

ALAMEDA COUNTY  
HEALTH CARE SERVICES

AGENCY  
DAVID J. KEARS, Agency Director



720260

Don

July 24, 1997

Lori Casias, County Liaison  
Division of Clean Water Programs  
State Water Resources Control Board  
P.O. Box 944212  
Sacramento, CA 94224-2120

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

Dear Lori Casias:

The following is the response of the Alameda County Health Services to the Petition, dated December 11, 1996, for STID 498, 1432 Harrison St., Oakland, CA 94612, submitted by Mark Borsuk on behalf of the responsible parties: Alvin H. Bacharach and Barbara Jean Borsuk.

**I. Introduction to Petition**

This is a statement of opinions which requests no action. No response is necessary.

**II. Institutional Corruption**

This is a statement of opinions which requests no action. No response is necessary.

**III. Excessive, False and Unnecessary UST Program Billing**

This is a statement of opinions which requests no action. No response is necessary.

**IV. LOP Incompetence**

This is a statement of opinions which requests no action. No response is necessary.

**V. Appeal of the Alameda County LOP Oversight Charges**

A. The \$62.44 charge dated October 3, 1994 for P. Smith's time. Paul Smith charged time under activity code 212 when it should have been under activity code 204. This is a simple key stroke error, especially for a person not assigned daily casework. Paul Smith was asked to participate because he had been the past caseworker, prior to the case being in the LOP. The inquiry was initiated by the cleanup fund manager and this telephone conversation did occur, as "odd" as this may seem. A copy of the subsequent NOV dated January 26, 1995 is attached.

B. A charge of \$121.20 dated November 15 & 16, 1994.

A pattern of non-compliance was looked at, which is an enforcement type activity. A copy of the subsequent NOV dated January 26, 1995 is attached. The demolition of the building did not effect any of the monitoring wells of concern. The NOV elaborates the specifics of a lack of required work which was the reason for the NOV. The charges should not be deleted.

VI. **Request for Water Board Intervention and Investigation. Request for State Board to initiate an investigation of Alameda County's UST Program.** The Alameda County LOP has already received a complete audit by the State Board of its program. This audit, which covered a four year period of time, included the time frames that are particulars of this petition.

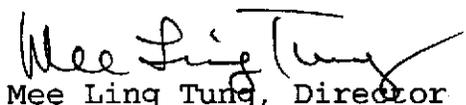
**Request for Transfer of Lead Agency to RWQCB.** The Alameda County LOP has already asked the RWQCB staff to accept this case and they have declined. However, the petitioner has the option, independently, to request any lead agency he chooses under AB2061 (Site Designation Committee).

**Request for suspension of future payment obligations on the part of the petitioner until an investigation prior payments in completed.** This issue should be considered moot as the direct billing of LOP charges, (known as cost recovery) has ceased as of January 1, 1997, as provided for in SB562.

VII. **Conclusion.** This section has no requests and requires no response.

If you have any questions please contact me at (510) 567-6782.

Sincerely,



Mee Ling Tung, Director

Division of Environmental Protection

c: Thomas Peacock, Manager, LOP  
Gordon Coleman, Chief  
Mark Borsuk, 1626 Vallejo St., San Francisco, CA 94123-5116



**Ca/EPA**

ENVIRONMENTAL  
**MEMORANDUM**

97 JUL 22 PM 3: 59



Pete Wilson  
Governor

San Francisco  
Bay Regional  
Water Quality  
Control Board

2101 Webster St. #500  
Oakland, CA  
94612  
(510) 286-1255  
FAX (510) 286-1380

**TO:** Lori Casias  
SWRCB, Local Oversight Program

**FROM:** Stephen I. Morse  
Chief, Toxics Division

**DATE:** July 18, 1997  
File No. 2198.11

**SUBJECT:** RESPONSE TO PETITION, DATED DECEMBER 11, 1996,  
ALAMEDA COUNTY SITE #498, 1432 HARRISON STREET,  
OAKLAND, CA

Listed below is the response of Regional Board staff to the issues raised in the petition for the above site, submitted by Mark Borsuk. Comments are listed by section as submitted in the original petition.

I. Introduction to Petition

Statement of opinions and facts. No action is requested. No response necessary.

II. Institutional Corruption

Statement of opinions and facts. No action is requested. No response necessary.

III. Excessive, False and Unnecessary UST Program Billing

Statement of opinions and facts. No action is requested. No response necessary.

IV. LOP Incompetence

Statement of opinions and facts. No action is requested. No response necessary.

V. Appeal of the Alameda County LOP Oversight Charges

A) **Request for deletion of a \$62.44 charge dated October 3, 1994**

The text of the appeal states that the county's reason for the charge was a call initiated by the UST fund manager to discuss compliance issues at the site. The petitioner states that this explanation is "rather odd" and inconsistent with actual events. The fund manager was in contact with Regional Board staff during that timeframe discussing the same issues, so the rationale for the charge does not appear, from the perspective of Board staff, to be "odd" or inconsistent with actual events. We recommend the charge not be deleted.



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*Our mission is to preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.*

cc: Mark Borsuk  
1626 Vallejo Street  
San Francisco, CA 94123-5116

Tom Peacock  
Alameda County Environmental Health Dept.  
1131 Harbor Bay Parkway  
2nd Floor  
Alameda, CA 94502



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**Ca/EPA**

**State Water  
Resources  
Control Board**

**Division of  
Clean Water  
Programs**

Mailing Address:  
PO Box 944212  
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**JUL 09 1997**

**Tom Peacock  
Alameda County  
Environmental Health Services  
1131 Harbor Bay Parkway, 2nd Floor  
Alameda, CA 94502-6577**

**John Kaiser  
San Francisco Bay Regional Water  
Quality Control Board  
2101 Webster Street, Suite 500  
Oakland, CA 94612**

Dear Mr. Peacock and Mr. Kaiser:

**PETITION, UNDERGROUND STORAGE TANK (UST) LOCAL OVERSIGHT  
PROGRAM, SITE NO. 498, 1432 HARRISON STREET, OAKLAND, ALAMEDA  
COUNTY, FILE NO. P96-175**

We have received a petition from Mark Borsuk on behalf of Alvin H. Bacharach and Barbara Jean Borsuk, a copy of which was sent to both of you. Please provide this office with a response to the petition within the next 20 days. A copy of each response shall be forwarded to Mr. Borsuk. In addition to responding to the issues raised in the petition, the County's response shall also include a brief history of the site including historic and current land use and status of cleanup. A copy of the entire site file shall be provided to this office and to Mr. Borsuk.

If you have any questions, please telephone me at (916) 227-4325.

Sincerely,

**Lori Casias  
Local Oversight Program**

cc: **Mark Borsuk  
Attorney at Law  
1626 Vallejo Street  
San Francisco, CA 94123-5116**



**Pete Wilson  
Governor**



Recycled Paper

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**MARK BORSUK**  
**Attorney at Law**  
**1626 Vallejo Street**  
**San Francisco, CA 94123-5116**  
**(415) 922-4740**  
**FAX 922-1485**  
**Internet: mborsuk@ix.netcom.com**

VIA FAX & FEDX

November 25, 1996

Ms. Lori Casias  
LOP Manager  
Clean Water Program  
State Water Resources Control Board  
901 P Street  
Sacramento, CA 95814  
(916) 227-4325 / FAX 227-4349

**SUBJECT:** Appeal of Alameda County LOP Charges to the California State Water Resources Control Board; Request for Transfer of Oversight Responsibility from the Alameda County LOP to the San Francisco Regional Board; Suspension of LOP Payment Obligations Pending Investigation of All Alameda County Charges Related to the Petitioner's Site since 1990.

**Petitioner:** Alvin H. Bacharch and Barbara Jean Borsuk  
c/o Mark Borsuk  
Attorney at Law  
1626 Vallejo Street  
San Francisco, CA 94123-5116  
(415) 922-4740 / FAX 922-1485 / mborsuk@ix.netcom.com

**Site:** 1432 Harrison Street, Oakland, CA 94612  
LOP Site ID #498 / UST FUND Claim 2219

**Issue:** Reversal of Alameda County LOP Charges and  
Other Relief.

**Authority:** In the Matter of Zedrick (WQ 94-4-UST; June 16, 1994) and  
23 CCR 2813 (e) & 2814.2 (b).

**Date:** November 25, 1996

**Interested** Persons interested in the subject matter of this Petition are all

Parties: Responsible Parties billed by Alameda County for UST oversight charges.

*not named?*

Petition: Petitioner has provided a copy of the Petition to the local agency.

Preparation of Record: Petitioner requested the local agency to prepare a local agency record.

### **I. Introduction to Petition.**

This is an appeal to the State Water Resources Control Board (the "State Board") regarding certain charges made by the Alameda County Local Oversight Program in 1994. The issues presented on appeal reflect the Underground Storage Tank (the "UST") Program's failure to protect human health and the environment.

The appeal results from the UST Program's failure to use an objective standard for assessing the risk to human health and the environment from fuel leaks. Rather the UST Program permitted local regulators and enforcement personnel to subjectively determine each site's risk and to demand in many instances costly remediation without having to analyze the actual threat to human health and the environment.

The UST Program's reliance on subjective standards financially rewarded regulators and enforcement personnel by permitting them to keep low risk sites open in order to maintain federal and state funding. The lack of an objective standard institutionalized corruption in the UST Program. In addition, the lack of an objective standard fostered technical incompetence and sloth.

The failure of the UST Program to protect the environment is well documented. In 1992 and again in 1996 the US/EPA reported on the Program's failure.<sup>1</sup> In 1996, the Sacramento Bee and other sources revealed corruption and gross incompetence in the Los Angeles Regional Water Board.<sup>2</sup> Another article called for abolishing the UST Program for its failure at a horrific cost to protect the environment.<sup>3</sup> In 1995, a lengthy law review article concluded the program failed and did not protect the environment.<sup>4</sup> In the course of a decade the UST Program succeeded in unjustly stigmatizing low risk properties, destroying the life savings of many small property owners and not protecting California citizens from the hazards of groundwater contamination.

<sup>1</sup> US EPA Audit Report No. E1LLB1-09-0200-2100665 (September 30, 1992) & E1LLF5-10-0021-6100264 (August 6, 1996).

<sup>2</sup> Chris Bowman, Millions in taxes misspent on 'gas-polluted' sites in L.A., Sacramento Bee, July 30, 1996.

<sup>3</sup> Mark Borsuk, The Leaking Tank Scam, California Environmental Law Reporter (March, 1996).

<sup>4</sup> Christen Carlson White, Regulation of Leaky Underground Fuel Tanks: An Anatomy of Regulatory Failure, 14 UCLA J. ENVTL. L. & Pol'y 105 (1995).

## **II. Institutional Corruption.**

The L.A. Regional Board scandal is unlikely an isolated event. The subjective nature of the UST Program was incentive enough for others to benefit at the expense of the environment. For example, the Alameda County UST Program is notorious for overzealous enforcement on some sites while turning a blind eye to others. Their excessive oversight at some sites in downtown Oakland is in direct contradiction to the San Francisco Regional Board's policy of recognizing the industrial nature of the area and the limited impact on the environment from tank leaks after source removal.

## **III. Excessive, False and Unnecessary UST Program Billing.**

Institutional corruption in the UST Program manifests itself in many ways. One is the payment of oversight charges to local agencies like the Alameda County LOP. Federal and state monies support this program. Due to the Program's subjective nature, local officials and enforcement personnel can bill unlimited time to responsible parties ("RPs"). This creates a state sanctioned shakedown. Inevitably excessive, false and unnecessary billing practices developed due to the lack of effective controls.

Responsible parties pay a portion of the agency charges. Those lucky enough to receive funding from the UST FUND are reimbursed. The UST FUND has not in the past questioned these charges. With the implementation of Senate Bill 562 (Thompson), the UST FUND after January 1, 1997 will be the only bulwark against excessive, false and unnecessary billing.

Despite concern over bureaucratic retribution, the Petitioner protested a number of false billings. The first concerned a time charge for an alleged meeting between a former case officer and the Petitioner's consultant. No meeting ever occurred. The current appeal includes this item.

The second false billing relates to the LOP charging the Petitioner for demanding an adjacent site be investigated for groundwater contamination. The site was seventy-five (75') feet away and potentially impacted the Petitioner's property. After initial characterization, the LOP had "forgotten" about the site for two and one half years. Only after the Petitioner complained did the LOP order the adjacent property owner to undertake a groundwater investigation. Exhibit A.

## **IV. LOP Incompetence.**

The unfettered discretion afforded to local agencies by the subjective standard perverted the UST Program. One expected outcome was allowing local programs

to ignore best scientific practices and indulge in arm twisting and other undesirable actions against RPs.

The Petitioner's experience is indicative of how the State has treated thousands of property owners. The Alameda County UST Program is characterized by inconsistent and excessive enforcement of low priority sites, gross incompetence, and a punitive mindset. It is interesting to note that the Alameda County District Attorney in charge of UST enforcement referred to the San Francisco Regional Board as the "enemy".<sup>5</sup> No doubt the Regional Board's attitude towards fuel leaks as a limited risk to human health and the environment was an irritation. What is even more surprising is that the State Board could fund enforcement by the DA through the LOP while the DA was denouncing the Regional Board.

Further, the Petitioner's site is not near a drinking water well and would likely qualify for inclusion in the San Francisco Regional Board's containment zone. The chart below provides vivid examples of the UST Program's failure in Alameda County.

#### Examples of the Alameda County UST Program's Incompetence

Site/Event	Action/Inaction	Harm to Petitioner	Case Officer
1424 Harrison St.	County's failure to order testing of upgradient tanks in 1991. Exhibit B & Area Map.  The parcel is contiguous to Petitioner's site.	The closed in place tanks are ten (10') feet from Petitioner's former gasoline tanks.  Subsequent investigation disclosed gasoline contamination in the soil from upgradient site. Exhibit C.	P. Smith
246 14th St. at Alice St. [Site ID #1098]	Failure to investigate groundwater contamination after benzene detected in soil.  Former service station located seventy-five (75') feet from Petitioner's	Case officer notified property owner to remove tanks in September 1990. Tanks removed in September 1991.  Case officer took no further action until Petitioner demanded	P. Smith

<sup>5</sup> Christen Carlson White, *supra*, p. 153.

	site on Alice St.	<p>site investigation in 1994. Exhibit A.</p> <p>The County's excuse for not taking any action was the file had been "lost".</p>	
<p>1428-1432 Harrison &amp; 1439-1443 Alice Streets. [Site ID #498]</p>	<p>Failure to name the long-term tenant as a responsible party.</p> <p>Then only naming the long-term tenant as a responsible party for the gasoline tank clean-up.</p>	<p>Despite Water Board testimony and documentary evidence requiring the long-term tenant named to the clean-up order, the County refused to do so.</p> <p>After a favorable ruling from the State Water Board in 1991 [WQ 91-07], the County only added the long-term tenant to part of the order in 1992. The County lacked the authority to parse the order. Exhibit D.</p> <p>The San Francisco Regional Board upon learning of the County's egregious action immediately named the long-term tenant to the entire order within one day of notification. Exhibit E.</p> <p>The County's intransigent and overt bias forced the Petitioner to spend tens of thousand of</p>	P. Smith.

		dollars in legal fees over three years in fruitless negotiations and appeals.	
1428-1432 Harrison & 1439- 1443 Alice Streets. [Site ID #498]	Failure to disregard suspect laboratory readings for benzene concentrations in the gasoline tanks.	<p>During the period the Petitioner was formulating the tank removal plan, Petitioner's tenant submitted a laboratory report showing liquid in the abandoned gasoline tanks with benzene concentrations of 13% &amp; 14%. Exhibit F.</p> <p>The tanks had been abandoned by another tenant, the long-term tenant.</p> <p>The Petitioner's consultant, holding a Doctorate in Chemistry, could not persuade the County to disregard the suspect finding even after the Petitioner's tests confirmed benzene to be in the normal range for gasoline. The LUFT Manual shows benzene to be between 0.12-3.5% by weight.</p> <p>The County's gross ignorance of hydrocarbon chemistry greatly</p>	P. Smith

		harmed the Petitioner.	
1428-1432 Harrison & 1439- 1443 Alice Streets. [Site ID #498]	County demanded the Consultant's removal for following standard industry practices for tank removal, safety and site characterization.	The County made extraordinary demands for site characterization prior to tank removal. The County denigrated the Petitioner's consultant and forced the Petitioner to retain another consultant. Exhibit G.  This action dramatically escalated the Petitioner's costs and delayed the tank removal for three years. Exhibit H.  The irony is the County finally accepted the tank removal and site characterization plan in substantially the same form as original proposed by the first consultant.	P. Smith

*All this time  
was prior to  
There being  
an Alameda  
County LOP.*

Due to the County's unlimited discretion to demand further work, the Petitioner spent tens of thousands of dollars unnecessarily to comply with the County's orders. In addition, to the cost of consultants and lawyers, the County charged the Petitioner for oversight.

**V. Appeal of the Alameda County LOP Oversight Charges.**

In the Matter of Zedrick (WQ 94-4-UST) is the authority to appeal local agency charges. The Petitioner requests reversing two charges made in the amount of \$183.64 for agency oversight during the period July 1 to December 31, 1994.

**A. The \$62.44 charge dated October 3, 1994 for P. Smith's time.**

On May 16, 1995, the Petitioner requested the County to explain a charge assessed against the site by a former case officer. The charge was for a "meeting with responsible parties or responsible party consultants (Code #212)." On July 11, the Petitioner again requested an explanation of the charge from the County.

The first justification for the charge was patently false. No meeting ever took place. So on August 14, the County switched its story and instead charged the time for discussing past compliance with the State Board by the former case officer.

On September 19, the Petitioner sent the State LOP administrator a detailed list of questions regarding the legitimacy of the former case officer's charge. On December 22, the County replied attempting to justify the charge on the site's supposed non-compliance when in fact during the period of the former case officer's oversight he had not issued a non-compliance order.

On January 22, 1996, the Petitioner again requested the State LOP administrator to explain the basis for the charge. On July 26, the administrator responded by stating the head of the UST FUND, Mr. Dave Deaner, had initiated the call to the former case officer expressing concern over whether the site was in compliance.

On August 25, the Petitioner wrote to the State LOP administrator stating the administrator explanation was "... rather odd since the tanks were removed on December 7, 1993 and the FUND accepted the claimants (Petitioner) on December 17, 1993. Clearly, the LOP's explanation is inconsistent with events."

Why would the UST FUND's most senior officer, responsible for thousands of claims, call a former case worker eleven months after funding the site about compliance? If there was a concern, a member of the FUND's staff would have made the inquiry. In addition, the LOP administrator's statement that no written notes were taken of the conversation remains a troubling aspect for the justification. All correspondence attached to Exhibit I.

*But he did  
call me. (Pom)  
What are we  
going to do?  
"Dave Deaner"*

Based upon the above explanation and correspondence, the State Board is urged to delete the charge assessed against the Petitioner.

**B. The \$121.20 charge dated November 15 & 16, 1994.**

On January 26, 1995, the County issued a "Notice of Violation" to the Petitioner. The Petitioner contested the notice and the associated charges. A review of the correspondence from March to August 1994 demonstrates the Petitioner met the County's monitoring schedule.

The correspondence, submittals and well monitoring show the LOP concurred with the consultant's (Levine-Fricke) proposed work schedule. At no time did the LOP state that it is was going to issue a "Notice of Violation." Rather, the L-F correspondence discloses a continuing effort to meet the LOP's requests. Especially noteworthy is the January 9, 1994 ("1995") letter to the LOP regarding the LOP's concurrence with L-F's recommendations in 1994. This letter recites a compliance chronology totally at odds with the LOP's justification for issuing the "Notice of Violation."

The Petitioner submits it did comply with the LOP's monitoring request by sampling in the third and fourth calendar quarters of 1994 and the "Notice of Violation" was issued in error. Further, the charges assessed against the Petitioner are unjustified. The following chronology demonstrates the Petitioner's compliance with the LOP's requests. All correspondence attached to Exhibit J.

Date	From	To	Discussion
December, 1993			Tanks, hydraulic lifts and appurtenant piping removed from the site. GW-1 installed.
March 15, 1994	LOP	Petitioner ("P")	Request update on additional well installation and monitoring schedule. Overdue to begin groundwater monitoring. Note: site misidentified as 1432-1434 Franklin St. Correct address is 1432-1434 Harrison St.
March 27	LF	LOP	Schedule for submitting work plan for LOP approval to install MW-2 & MW-3.
March 29			Meeting with LOP and P's consultant and counsel on scope of work and schedule.
April 8	LF	LOP	Proposed work plan submitted to LOP.
April 14	LOP	P	L-F work plan approved. Installation and monitoring to be completed by July 1994.
June 28	LOP	P	Request for status update on well installation and sampling.
August 16	LF	LOP	Report on well installation (July 29 & 30) and sampling (August 1).
September 1	LF	LOP	IIIQ94 monitoring data submitted to LOP.
September 6	LOP	LF	LOP comments on September 1st report & concurs with L-F recommendations for further sight characterization. See Jan. 9, 1995 L-F letter to LOP.
December 21			IVQ94 well monitoring.
January 9, 1995	LF	LOP	Request to approve Phase II of Work Plan.
January 23	Blaine Tech	LOP	IVQ94 monitoring data submitted to LOP.

Based upon the above explanation and correspondence, the Petitioner requests the State Board reverse the LOP's unjustified time charges.

#### **VI. Request for Water Board Intervention and Investigation.**

Under Title 23 of the California Code of Regulations, the State Board may at its own initiative undertake inquiries and actions. The Petitioner requests the State Board to initiate an investigation of Alameda County's UST Program. The inquiry should evaluate the extent to which the County unnecessarily, excessively and falsely billed RPs before and after they entered the LOP. The Petitioner's experience offers an arsenal of smoking guns related to unjustified oversight and enforcement charges.

Further, the Petitioner requests the Water Board to transfer the Petitioner's site from the jurisdiction of the Alameda County LOP to the San Francisco Regional Board for oversight. In addition, the Petitioner requests the Water Board to suspend any further payment obligations on the part of the Petitioner until the site's history is investigated for unnecessary, excessive and false billing.

#### **VII. Conclusion.**

The UST Program has not protected human health and the environment due to a subjective regulatory and enforcement system. The UST Program could have succeeded by the use of a risk based assessment standard and by acknowledging most UST sites pose minimal risk to drinking water. Instead, a great number of small RPs have spent years inside a bureaucratic labyrinth suffering financial ruin. They continue to suffer at the hands of a government program incapable of reform and contrition.

*no standard  
existed at the  
time.  
LH/L report  
not done at  
the time.*

The Petitioner asks the Water Board to reverse the LOP charges, initiate an investigation and grant the other relief requested.

Sincerely yours,



Mark Borsuk

ENVIRONMENTAL HEALTH SERVICES

Interoffice Memorandum

**DATE:** July 23, 1997

**TO:** Gordon Coleman

**FROM:** Mee Ling Tung *MLT*

**SUBJECT:** Attached Petition

---

Please prepare a response for the attached petition by July 28, 1997.

MLT/ bon

c: Tom Peacock

DATE: July 22, 1997

JUL 24 1997

Director of Environmental Health

TO: Gordon, Mee Ling Tung

FROM: Tom 

SUBJ: attached petition from Mark Borsuk

---

Attached is a petition mark Borsuk sent the State Water Resources Control Board many months ago. Lori Casias first thought it was outrageous but is now forced to respond to it. We have until July 29. Lori thinks that Gordon would want to comment and also said that Mee Ling would have to sign our response.

If you have any questions please contact me. Thank you.



Pete Wilson  
Governor

JUL 09 1997

State Water  
Resources  
Control Board

Tom Peacock  
Alameda County  
Environmental Health Services  
1131 Harbor Bay Parkway, 2nd Floor  
Alameda, CA 94502-6577

Division of  
Clean Water  
Programs

Mailing Address:  
PO Box 944212  
Sacramento, CA  
94244-2120

John Kaiser  
San Francisco Bay Regional Water  
Quality Control Board  
2101 Webster Street, Suite 500  
Oakland, CA 94612

2014 T Street,  
Suite 130  
Sacramento, CA  
95814  
(916) 227-4325  
FAX (916) 227-4349

Dear Mr. Peacock and Mr. Kaiser:

www.swrcb.ca.gov

PETITION, UNDERGROUND STORAGE TANK (UST) LOCAL OVERSIGHT  
PROGRAM, SITE NO. 498, 1432 HARRISON STREET, OAKLAND, ALAMEDA  
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If you have any questions, please telephone me at (916) 227-4325.

Sincerely,

Lori Casias  
Local Oversight Program

cc: Mark Borsuk  
Attorney at Law  
1626 Vallejo Street  
San Francisco, CA 94123-5116



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**MARK BORSUK**  
**Attorney at Law**  
**1626 Vallejo Street**  
**San Francisco, CA 94123-5116**  
**(415) 922-4740**  
**FAX 922-1485**  
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VIA FAX & FEDX

November 25, 1996

Ms. Lori Casias  
LOP Manager  
Clean Water Program  
State Water Resources Control Board  
901 P Street  
Sacramento, CA 95814  
(916) 227-4325 / FAX 227-4349

**SUBJECT:** Appeal of Alameda County LOP Charges to the California State Water Resources Control Board; Request for Transfer of Oversight Responsibility from the Alameda County LOP to the San Francisco Regional Board; Suspension of LOP Payment Obligations Pending Investigation of All Alameda County Charges Related to the Petitioner's Site since 1990.

**Petitioner:** Alvin H. Bacharch and Barbara Jean Borsuk  
c/o Mark Borsuk  
Attorney at Law  
1626 Vallejo Street  
San Francisco, CA 94123-5116  
(415) 922-4740 / FAX 922-1485 / mborsuk@ix.netcom.com

**Site:** 1432 Harrison Street, Oakland, CA 94612  
LOP Site ID #498 / UST FUND Claim 2219

**Issue:** Reversal of Alameda County LOP Charges and  
Other Relief.

**Authority:** In the Matter of Zedrick (WQ 94-4-UST; June 16, 1994) and  
23 CCR 2813 (e) & 2814.2 (b).

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**Interested** Persons interested in the subject matter of this Petition are all

Parties: Responsible Parties billed by Alameda County for UST oversight charges.

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Petition: Petitioner has provided a copy of the Petition to the local agency.

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The appeal results from the UST Program's failure to use an objective standard for assessing the risk to human health and the environment from fuel leaks. Rather the UST Program permitted local regulators and enforcement personnel to subjectively determine each site's risk and to demand in many instances costly remediation without having to analyze the actual threat to human health and the environment.

The UST Program's reliance on subjective standards financially rewarded regulators and enforcement personnel by permitting them to keep low risk sites open in order to maintain federal and state funding. The lack of an objective standard institutionalized corruption in the UST Program. In addition, the lack of an objective standard fostered technical incompetence and sloth.

The failure of the UST Program to protect the environment is well documented. In 1992 and again in 1996 the US/EPA reported on the Program's failure.<sup>1</sup> In 1996, the Sacramento Bee and other sources revealed corruption and gross incompetence in the Los Angeles Regional Water Board.<sup>2</sup> Another article called for abolishing the UST Program for its failure at a horrific cost to protect the environment.<sup>3</sup> In 1995, a lengthy law review article concluded the program failed and did not protect the environment.<sup>4</sup> In the course of a decade the UST Program succeeded in unjustly stigmatizing low risk properties, destroying the life savings of many small property owners and not protecting California citizens from the hazards of groundwater contamination.

<sup>1</sup> US EPA Audit Report No. E11LB1-09-0200-2100665 (September 30, 1992) & E11LF5-10-0021-6100264 (August 6, 1996).

<sup>2</sup> Chris Bowman, Millions in taxes misspent on 'gas-polluted' sites in L.A., Sacramento Bee, July 30, 1996.

<sup>3</sup> Mark Borsuk, The Leaking Tank Scam, California Environmental Law Reporter (March, 1996).

<sup>4</sup> Christen Carlson White, Regulation of Leaky Underground Fuel Tanks: An Anatomy of Regulatory Failure, 14 UCLA J. ENVTL. L. & Pol'y 105 (1995).

## **II. Institutional Corruption.**

The L.A. Regional Board scandal is unlikely an isolated event. The subjective nature of the UST Program was incentive enough for others to benefit at the expense of the environment. For example, the Alameda County UST Program is notorious for overzealous enforcement on some sites while turning a blind eye to others. Their excessive oversight at some sites in downtown Oakland is in direct contradiction to the San Francisco Regional Board's policy of recognizing the industrial nature of the area and the limited impact on the environment from tank leaks after source removal.

## **III. Excessive, False and Unnecessary UST Program Billing.**

Institutional corruption in the UST Program manifests itself in many ways. One is the payment of oversight charges to local agencies like the Alameda County LOP. Federal and state monies support this program. Due to the Program's subjective nature, local officials and enforcement personnel can bill unlimited time to responsible parties ("RPs"). This creates a state sanctioned shakedown. Inevitably excessive, false and unnecessary billing practices developed due to the lack of effective controls.

Responsible parties pay a portion of the agency charges. Those lucky enough to receive funding from the UST FUND are reimbursed. The UST FUND has not in the past questioned these charges. With the implementation of Senate Bill 562 (Thompson), the UST FUND after January 1, 1997 will be the only bulwark against excessive, false and unnecessary billing.

Despite concern over bureaucratic retribution, the Petitioner protested a number of false billings. The first concerned a time charge for an alleged meeting between a former case officer and the Petitioner's consultant. No meeting ever occurred. The current appeal includes this item.

The second false billing relates to the LOP charging the Petitioner for demanding an adjacent site be investigated for groundwater contamination. The site was seventy-five (75') feet away and potentially impacted the Petitioner's property. After initial characterization, the LOP had "forgotten" about the site for two and one half years. Only after the Petitioner complained did the LOP order the adjacent property owner to undertake a groundwater investigation. Exhibit A.

## **IV. LOP Incompetence.**

The unfettered discretion afforded to local agencies by the subjective standard perverted the UST Program. One expected outcome was allowing local programs

to ignore best scientific practices and indulge in arm twisting and other undesirable actions against RPs.

The Petitioner's experience is indicative of how the State has treated thousands of property owners. The Alameda County UST Program is characterized by inconsistent and excessive enforcement of low priority sites, gross incompetence, and a punitive mindset. It is interesting to note that the Alameda County District Attorney in charge of UST enforcement referred to the San Francisco Regional Board as the "enemy".<sup>5</sup> No doubt the Regional Board's attitude towards fuel leaks as a limited risk to human health and the environment was an irritation. What is even more surprising is that the State Board could fund enforcement by the DA through the LOP while the DA was denouncing the Regional Board.

Further, the Petitioner's site is not near a drinking water well and would likely qualify for inclusion in the San Francisco Regional Board's containment zone. The chart below provides vivid examples of the UST Program's failure in Alameda County.

#### Examples of the Alameda County UST Program's Incompetence

Site/Event	Action/Inaction	Harm to Petitioner	Case Officer
1424 Harrison St.	County's failure to order testing of upgradient tanks in 1991. Exhibit B & Area Map.  The parcel is contiguous to Petitioner's site.	The closed in place tanks are ten (10') feet from Petitioner's former gasoline tanks.  Subsequent investigation disclosed gasoline contamination in the soil from upgradient site. Exhibit C.	P. Smith
246 14th St. at Alice St. [Site ID #1098]	Failure to investigate groundwater contamination after benzene detected in soil.  Former service station located seventy-five (75') feet from Petitioner's	Case officer notified property owner to remove tanks in September 1990. Tanks removed in September 1991.  Case officer took no further action until Petitioner demanded	P. Smith

<sup>5</sup> Christen Carlson White, *supra*, p. 153.

	site on Alice St.	<p>site investigation in 1994. Exhibit A.</p> <p>The County's excuse for not taking any action was the file had been "lost".</p>	
<p>1428-1432 Harrison &amp; 1439-1443 Alice Streets. [Site ID #498]</p>	<p>Failure to name the long-term tenant as a responsible party.</p> <p>Then only naming the long-term tenant as a responsible party for the gasoline tank clean-up.</p>	<p>Despite Water Board testimony and documentary evidence requiring the long-term tenant named to the clean-up order, the County refused to do so.</p> <p>After a favorable ruling from the State Water Board in 1991 [WQ 91-07], the County only added the long-term tenant to part of the order in 1992. The County lacked the authority to parse the order. Exhibit D.</p> <p>The San Francisco Regional Board upon learning of the County's egregious action immediately named the long-term tenant to the entire order within one day of notification. Exhibit E.</p> <p>The County's intransigent and overt bias forced the Petitioner to spend tens of thousand of</p>	P. Smith.

		dollars in legal fees over three years in fruitless negotiations and appeals.	
1428-1432 Harrison & 1439-1443 Alice Streets. [Site ID #498]	Failure to disregard suspect laboratory readings for benzene concentrations in the gasoline tanks.	<p>During the period the Petitioner was formulating the tank removal plan, Petitioner's tenant submitted a laboratory report showing liquid in the abandoned gasoline tanks with benzene concentrations of 13% &amp; 14%. Exhibit F.</p> <p>The tanks had been abandoned by another tenant, the long-term tenant.</p> <p>The Petitioner's consultant, holding a Doctorate in Chemistry, could not persuade the County to disregard the suspect finding even after the Petitioner's tests confirmed benzene to be in the normal range for gasoline. The LUFT Manual shows benzene to be between 0.12-3.5% by weight.</p> <p>The County's gross ignorance of hydrocarbon chemistry greatly</p>	P. Smith

		harmed the Petitioner.	
1428-1432 Harrison & 1439- 1443 Alice Streets. [Site ID #498]	County demanded the Consultant's removal for following standard industry practices for tank removal, safety and site characterization.	The County made extraordinary demands for site characterization prior to tank removal. The County denigrated the Petitioner's consultant and forced the Petitioner to retain another consultant. Exhibit G.  This action dramatically escalated the Petitioner's costs and delayed the tank removal for three years. Exhibit H.  The irony is the County finally accepted the tank removal and site characterization plan in substantially the same form as original-proposed by the first consultant.	P. Smith

*All this time  
was prior to  
there being  
an Alameda  
County LOP.*

Due to the County's unlimited discretion to demand further work, the Petitioner spent tens of thousands of dollars unnecessarily to comply with the County's orders. In addition, to the cost of consultants and lawyers, the County charged the Petitioner for oversight.

#### **V. Appeal of the Alameda County LOP Oversight Charges.**

**In the Matter of Zedrick (WQ 94-4-UST)** is the authority to appeal local agency charges. The Petitioner requests reversing two charges made in the amount of \$183.64 for agency oversight during the period July 1 to December 31, 1994.

**A. The \$62.44 charge dated October 3, 1994 for P. Smith's time.**

On May 16, 1995, the Petitioner requested the County to explain a charge assessed against the site by a former case officer. The charge was for a "meeting with responsible parties or responsible party consultants (Code #212)." On July 11, the Petitioner again requested an explanation of the charge from the County.

The first justification for the charge was patently false. No meeting ever took place. So on August 14, the County switched its story and instead charged the time for discussing past compliance with the State Board by the former case officer.

On September 19, the Petitioner sent the State LOP administrator a detailed list of questions regarding the legitimacy of the former case officer's charge. On December 22, the County replied attempting to justify the charge on the site's supposed non-compliance when in fact during the period of the former case officer's oversight he had not issued a non-compliance order.

On January 22, 1996, the Petitioner again requested the State LOP administrator to explain the basis for the charge. On July 26, the administrator responded by stating the head of the UST FUND, Mr. Dave Deamer, had initiated the call to the former case officer expressing concern over whether the site was in compliance.

On August 25, the Petitioner wrote to the State LOP administrator stating the administrator explanation was "... rather odd since the tanks were removed on December 7, 1993 and the FUND accepted the claimants (Petitioner) on December 17, 1993. Clearly, the LOP's explanation is inconsistent with events."

Why would the UST FUND's most senior officer, responsible for thousands of claims, call a former case worker eleven months after funding the site about compliance? If there was a concern, a member of the FUND's staff would have made the inquiry. In addition, the LOP administrator's statement that no written notes were taken of the conversation remains a troubling aspect for the justification. All correspondence attached to Exhibit I.

*But he did  
call me. (Tom)  
What are we  
going to do?  
"Dave Deamer"*

Based upon the above explanation and correspondence, the State Board is urged to delete the charge assessed against the Petitioner.

**B. The \$121.20 charge dated November 15 & 16, 1994.**

On January 26, 1995, the County issued a "Notice of Violation" to the Petitioner. The Petition contested the notice and the associated charges. A review of the correspondence from March to August 1994 demonstrates the Petitioner met the County's monitoring schedule.

The correspondence, submittals and well monitoring show the LOP concurred with the consultant's (Levine-Fricke) proposed work schedule. At no time did the LOP state that it is was going to issue a "Notice of Violation." Rather, the L-F correspondence discloses a continuing effort to meet the LOP's requests. Especially noteworthy is the January 9, 1994 ("1995") letter to the LOP regarding the LOP's concurrence with L-F's recommendations in 1994. This letter recites a compliance chronology totally at odds with the LOP's justification for issuing the "Notice of Violation."

The Petitioner submits it did comply with the LOP's monitoring request by sampling in the third and fourth calendar quarters of 1994 and the "Notice of Violation" was issued in error. Further, the charges assessed against the Petitioner are unjustified. The following chronology demonstrates the Petitioner's compliance with the LOP's requests. All correspondence attached to Exhibit J.

Date	From	To	Discussion
December, 1993			Tanks, hydraulic lifts and appurtenant piping removed from the site. GW-1 installed.
March 15, 1994	LOP	Petitioner ("P")	Request update on additional well installation and monitoring schedule. Overdue to begin groundwater monitoring. Note: site misidentified as 1432-1434 Franklin St. Correct address is 1432-1434 Harrison St.
March 27	LF	LOP	Schedule for submitting work plan for LOP approval to install MW-2 & MW-3.
March 29			Meeting with LOP and P's consultant and counsel on scope of work and schedule.
April 8	LF	LOP	Proposed work plan submitted to LOP.
April 14	LOP	P	L-F work plan approved. Installation and monitoring to be completed by July 1994.
June 28	LOP	P	Request for status update on well installation and sampling.
August 16	LF	LOP	Report on well installation (July 29 & 30) and sampling (August 1).
September 1	LF	LOP	IIIQ94 monitoring data submitted to LOP.
September 6	LOP	LF	LOP comments on September 1st report & concurs with L-F recommendations for further sight characterization. See Jan. 9, 1995 L-F letter to LOP.
December 21			IVQ94 well monitoring.
January 9, 1995	LF	LOP	Request to approve Phase II of Work Plan.
January 23	Blaine Tech	LOP	IVQ94 monitoring data submitted to LOP.

Based upon the above explanation and correspondence, the Petitioner requests the State Board reverse the LOP's unjustified time charges.

#### **VI. Request for Water Board Intervention and Investigation.**

Under Title 23 of the California Code of Regulations, the State Board may at its own initiative undertake inquiries and actions. The Petitioner requests the State Board to initiate an investigation of Alameda County's UST Program. The inquiry should evaluate the extent to which the County unnecessarily, excessively and falsely billed RPs before and after they entered the LOP. The Petitioner's experience offers an arsenal of smoking guns related to unjustified oversight and enforcement charges.

Further, the Petitioner requests the Water Board to transfer the Petitioner's site from the jurisdiction of the Alameda County LOP to the San Francisco Regional Board for oversight. In addition, the Petitioner requests the Water Board to suspend any further payment obligations on the part of the Petitioner until the site's history is investigated for unnecessary, excessive and false billing.

#### **VII. Conclusion.**

The UST Program has not protected human health and the environment due to a subjective regulatory and enforcement system. The UST Program could have succeeded by the use of a risk based assessment standard and by acknowledging most UST sites pose minimal risk to drinking water. Instead, a great number of small RPs have spent years inside a bureaucratic labyrinth suffering financial ruin. They continue to suffer at the hands of a government program incapable of reform and contrition.

*no standard  
existed at the  
time.  
LHWL report  
not done at  
the time.*

The Petitioner asks the Water Board to reverse the LOP charges, initiate an investigation and grant the other relief requested.

Sincerely yours,



Mark Borsuk