sealed.

22 The underground tanks were still in place, apparently not in
23 use any longer, but still leaking. Samples from the monitoring well
24 again showed a solvent water mixture. This time a sample was
25 actually extracted from one of the tanks, which also showed a
26 solvent water mixture. In addition, a piece of concrete flooring
27 near the tanks was removed, and samples of soil found beneath it
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2 showed extensive contamination.

3 Members of the Bay Area Air Quality Management District
4 (BAAQMD) found numerous violations of air quality regulations,
5 including the storage of solvents and dry cleaning waste in open
6 containers, the operation of dry cleaning machines which were
7 leaking and dripping solvent, and the usage of an inadequate waste
8 filtration system. This was extraordinary, given that the
9 defendants had previously received a variety of violation notices
10 for the exact same violations.

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12 II.

13 THE COUNTS

- 14 1. H & S § 25189.5(b) (disposal of hazardous waste in Orinda -
15 1990).²
- 16 2. H & S § 25189.5(c) (transportation of hazardous waste to Orinda
17 - 1990).
- 18 3. H & S § 25189.5(b) (disposal of hazardous waste to dumpster -
19 1990).
- 20 4. Water Code § 13387(a)(4) (sewer discharge in violation of
21 pretreatment standards - 1990).
- 22 5. H & S § 25189.5(b) (disposal of hazardous waste by allowing
23 underground tanks to leak [4/90-4/93]).
- 24 6. H & S § 25189.5(b) (disposal of hazardous waste into dumpster
25 -1992).

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27 ² Alameda County has jurisdiction over the Orinda dumping
28 because acts "requisite to the consummation of the offense"
occurred in Alameda County. (Penal Code § 781)

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- 2 7. Water Code § 13387(a)(4) (sewer discharge in violation of
- 3 pretreatment standards - 1992).
- 4 8. H & S § 25189.5(d) (storage of hazardous waste beyond 90 days
- 5 -1992).
- 6 9. Title 22 § 66262.34 (H & S § 25190) (inadequate labeling of
- 7 hazardous waste).
- 8 10. Title 22 § 66264.173 (H & S § 25190) (storage of hazardous
- 9 waste in open containers).
- 10 11. Title 22 § 66264.175 (H & S Code section 25190) (no secondary
- 11 containment).
- 12 12. Regulation 8, Rule 17-301.2 of BAAQMD Rules and Regulations (H
- 13 & S § 42400) (solvents and spent solvents in open containers).
- 14 13. Regulation 8, Rule 17-301.5 of BAAQMD Rules and Regulations
- 15 (dry cleaning wastes in open containers [stoddard])
- 16 14. Regulation 8, Rule 27-301.7 of the BAAQMD Rules and Regulations
- 17 (dry cleaning wastes in open containers [perchloroethylene]).
- 18 15. Regulation 8, Rule 17-301.1 of the BAAQMD Rules and Regulations
- 19 (machines leaking solvent).
- 20 16. Regulation 8, Rule 17-303 of the BAAQMD Rules and Regulations
- 21 (inadequate solvent filtration system).
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23 III.

24 APPLICABLE LAW

- 25 A. Disposal of Hazardous Waste (counts 1, 3, 5, and 6)
26 Health and Safety Code section 25189.5(b) provides:

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28 Any person who is convicted of knowingly