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HAZMAT

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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

3/4/94

In re:

208 Jackson Street,  
Oakland, California

PETITION OF EAST BAY PACKING  
CO. FOR REVIEW UNDER WATER  
CODE SECTION 13320(a) OF  
ACTION BY THE REGIONAL WATER  
QUALITY CONTROL BOARD, SAN  
FRANCISCO BAY REGION

Fred L. Pillon  
Kimberly S. McGovern  
GIBSON, DUNN & CRUTCHER  
One Montgomery Street  
San Francisco, CA 94104  
(415) 393-8200

Attorneys for Petitioner  
East Bay Packing Co.

BEFORE THE STATE WATER RESOURCES CONTROL BOARD

In re:

208 Jackson Street,  
Oakland, California

PETITION OF EAST BAY PACKING  
CO. FOR REVIEW UNDER WATER  
CODE SECTION 13320(a) OF  
ACTION BY THE REGIONAL WATER  
QUALITY CONTROL BOARD, SAN  
FRANCISCO BAY REGION

I.  
INTRODUCTION

This Petition is filed pursuant to California Water Code § 13320(a) and California Code of Regulations ("C.C.R."), Title 23, § 2050. Petitioner, East Bay Packing Co. ("EBPC"), seeks review of action taken by the Regional Water Quality Control Board, San Francisco Bay Region ("regional board"), on February 24, 1994. Specifically, EBPC seeks review of the regional board's action in designating EBPC as a responsible party and requiring EBPC to submit a technical report pursuant to California Water Code § 13267(b).

II.  
PETITION

1. Name and address of the petitioner:

East Bay Packing Co., by its attorneys, Fred L. Pillon and Kimberly S. McGovern, Gibson, Dunn & Crutcher, One Montgomery Street, San Francisco, California 94104.

2. Specific action State Board requested to review:

EBPC requests review of the regional board's issuance of a Legal Designation of Responsible Party/Request for Submittal of a Technical Report on February 24, 1994 (the

"Order"). Specifically, EBPC requests review of the regional board's action of designating EBPC a responsible party. A copy of the regional board's Order is attached to this Petition as Exhibit A.

3. Date on which regional board acted:

February 24, 1994.

4. Statement of reasons why action was inappropriate or improper:

The regional board action was improper for at least two reasons. First, there is an agreement between East Bay Packing Co. and the current owner of the property, Tzu Ming Chen, in which Mr. Ming Chen agrees to undertake any and all necessary remediation at the property, and to comply with all directives of the regional board relating to such remediation. A copy of this agreement is attached to this Petition as Exhibit B. Based on this agreement, the regional board should have designated Mr. Ming Chen as "primarily liable" for investigation and remediation at the property, and EBPC as, at most, "secondarily liable," only in the event Mr. Ming Chen fails to comply both with the regional board Order and the remediation agreement between the parties.

Second, the regional board has not demonstrated that any residual contamination at the site is from the underground storage tanks or that EBPC owned the property at the time of an unauthorized release from such tanks.

5. The manner in which EBPC is aggrieved:

The regional board is seeking to require EBPC to submit a technical report within a specified period of time or, if it fails to comply, to risk fines of up to \$1,000 per day.

6. Requested action by state or regional board:

Petitioner requests that the State Water Resources Control Board ("State Board") order the regional board to amend its Order by designating the current owner of the property, Tzu Ming Chen, as the party primarily responsible for complying with the Order, and EBPC as secondarily liable.

7. Statement of points and authorities in support of legal issues:

(a) The regional board has authority to designate one party "primarily liable" and another "secondarily liable" for any remediation required at a site: see, e.g., In re Wenwest, Inc., SWRCB Order No. WQ 92-13 (Oct. 22, 1992); In re Prudential Insurance Co., SWRCB Order No. WQ 87-6 (June 18, 1987).

(b) The regional board has not demonstrated that any residual contamination at the site is from the underground storage tanks or that EBPC owned the property at the time of an unauthorized release from a tank: see California Water Code § 13267(b); 23 C.C.R. § 2720; In re Wenwest, Inc., SWRCB Order No. WQ 92-13 (Oct. 22, 1992); In re Spitzer, SWRCB Order No. WQ 89-8 (May 16, 1989).

EBPC is requesting that this Petition be held in abeyance, see III., below. If this Petition is not to be held

in abeyance, EBPC requests leave to supplement the foregoing statement of points and authorities.

8. List of persons with interest in subject matter:

In addition to EBPC, the following parties were named in the regional board's Order:

(a) Kretschmar Brands, Inc. and The Courtenay Corporation, by their attorneys, Fred L. Pillon and Kimberly S. McGovern, Gibson, Dunn & Crutcher, One Montgomery Street, San Francisco, California 94104.

(b) Tzu Ming Chen, by his attorneys, Jonathan W. Redding, Esq., Fitzgerald, Abbott & Beardsley, 1221 Broadway, 21st Floor, Oakland, CA 94612.

(c) Hunter/Krey/Kretschmar, 6038 N. Lindbergh Avenue, Hazelwood, Missouri 63042

(d) John Morrell & Co., 250 East 5th Street, Cincinnati, Ohio 45202.

9. Statement of service of Petition on regional board and discharger:

See attached Declarations of Service.

10. Request for preparation of regional board record:

EBPC is requesting that this Petition be held in abeyance, see III., below. Subject to this Petition being held in abeyance, EBPC has requested the regional board to prepare the record for submittal to the State Board. (See Exhibit C, attached.) If this Petition is held in abeyance, the regional board should not be required to prepare and

submit the record, except and until required to do so by the State Board.

11. Request for hearing/presentation of additional evidence:

EBPC is requesting that this Petition be held in abeyance, see III., below. Subject to this Petition being held in abeyance, EBPC is requesting a hearing before the State Board for the purpose of presenting additional evidence. At that time, EBPC will also amend this Petition to include a statement of the nature of the evidence it will submit and why such evidence was not submitted to the regional board.

**III.**

**REQUEST THAT PETITION BE HELD IN ABEYANCE**

EBPC hereby requests that its Petition be held in abeyance pending compliance with the Order by the current owner of the property, Tzu Ming Chen.

DATED: March 24, 1994

GIBSON, DUNN & CRUTCHER  
FRED L. PILLON  
KIMBERLY S. MCGOVERN

By   
Fred L. Pillon

Attorney for Petitioner  
East Bay Packing Co.

FA940800.123

**DECLARATION OF SERVICE BY MAIL**

Carol Goepferd declares as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is One Montgomery Street, San Francisco, California 94104, in said County and State; I am readily familiar with Gibson, Dunn & Crutcher's practice in its above-described San Francisco office for the collection and processing of correspondence for mailing with United States Postal Service; pursuant to that practice, envelopes placed for collection at designated locations during designated hours are deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business; on the 24th day of March, 1994, I served the attached:

PETITION OF EAST BAY PACKING CO. FOR REVIEW  
UNDER WATER CODE SECTION 13320(a) OF ACTION BY  
THE REGIONAL WATER QUALITY CONTROL BOARD, SAN  
FRANCISCO BAY REGION

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown below:

Rich Hiett  
San Francisco Bay Region  
Regional Water Quality Control Board  
2101 Webster Street, Suite 500  
Oakland, CA 94612

Jennifer Eberle  
Alameda County Health Care Services Agency  
Department of Environmental Health  
80 Swan Way, Room 350  
Oakland, CA 94621

Gilbert Jensen, Esq.  
Alameda County District Attorney  
Environmental Division  
7677 Oakport Street, Suite 400  
Oakland, CA 94621

Jonathan W. Redding, Esq.  
Fitzgerald, Abbott & Beardsley  
1221 Broadway, 21st Floor  
Oakland, CA 94612

and by then sealing and placing said envelope(s) for collection at a designated location at Gibson, Dunn & Crutcher's offices at One Montgomery Street, San Francisco, California 94104 during designated hours, for mailing with the United States Postal Service on the above date, following ordinary business practice.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 24th day of March, 1994, at San Francisco, California.

  
\_\_\_\_\_  
Carol Goepferd



**DECLARATION OF SERVICE BY FEDERAL EXPRESS  
AND BY FACSIMILE**

Carol Goepferd declares as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; my business address is One Montgomery Street, San Francisco, California 94104, in said County and State; I am readily familiar with Gibson, Dunn & Crutcher's practice in its above-described San Francisco office for the collection and processing of correspondence for delivery by an overnight courier service such as Federal Express; pursuant to those practices, envelopes placed for collection at designated locations during designated hours are delivered to the designated overnight courier service with a fully completed airbill under which all delivery charges are paid by Gibson, Dunn & Crutcher that same day in the ordinary course of business; on the 24th day of March, 1994, I served the attached:

PETITION OF EAST BAY PACKING CO. FOR REVIEW UNDER  
WATER CODE SECTION 13320(a) OF ACTION BY THE REGIONAL  
WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown below:

Mr. Ted Cobb  
Office of the Chief Counsel  
Water Resources Control Board  
901 "P" Street  
Sacramento, CA 95814

and by then sealing and placing said envelope(s) for collection at a designated location at Gibson, Dunn & Crutcher's offices at One Montgomery Street, San Francisco,

California 94104 during designated hours, for delivery by overnight courier service, on the above date, following ordinary business practice.

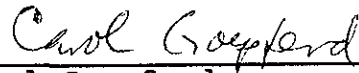
I further declare that on the date indicated below, I served by telefax a true copy of the following document:

PETITION OF EAST BAY PACKING CO. FOR REVIEW UNDER  
WATER CODE SECTION 13320(a) OF ACTION BY THE REGIONAL  
WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

I am readily familiar with Gibson, Dunn & Crutcher's practice in its San Francisco office for processing of documents via telefax. Documents so processed are sent through the telefax machine in our office and received simultaneously at their destination. The above-referenced document(s) were placed in the telefax machine with all costs of telefaxing prepaid, directed to each of the below listed parties using their telefax numbers(s), and processed through the telefax equipment, until a report is provided by that equipment indicating that the telefax operation was successful.

Mr. Ted Cobb	Telephone: (916) 657-0406
Office of the Chief Counsel	Fax: (916) 653-0428
State Water Resources Control Board	
901 "P" Street	
Sacramento, CA 95814	

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 24th day of March, 1994, at San Francisco, California.

  
\_\_\_\_\_  
Carol Goepferd

## CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN FRANCISCO BAY REGION

2101 WEBSTER S. EET, SUITE 500

OAKLAND, CA 94612

(510) 286-1255

ALCO  
HAZMAT

94 FEB 25 AM 11:35

RECEIVED  
FEB 24 1994

East Bay Packing Company  
by Kretschmar Brands Inc., a parent corporation  
1 Boatmans Plaza-Price Waterhouse  
St. Louis, MO 63101-2602

February 24, 1994  
File: 01-0533  
& 2198.17  
STID3707

East Bay Packing Company  
by Hunter/Krey/Kretschmar, formerly Kretschmar Brands Inc.  
as parent corporations  
6038 N. Lindbergh Ave.  
Hazelwood, MO 63042

East Bay Packing Company  
by Courtenay Corporation, a successor corporation  
Suite 217, 811-14 St. NW  
Calgary, Alberta T2N 2A4  
Attn: Erwin Greisinger

East Bay Packing Company and Kretschmar Brands Inc.,  
as a parent corporation  
by John Marshall and Co., as a successor corporation  
250 East 5th Street\  
Cincinnati, OH 45202

Tzu Ming Chen  
208 Jackson Street  
Oakland, CA 94607

**RE: Legal Designation of Responsible Party and Request for  
Submittal of a Technical Report Resulting from the Alameda  
County Department of Environmental Health's Pre-Enforcement  
Review Panel Meeting on January 18, 1994**

Dear Sirs:

It has been brought to my attention by Regional Board staff that a condition of soil and groundwater pollution exists on the property located at 208 Jackson Street, Oakland as a result of an underground storage tank release. The Alameda County Department of Environmental Health (ACHD) staff have requested technical reports from you to fulfill your obligations per California Code of Regulations, Title 23 Waters, Chapter 16, Underground Storage Tank Regulations, Article 11, Corrective Action Requirements. It is my understanding that ACHD staff were unsuccessful in eliciting your co-operation in resolving these issues through normal correspondence.

A Pre-Enforcement Review Panel was held at the ACHD offices on January 18, 1994, and attended by Lester Feldman of my staff.

Pursuant to the Regional Board's authority under Section 13267 (b) of the California Water Code, you are hereby required to submit a technical report to address soil and groundwater pollution at this site within 30 days of the date of this letter. This technical report should specifically address the following numbered items:

- 1) workplan to define the extent of groundwater hydrocarbon pollution;
- 2) commencement of quarterly groundwater monitoring and sampling for TPHg, TPHd, and BTEX;
- 3) submittal of quarterly groundwater monitoring and sampling reports to ACHD;
- 4) well surveying with respect to mean sea level;
- 5) a detailed description of work performed in regards to a storage tank removed from inside the building.

All work should adhere to the requirements of the Tri-Regional Board Staff Recommendations for the Preliminary Evaluation and Investigation of Underground Storage Tank Sites-August 10, 1990 and Article 11 of Title 23, Waters, California Code of Regulations.

This request is based on the evidence submitted to the pre-enforcement Review Panel, as well as the documentary record. East Bay Packing Co., its parent companies Kretschmar Brands Inc. and Hunter/Krey/Kretschmar, and its successor corporations, Courtenay Corp., and John Marl & Co., are responsible parties as per Section 2720 of Article 11 of Title 23, Waters, California Code of Regulations, in that they "owned or operated the underground storage tank immediately before the discontinuation of its use", and they "had or has control over a underground storage tank at that time of or following an unauthorized release of a hazardous substance." The record indicates that Kretschmar Brands Inc. is the parent corporation and John Marl & Co. are the successor corporations to East Bay Packing Co. The record also indicates that Hunter/Krey/Kretschmar Brands Inc., and is a parent corporation of East Bay Packing Co.

Mr. Tzu Ming Chin is a responsible party as per Section 2720 of Article 11 of Title 23, Waters, California Code of Regulations, in that he is "an owner of property where an unauthorized release of a hazardous substance from an underground storage tank has occurred."

I am hereby transmitting this request for a technical report to ACHD for service and continued case handling. You should be aware that failure on your part to submit the requested technical report, or late submittal may result in fines up to \$1000 per day of delinquency.

Enforcement Panel  
Page 3 of 3

Your response to this technical report request should be sent to the attention of Ms. Jennifer Eberle at ACHD. Please inform their office at least three working days in advance of all field activities.

Please be advised that this is a formal request for a technical reports pursuant to California Water Code Section 13267 (b). Any extensions of the stated deadlines, or modifications of the required tasks, must be confirmed in writing by either this agency or the ACHD.

If you have any questions regarding the contents of this letter, Please contact Ms. Eberle of ACHD, at (510) 271-4530.

Sincerely,



for

Steven R. Ritchie  
Executive Officer

cc: Gil Jensen, ACDA, 7677 Oakport Street, Suite 400, Oakland  
94621  
Jennifer Eberle, ACHD, 80 Swan Way, Suite 200, Oakland 94621

**EAST BAY PACKING CO.**  
 c/o #2500, 10123 - 99 Street  
 Edmonton, AB T5J 3H1

June 28, 1993

Tzu Ming Chen  
 c/o Loh Realty & Investment  
 Commercial Real Estate  
 6400 Moraga Avenue  
 Oakland, CA 94611

Dear Mr. Chen:

RE: Letter Agreement re 208 Jackson Street, Oakland, CA

This letter shall serve to set out the terms recently agreed upon in regard to the amendment of the terms of your purchase from East Bay Packing Co. (the "Seller") of 208 Jackson Street, Oakland, CA (the "Property").

It is hereby agreed that you shall continue to make the required monthly payments as set out in the Promissory Note dated November 7, 1990, which Note is in the amount of \$925,000.00 until such time as you provide a principal payment to the Seller in the amount of \$450,000.00. Upon such payment, the Promissory Note shall be considered to have been paid in full, shall be returned to you marked paid, and you shall have no further obligations thereunder. The deed of trust securing the Promissory Note will be concurrently reconveyed and an additional full release shall be granted to Seller and its affiliates by you. The payment of \$450,000.00 shall be made by you at any time prior to October 1994 but you shall provide the Vendor with thirty (30) days' prior written notice of the date on which you intend to provide such payment. The discount will expire on close of business, October 1, 1994, and if the \$450,000.00 payment is not paid by that date, the Promissory Note will revert to its original terms and the assumption of responsibility for remediation, releases and indemnities set out below will remain in full force and effect.

It is further agreed that you hereby release and discharge the Seller, all directors, and all associated or affiliated corporations or parties from any and all liability or responsibility for the remediation of the Property and waive any and all claims you may have against such parties or any of them related thereto. You shall be responsible to proceed with such remediation as is necessary to obtain clearance or to comply with the directives of all authorities having jurisdiction in this matter and by executing this Letter Agreement you presently agree to defend, indemnify, protect and hold harmless the Seller and all related or affiliated parties from any and all costs, damages, actions, or liabilities which they may incur as a result of your failure to fulfill this obligation.

Please indicate your acceptance of the terms and obligations set out above by executing, where indicated below, the enclosed copy of this letter and returning it to us.

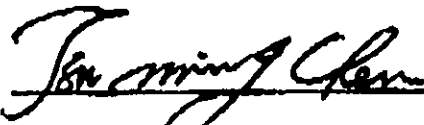
Yours truly,

EAST BAY PACKING CO.

  
 per: C. Douglas Horrey

/ccg

The foregoing terms are agreed upon and accepted this 16 day of July, 1993.

  
 \_\_\_\_\_

GIBSON, DUNN & CRUTCHER

LAWYERS

ONE MONTGOMERY STREET

TELESIS TOWER

SAN FRANCISCO, CALIFORNIA 94104-4505

(415) 393-8200

FACSIMILE: (415) 986-5309

March 22, 1994

JAS. A. GIBSON, 1852-1922  
W. E. DUNN, 1861-1925  
ALBERT CRUTCHER, 1860-1931

NEW YORK  
200 PARK AVENUE  
NEW YORK NEW YORK 10166-0193

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HONG KONG

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1-1-3 MARUNOUCHI CHIYODA-KU  
TOKYO 100 JAPAN

AFFILIATED SAUDI ARABIA OFFICE  
JARIR PLAZA, OLAYA STREET  
P.O. BOX 15870  
RIYADH 11454, SAUDI ARABIA

OUR FILE NUMBER

LOS ANGELES  
333 SOUTH GRAND AVENUE  
LOS ANGELES CALIFORNIA 90071-3197

CENTURY CITY  
2029 CENTURY PARK EAST  
LOS ANGELES, CALIFORNIA 90067-3026

ORANGE COUNTY  
4 PARK PLAZA  
IRVINE, CALIFORNIA 92714-8557

SACRAMENTO  
400 CAPITOL MALL  
SACRAMENTO, CALIFORNIA 95814-4407

SAN DIEGO  
750 B STREET  
SAN DIEGO, CALIFORNIA 92101-4605

MENLO PARK  
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MENLO PARK CALIFORNIA 94025

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DALLAS TEXAS 75201-7390

DENVER  
1801 CALIFORNIA STREET  
DENVER COLORADO 80202-2694

SEATTLE  
999 THIRD AVENUE  
SEATTLE WASHINGTON 98104-7089

WRITER'S DIRECT DIAL NUMBER

(415) 393-8340

T 50143-00001


Mr. Rich Hiett  
San Francisco Bay Region  
Regional Water Quality Control Board  
2101 Webster Street, Suite 500  
Oakland, CA 94612

Re: 208 Jackson Street, Oakland  
Request for Technical Report dated  
February 24, 1994;  
Petition for Review filed with State Board on  
behalf of East Bay Packing Co.

Dear Mr. Hiett:

I hereby request preparation of the Regional Board record in the above referenced matter to be submitted to the State Board, pursuant to 23 C.C.R. § 2050.5. Because a request has been made to hold the Petition for Review filed on behalf of East Bay Packing Co. in abeyance, I ask that the record be submitted only if the State Board does not grant my request to hold the Petition in abeyance. Thank you.

Very truly yours,

  
Kimberly S. McGovern

KSM/cbg

cc: Jennifer Eberle  
Gil Jensen, Esq.

FA940810.047/-1+