

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
ALVIN BACHARACH AND BARBARA BORSUK)
For Review of Alameda County Cleanup)
Order Issued on January 14, 1991.)
Our File No. A-728.)

ORDER NO. WQ 91-07

BY THE BOARD:

The Alameda County Health Care Services Agency (County) has taken responsibility for supervising the cleanup of certain leaking underground tank sites within its jurisdiction. On July 31, 1990, the County issued a notice of violation to Alvin Bacharach and Barbara Borsuk (Petitioners) concerning a piece of property in Oakland which they have owned since about 1945. The site, located at 1432 Harrison Street, had served as a parking garage for several decades. It was leased to various operators over the years including Douglas Motor Services (Douglas) which occupied the site from 1972 through 1988. Petitioners asked the County to amend the notice of violation, as well as subsequent requirements for site assessment and cleanup, to include Douglas as a responsible party. On January 14, 1991, the County refused to do so. This petition followed on February 7, 1991.

I. STATE BOARD JURISDICTION

In 1989 the Legislature added several new sections to the underground tank law. Chapter 6.75--Petroleum Underground

Storage Tank Cleanup--was added to give local government more flexibility in ordering dischargers to clean up spilled gasoline and other petroleum products. Under earlier law, counties could only go to court for injunctions and penalties and had little more than the threat of doing so to compel cooperation. Chapter 6.75 placed local government on a par with a Regional Water Quality Control Board (Regional Board) in many ways. Among other things, local agencies "may issue an order to the owner, operator, or other responsible party requiring compliance" with the cleanup sections of the statute. (Health and Safety Code Section 25299.37(c).) The State Water Resources Control Board (State Board) is required to adopt regulations which implement Chapter 6.75. Those regulations may clarify the remedies available to local agencies. Until the State Board adopts those regulations, a local agency order must still be enforced using the normal judicial sanctions.

When a local agency issues an order under that section, the person to whom it is directed may petition the State Board in precisely the same manner as if it were a cleanup and abatement order issued by a Regional Board. (Health and Safety Code Section 25299.37(d).) From the language as well as the context of that section, it seems clear the Legislature intended to give a local agency the power to issue what amounts to a cleanup and abatement order in this limited context. We will review the County's order as if it were a cleanup and abatement order issued by a Regional Board.

II. CONTENTION AND FINDING

1. Contention: Petitioner raises only one point in its brief to the State Board. Petitioner contends that the County erred in refusing to add the name of Douglas Motor Services to the order to investigate subsurface contamination of the parking garage. Petitioner has dropped the argument it made to the County that only Douglas should be named in the order.

Finding: Petitioner's claim that Douglas ought to be added to the order has merit. While a landowner generally should be named whenever he or she knew of and allowed the activity which caused the problem, it would be unfair to place all of the responsibility on the landowner. The Water Code provides for the issuance of cleanup and abatement orders to "dischargers." Orders issued pursuant to the Health and Safety Code section under which the County is proceeding are equivalent to cleanup and abatement orders under Section 13304 of the Water Code. Thus, equating "dischargers" with "operators" or "other responsible parties" in this order is proper. Lessees have often been named as responsible parties under Section 13304. (See e.g. Order No. WQ 89-8, Arthur Spitzer et al., Order No. WQ 85-15, Stuart Petroleum.)

Several factors support a conclusion that Douglas ought to be named in this order. Douglas operated a parking garage on the site for about 16 years. During that time, he pumped gas from two underground tanks. His business benefited from his ability to provide gasoline to his customers. Over time, he

replaced both of those tanks largely at his own expense (though not without efforts to have Petitioners share in the cost.) The record contains some evidence that Douglas may have known in 1982 that the tanks were leaking. The extent of the migration of the gasoline, as mapped in the Subsurface Consultants report, is consistent with an assumption that leaks have existed for some time.

The record before the State Board is far from complete and, from it, we cannot be certain that leaks at the garage occurred during its operation by Douglas. However, if the County has substantial evidence which shows that Douglas was in control of the property and using the tanks while leaks were taking place, even if Douglas was not actually aware of the leaks, the County should consider Douglas a "responsible party" and, under these circumstances, name him in its order.

In many cases we have deemed it reasonable to place one party in a position of secondary responsibility. (See e.g. Order No. WQ 87-6, Prudential Insurance Company of America.) We find no basis for suggesting that the County do that in this case.

III. CONCLUSION

Petitioner's contention that Douglas ought to be added to the County's order appears to have merit. If the County has substantial evidence that the leaks from the underground tanks occurred during the time Douglas was operating them, the County should add Douglas to its order.

IV. ORDER

IT IS HEREBY ORDERED that this matter is remanded to the County for action consistent with this order.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 20, 1991.

AYE: W. Don Maughan
Eliseo M. Samaniego
John Caffrey

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board