

July 7, 2010

VIA ELECTRONIC & U.S. MAIL

Mark Detterman
 Alameda County Environmental Health
 Department
 1311 Harbor Bay Parkway, 2nd Floor
 Alameda, CA 94502-6577

Re: 14901 East 14th Street, San Leandro, California

Dear Mr. Detterman:

Our firm represents the San Leandro Redevelopment Agency ("Agency"), which is the current owner of the property located at 14901 East 14th Street in San Leandro (the "Property"). This letter is to follow up on our e-mail exchange in June and to request that the Alameda County Environmental Health Department ("ACEH") refrain from naming the Agency as a responsible party for the former leaking underground storage tanks on the Property, or in the alternative, simply name the Agency as a secondarily responsible.

Background

The Agency never owned or operated underground storage tanks on this Property. The Agency simply acquired the Property for roadway widening purposes. It is our understanding that a gasoline station, operated by three consecutive operators, occupied the Property from 1948 through 1976. In 1975, another automotive use, Electrotune moved onto the Property and in 1981, the current tenant, Quality Tune Up began occupying the site. Initial site investigations began in 1993 and four underground storage tanks were removed in 1997. Thus, the Agency acquired the Property after the environmental damage was done.

The Agency acquired the Property from Diana Pagano under the threat of eminent domain. The Property will be part of a street widening project. While the Agency and Ms. Pagano were able to negotiate the terms of the purchase and sale, the Agency was prepared to use its eminent domain powers if necessary. And it was the threat of eminent domain that ultimately moved the negotiations along.

In the purchase and sale agreement, the parties recognized that Ms. Pagano is the responsible party for the contamination. Since Ms. Pagano is elderly and will no longer have day to day access to the Property, the Agency agreed to coordinate the cleanup ON BEHALF OF Ms. Pagano. Ms. Pagano is eligible for the California Underground

Storage Tank Cleanup Fund ("Fund"). Since she is paying for the cleanup and the cleanup work will be done on her behalf, she has the option of seeking reimbursement from the Fund.

Responsible Party Designation

Under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), a public entity that acquires property via an involuntary means, such as eminent domain, qualifies as an "innocent landowner" and is not a responsible party. (See 42 USC § 9601(35).) We understand that underground storage tanks are not covered under CERCLA, but under the California Health & Safety Code and the California Water Code. And we further understand that the California underground tank laws do not contain the same exclusions that CERCLA does.

On the other hand, the California Legislature, as well as the Congress, have worked to focus responsibility on the true responsible parties rather than on those who simply take ownership after the environmental damage has been done. For example, in passing the California Land Reuse and Revitalization Act of 2004, the California Legislature agreed that bona fide purchasers—those people who purchased property after the environmental damage occurred and who agree to clean the property up—are entitled to immunities. I mention CLRRRA, not because it applies in this case (it does not), but because it shows a shift in how the law makers view the issue of naming responsible parties. Additionally, California EPA through the Department of Toxic Substances Control and the Regional Water Quality Control Boards is more willing to enter in to Prospective Purchase Agreements with prospective purchasers who had no part in creating the pollution.

Given this trend in only naming the truly responsible parties—i.e. the owner or operator at the time of the discharge—and the CERCLA recognition that involuntary purchases through eminent domain do not warrant naming the public agency as a responsible party, the Agency respectfully requests that at this time ACEH reconsider naming the Agency as a responsible party for the underground storage tank contamination. Moreover, the ACEH maintains the right to name the Agency as a responsible party if, in the future, the true responsible parties are unable to complete the cleanup.

Primary/Secondary Liability

If ACEH insists upon naming the Agency as a responsible party, the Agency urges ACEH to name the Agency as only secondarily responsible. The State Water Resources Control Board recognized that a party should be placed in a secondarily responsible position where it "neither caused nor permitted the activity which lead to the discharge." (*Wenwest, Inc. et al.*, Order No. WQ 92-13 (SWRCB 1992).) There is no question here that the Agency did not cause the discharge because it was not the

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operator of the tanks, nor did the Agency permit the discharge because the Agency was not the landowner at the time of the release and did not choose to lease the Property to any of the automotive uses.

A secondarily responsible party is not required to comply with cleanup orders unless and until the primarily responsible party fails to comply. (See *Valco Park, Ltd.*, Order No. WQ 86-18 (SWRCB 1986); *Prudential Ins. Co. of Am.*, Order no. WQ 87-6 (SWRCB 1987).) Ms. Pagano would be considered the primarily responsible party because she "permitted" the discharge by leasing the Property to a gasoline station and other automotive uses. Ms. Pagano has not only been directed to clean up the Property by ACEH, she is obligated to clean up the Property under the purchase and sale agreement. While the Agency would again request that ACEH refrain from naming the Agency as a responsible party, in the event ACEH insists on naming the current Property owner, the Agency respectfully requests that ACEH distinguish that the Agency is only secondarily responsible.

Thank you for your time and attention to this matter. Please do not hesitate to call with any questions or comments.

Sincerely yours,



Leah S. Goldberg

LG:LG

c: Tara Peterson
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