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March 4, 1993

Mr. Paul Smith
Sr. Hazardous Material Specialist
Alameda County Dept. of Environmental Health
Hazardous Materials Division
80 Swan Way, Room 200
Oakland, CA 94621

Re: Appeal of Responsible Party Status
Property: Harrison Street Garage
1432 Harrison Street
Oakland, California
Petitioner: Douglas Motors Service and Its Partners

Dear Mr. Smith:

Please accept this letter as formal notification that Douglas Motors Service and Its Partners are appealing the naming of them as responsible parties with regard to the investigation and remediation of the above-referenced property.

A copy of the petition and related documents is enclosed pursuant to the requirements of 23 CCR § 2050(a)(9).

Petitioners request, pursuant to 23 CCR § 2050(a)(8), that your agency provide the State Board with a list of all persons other than those shown in Section 8 of the Petition, if any, known to your agency to have an interest in the matter which is the subject of the petition.

Finally, pursuant to 23 CCR § 2050(a)(10), your agency is hereby requested to prepare its record in the matter.

Very truly yours,

RANDICK & O'DEA

William J. Trinkle
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WJT:co'b

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Attorneys for Douglas Motor
Service and its Partners

BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

Petition for Review of Decision)
of Alameda County Naming Douglas)
Motor Service and its Partners as)
Responsible Parties)
_____)

INTRODUCTION

Pursuant to California Health and Safety Code § 25297.1, California Water Code § 13320, and California Code of Regulations, Title 23, § 2050, Douglas Motor Service and its Partners ("Petitioners") petition the State Water Resources Control Board ("State Board") to review the February 5, 1993, decision of the Alameda County Department of Environmental Health ("Alameda County") naming them as responsible parties for corrective action in response to the discovery of unauthorized releases associated with gasoline tanks located at 1432 Harrison St., Oakland, California.

FACTUAL BACKGROUND

Alvin Bacharach and Barbara Borsuk have owned the Harrison St. Garage property since 1945. They purchased the property with knowledge of the existence of on-site underground storage tanks

("USTs"). They leased the property for use as a parking garage and service facility from that point through the present. In 1972, Petitioners Douglas Motor Service leased the property and its improvements from Bacharach and Borsuk, with Bacharach and Borsuk substantially sharing in the revenues of Douglas Motors parking garage business. Douglas Motors leased the property from 1972 to March 1988.

In 1982, Douglas Motors caused one of the gasoline storage tanks to be replaced, after the landlords Bacharach and Borsuk had refused to accept their responsibility to replace the tank. Inventory reconciliation procedures had identified that more fuel was being purchased than sold and a subsequent air test of the tank identified that the tank was not "air tight".

Bacharach and Borsuk have caused technical investigations to be made in the gasoline tank areas following their having been properly named responsible parties, as owners, for the site.

The results of technical investigations establish that there is no scientific basis or evidence for concluding that an actionable release resulted from Douglas Motors' operation of the gasoline fuel tanks at the property. The evidence shows that contamination levels in the areas near the soil surface are at low or non detect level. It also reflects a barrier between the shallow and lower levels of the soil and significant contamination only in the 20 foot deep range. The deep contamination simply could not be the result of releases from the USTs. Most likely such contamination migrated on-site from an off-site source. The empirical evidence is, thus, diametrically opposed to that which

the State Water Quality Control Board said must be demonstrated in order to name Douglas Motors as a responsible party for this site; i.e., "substantial evidence" that the contamination requiring corrective action occurred as the result of Douglas Motors' operation of the underground fuel storage tank system and associated equipment. Douglas Motors should not, therefore, be named a responsible party.

The absence of scientific evidence linking Douglas Motors to the contamination at the site is easily seen when each area of concern at the site is evaluated individually:

1. Underground Gasoline Storage Tank System. The area around these tanks constitutes the primary battleground between Douglas Parking and the land owners with regard to whether or not Douglas Parking should be named a responsible party for the remediation of the contamination found there. Douglas Motors did operate the tanks for about 16 years, so, if there is any credible scientific evidence that, during that time, an actionable release occurred, then Douglas should share in the responsibility for its remediation. However, there is not; to wit:

a. The first fact of note is that, in the immediate vicinity of the tanks, RGA, Inc., Bacharach's own consultant, found no actionable contamination. The results of 4 soil borings drilled to a depth of 5 ft., which would place the sample at or just above the bottom of the tanks, indicated TPHg ranging from 2.0 to 2.5 ppm; and benzene, PCBs and chlorinated hydrocarbons all below detection limits. TPHd was reported at levels ranging from 22.7 to

28 ppm; however, not only are these levels also of minimal significance, more importantly Douglas Motors never stored or sold diesel, so, although the genesis of this material is a mystery, it can have no bearing on Douglas Motors' potential liability. The same goes for the small amount of Total Oil and Grease (TOG), 39.1 ppm, found in one of the samples taken: this does not relate in any way to Douglas Motors' storage and sale of gasoline from these tanks.

b. The second fact of substance is that soil samples taken in the area of the product delivery line extending from the tanks to the product dispensers also reveal no significant contamination at depths of 13 ft. and 15 ft. At 13 ft., TPHg and BTEX were all below detection limits. At 15 ft., TPHg was found at 2.1 ppm but, again, benzene was below detection limits (here again some TPHd was found, 16.7 ppm, but, as stated above, this material is not related to Douglas Motors' operations at the site).

c. It is not until the 18.5 - 20 ft. level is reached that significant levels of soil contamination are revealed; at this depth TPHg is reported at levels ranging from 2,500 ppm to 9,300 ppm; benzene at 3.5 to 99 ppm; toluene at 34 to 900 ppm; ethylbenzene at 33 to 190 ppm and xylenes at 130 to 1,100 ppm.

d. In addition to the soil sample results shown in c., above, water samples were taken from three of the borings. These samples also revealed contamination levels possibly requiring remediation. In three samples analyzed, TPHg was reported in amounts ranging from below detection limits to 96 ppb. The only

other compound reported in significant quantity is benzene, which was found at 6.0 ppb in one of the three samples, and was below detection limits in the other two samples.

An analysis of the contamination pattern revealed by the above data manifests a most interesting fact; there is no significant contamination until a depth of approximately 20 ft. below grade. The soil above this level was categorized as clayey sand, a relatively retentive material. It is virtually inconceivable that contamination levels as high as those reported at 20 ft. could in any manner be related to the use of the USTs some 15 ft. above without there being a tell-tale trail of relatively heavy contamination leading down to the 20 ft. level. The most probable scenario is that an off-site source has contaminated groundwater upgradient from the subject site and that this contaminated groundwater is carrying the contaminants into the property. In fact, other possible sources are - two more USTs have been discovered within a few feet of the Douglas tanks in the assumed upgradient direction and a former service station site with apparent contamination problems is also located upgradient. The data, however, suggests that such should be investigated before naming Douglas Parking as a responsible party at this site.

2. Pump Islands. Two soil borings at the pump islands were sampled and tested at 5 ft. and 10 ft., where groundwater was encountered:

a. The results at 5 ft. again showed no significant contamination which could be attributed to the Douglas Motors

operations; i.e., TPHg was reported at 2.5 and 42.3 ppm and benzene was below detection limits in both samples. The same anomaly discussed above occurred again - TPHd was reported at 26 and 670 ppm, but, as stated above, Douglas Motors never stored or sold diesel so it is impossible to relate the occurrence of this material to their operations.

b. The samples taken at 10 ft. were found to contain 3.3 ppm TPHg and no detectable benzene or TPHd in one and 1540 PPM TPHg, 175 TPHd and 0.987 ppm benzene in the other. These latter figures are a likely candidate for remediation, if they can be substantiated by further testing but, given the surrounding results, the numbers themselves are somewhat suspect. That is, just a few feet in all directions, TPHg is either insignificant or below detection limits. Certainly, this one anomalous reported result cannot be deemed "substantial evidence" that Douglas Motors suffered a release at the islands, especially since there has been no evidence or testimony to date even remotely suggesting any problem around the dispenser island.

The above results are entirely consistent with exigent conditions at the site. It cannot be overemphasized that the fuel delivery system at this site was of the "suction" or "vacuum" type. The significance of this is that, even if there were small holes in the product delivery lines or in the upper portion of the USTs, there would not be any significant release. While the pump at the dispensers is operating, fuel is being "pulled" to the dispensers and cannot divert out a hole. When the vacuum is broken, the fuel

personally had no recall of either repairs to or removal of the tank in 1975. Lee Douglas' testimony and declaration are entirely consistent - he has no recall of difficulties repair or replacement to the so-called tank 1 in 1975.

In Ron Douglas' testimony related to this Tank 1, he similarly had no recall of it being replaced in 1975, or at any other time. None of his testimony was to the effect that fuel was being lost from the tank. On the contrary rather than there being a loss, which would be necessary for a "release", instead the tank was found to be accumulating water. The water getting into the tank did not occur until approximately 1982 or 1983, as best recalled. Shortly, thereafter Douglas ceased to use the tank. Again there is no evidence of a release from this Tank 1 during Douglas' tenancy.

Ron Douglas has been retired from the business since April, 1987 and is no longer a partner. He also is not the most precise speaker, or witness, nor is he technically educated in any sense. When he was specifically asked about indications of gasoline leaking out of tank 1 (i.e., a release), he was unable to state any, but instead made a casual and improper assumption, which Mr. Morrison cites as the only evidence of a release from Tank 1. Such an assumption is not evidence of a release, nor is there any other evidence of such a release.

Water in a UST is not evidence of a release. In fact, such water can infiltrate a tank from numerous sources, e.g., when the tank is being filled by the supplier, by rain or other surface drainage into the tank, condensation, or suction into the tank due

years on site, there is no evidence of a release, whatsoever. There is also no reason to expect a release from this new UST.

1. NAME AND ADDRESS OF PETITIONER

Douglas Motor Service and Its Partners
1721 Webster St.
Oakland, CA 94612

2. SPECIFIC ACTION OF THE LOCAL AGENCY WHICH THE STATE BOARD IS REQUESTED TO REVIEW.

The specific action presented for review is Alameda County's naming of Douglas Motor Service and Its Partners as responsible parties for corrective action in response to the discovery of unauthorized releases associated with gasoline tanks at 1432 Harrison St., Oakland, California.

3. DATE ON WHICH THE LOCAL AGENCY ACTED.

Alameda County mailed to Petitioners its order that they were named responsible parties related to gasoline tanks on February 5, 1993 (Exhibit "A", attached). The order was received on February 10, 1993.

4. FULL AND COMPLETE STATEMENT OF REASONS THE ACTION OF THE LOCAL AGENCY WAS INAPPROPRIATE OR IMPROPER.

The local agency's naming of Petitioners as responsible parties is inappropriate and improper for the reasons discussed below.

A. STANDARD OF REVIEW.

Water Code § 13320, which governs the State Board's review of a regional board's (or a local agency such as Napa County acting on half of and in lieu of a regional board as is the case with local oversight programs) actions or inactions, states that:

primarily responsible party(ies) to conduct the necessary investigation and remediation.

Date: March 4, 1993

Respectfully submitted,

RANDICK & O'DEA

By:



William J. Trinkle,
Attorney for Petitioners

ALAMEDA COUNTY
HEALTH CARE SERVICE

AGENCY

DAVID J. KEARS, Agency Director



RAFAT A. SHAHID, Assistant Agency Director

February 5, 1992³

Mr. Randall Morrison Esq.
Crosby, Heafy, Roach & May
1999 Harrison Street
Oakland, CA 94612-3573

Mr. William Trinkle Esq.
Randick & ODea
1800 Harrison Street, Suite 1771
Oakland, CA 94612

DEPARTMENT OF ENVIRONMENTAL HEALTH
Hazardous Materials Division
80 Swan Way, Rm. 200
Oakland, CA 94621
(510) 271-4320

Re: 1432 Harrison Street, Oakland, CA 94612

On September 24, 1990, the Alameda County Department of Environmental Health issued an order pursuant to California Health and Safety Code Section 25299.37(c) ordering Alvin Bacharach and Barbara Borsuk, the property owners of 1432 Harrison St., Oakland, to take appropriate corrective action in response to the discovery of unauthorized releases associated with gasoline tanks located at the Harrison St. property.

On February 7, 1991, Mr. Bacharach and Ms. Borsuk, pursuant to Health and Safety Code Section 25299.37(d), petitioned the State Water Resources Board requesting the Board name Douglas Motor Services, a 16 year tenant of the Harrison St. property, as the primary responsible party.

The Board issued Order No. WQ 91-07 on June 20, 1991, stating in part:

In many cases we have deemed it reasonable to place one party in a position of secondary responsibility... We find no basis for suggesting that the County do that in this case.

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. (Order, p.4)

From June 20, 1991 until October 14, 1992, no new evidence on the responsible party issue was submitted to the Alameda County Department of Health.

On October 14, 1992, Mr. Bacharach and Ms. Borsuk presented new evidence to the Alameda County Department of Health and requested that Douglas Motor Service and its partners be named primary responsible parties for appropriate corrective action for unauthorized releases associated with gasoline tanks.

Mr. Morrison
Mr. Trinkle
February 5, 1993
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On January 15, 1993, Douglas Motors Service presented evidence to the Alameda County Department of Health in arguing against adding Douglas Motor Service as a responsible party for appropriate corrective action for unauthorized releases associated with gasoline tanks.

On January 29, 1993, Mr. Bacharach and Ms. Borsuk replied to the January 15, 1993 Douglas Motors Service presentation.

Order:

The County has been presented substantial evidence that leaks from the underground gasoline tanks occurred during the time Douglas Motor Service was operating them. Therefore, Douglas Motor Service is a responsible party. Pursuant to Health and Safety code Section 25299.37(c), Alvin Bacharach, Barbara Borsuk, and Douglas Motor Service and Its Partners shall take appropriate corrective action in response to the discovery of unauthorized releases associated with gasoline tanks located at 1432 Harrison St., Oakland, CA.

Sincerely,



Paul M. Smith
Senior Hazardous Materials Specialist

cc:

Gil Jensen Esq., Alameda County District Attorneys Office,
Consumer and Environmental Protection, 7677 Oakport
Dr., Suite 400, Oakland, CA 94621
Alvin Bacharach, 383 Diablo Road, #100, Danville, CA 94526
Barbara Jean Borsuk, 383 Diablo Road, #100, Danville, CA
94526
Leland Douglas, Douglas Parking Company, 1721 Webster
Street, Oakland, CA 94612
Lester Feldman, CA Regional Water Quality Control Board, San
Francisco Bay Region, 2101 Webster St., Fifth Floor,
Oakland, CA 94612

PROOF OF SERVICE

I, Christine O'Brien, declare:

That I am a citizen of the United States and am employed in the City of Oakland, County of Alameda, State of California; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1800 Harrison Street, Suite 1771, Oakland, California 94612.

On March 4, 1993, I served the following:

PETITION FOR REVIEW OF DECISION OF ALAMEDA COUNTY NAMING
DOUGLAS MOTOR SERVICE AND ITS PARTNERS AS RESPONSIBLE
PARTIES

on each of the parties to the within action by placing a copy thereof enclosed in a sealed envelope with postage fully paid and mailed with the United States Postal Service addressed as follows:

Mr. Paul Smith
Sr. Hazardous Material Specialist
Alameda County Department of Environmental Health
Hazardous Materials Division
80 Swan Way, Room 200
Oakland, CA 94621

Mr. Alvin Bacharach and Ms. Barbara Borsuk
c/o Mr. Randall Morrison, Esq.
Crosby, Heafy, Roach & May
1999 Harrison St.
Oakland, CA 94612-3573

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 1993 at Oakland, California.



Christine O'Brien