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April 16, 1993

Mr. Paul M. Smith
Senior Hazardous Materials Specialist
Alameda County Health Care Services Agency
Hazardous Materials Program
Department of Environmental Health
80 Swan Way, Room 200
Oakland, CA 94621

**Re: 1428-1434 Harrison Street and 1435-1443 Alice Street, Oakland, CA; Request to Amend County's February 5, 1993 Order to Name Douglas Motor Service and Its Partners as Additional Responsible Parties**

Dear Mr. Smith:

We appreciated your taking the time to meet with us on February 24 at Levine-Fricke's offices. During our meeting we reviewed analytical data from three consultants supporting Mr. Bacharach and Ms. Borsuk's request that the County name Douglas Motor Service and its partners ("Douglas") as a responsible party for investigation and possible remediation of the hydraulic lift and waste oil tank areas at the Harrison Street Garage. The analytical data supports naming Douglas, and it also makes practical sense to include Douglas in the Order. Naming Douglas is in accord with a long line of State Water Board decisions and the State policy of naming all responsible parties when there is a reasonable basis for doing so.

This letter provides you with a summary of the facts and the legal grounds for naming Douglas as a responsible party. We have included a proposed draft Order naming Douglas. Please see page 9. We, of course, recognize that the County's Order of February 5, 1993 already names Douglas as a responsible party with respect to the underground gasoline tanks. However, as discussed in our meeting, there is also substantial evidence to name Douglas as a responsible party for the hydraulic lift and waste oil system.

During our meeting, you explained that the County did not address the hydraulic lift and waste oil system because the County did not consider those areas to be included in the County's original Orders to the owners, dated July 31 and September 24, 1990. Nevertheless, it is clear from the County's subsequent correspondence with the owners that the County considers the hydraulic lift and waste oil system an integral part of the site investigation. The County has even imposed stringent health and safety requirements for investigative work in those areas. These areas should therefore be included in the County's Orders to both the owners and Douglas.

During our meeting, you also explained that the County did not wish to become involved in determining the relative degree of responsibility of Douglas and Mr. Bacharach and Ms. Borsuk, and that this was another reason for the County's reluctance to address the hydraulic lift and waste oil areas. We certainly understand the County's concern, and we do not expect the County or the State Board to make a legal apportionment of responsibility as a Court would do. Nevertheless, it is not realistic for the County to simply ignore the question of responsibility for the hydraulic lift and waste oil areas. These areas are part of the environmental problem in the garage, and the proper course is for the County to determine whether there is substantial evidence to support naming Douglas as a responsible party for these areas.

By making that assessment, the County performs its proper role and avoids the extremes of either doing nothing or getting bogged down in determining the precise legal obligations of the parties. All the County must do is determine whether there is credible evidence that Douglas is responsible for some of the contamination in these two areas of the garage. If there is such evidence, Douglas should be named in the Order.

In the following pages, we will review the data discussed during our meeting and the State Water Resources Control Board's standard for naming responsible parties.

## I. THE HYDRAULIC LIFT AREA

### A. Douglas' Use Of Hydraulic Lift

Douglas no longer disputes that the hydraulic lift was used by at least one of its subtenants.[1] Douglas' subtenant, William Thompson, stated that he used the hydraulic lift to service approximately five cars each day during his occupancy of the property.[2]

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[1] Letter from William J. Trinkle to Mark Thomson, January 15, 1993, p. 10.

[2] Declaration of William A. Thompson, III, ¶ 4.

B. Contamination Related To The Hydraulic Lift Area

Two consultants have confirmed petroleum hydrocarbon contamination in the hydraulic lift area. Subsurface Consultants, Inc.'s (SCI's) Report of October 19, 1990, indicated concentrations of 6,300 ppm TOG in soil boring B-4, near the hydraulic lift.[3] SCI concluded: ". . .these hydrocarbons are most likely associated with hydraulic fluids used in the lift. The data indicates that soil contamination has occurred, most likely as a result of leakage from the hydraulic lift cylinder."[4] Groundwater data obtained by RGA confirms high levels of oil and grease (TOG at 9,721 ppb) in the hydraulic lift area.[5] RGA also detected high gasoline concentrations (TPH-G at 60,200) in this area. This gasoline contamination, for which Douglas has already been named a responsible party, provides an independent basis for Douglas to accept investigative and cleanup responsibility in the hydraulic lift area.

Together, the SCI and RGA Reports indicate that hydraulic lift fluids and oil and grease were released into the soils around the lift. As we discussed during our meeting, the contamination is localized. High oil and grease concentrations were detected by SCI in boring B-4 but not in borings B-3 and B-5. The depth of the contamination (10 feet bgs), the relatively dense soils -- sandy clay and clayey sand -- and the limited extent of the contamination are all consistent with an on-going release from the hydraulic lift. If the release was a massive leak, one would expect the contamination to extend over a broader area and to impact borings B-3 and B-5. Instead, the contamination appears limited to the area of boring B-4, immediately next to the hydraulic lift. Since we know the lift was used during Douglas' tenancy, and we know there is leakage, there is reasonable basis for believing that at least some of the leakage occurred during Douglas' tenancy.

This evidence is all that it is necessary to name Douglas as a responsible party. As with other areas of the garage, Douglas cannot deny the use or the contamination. Instead, Douglas contends that the contamination is not "significant" or that it originated off-site. We believe you will agree that these arguments are not well-founded. The releases in the hydraulic lift area are "significant" and the data indicates that the releases occurred on site.

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[3] SCI Report, p. 4.

[4] SCI Report, p. 4.

[5] RGA Report, April 2, 1992, p. 7.

## II. WASTE OIL SYSTEM

### A. Douglas' Use Of The System

Douglas no longer disputes that the waste oil system was used during Douglas' tenancy.[6] In fact, Mr. William A. Thompson III, Douglas' subtenant, stated in his Declaration under penalty of perjury that, ". . . I changed oil for my customers. I poured approximately 300 gallons of used oil down a fill pipe near the hydraulic lift during my tenancy." Thompson also stated that he was instructed by "someone at Douglas Motor Service" to pour the oil into the drain.[7] Thompson's use of the system is therefore clear, and this use by Douglas' subtenant makes Douglas legally responsible for the results. See, pages 6-8.

### B. Contamination Related To The System

SCI performed the first soil borings in the basement. In its Report of October 19, 1990, SCI stated:

> A test boring drilled adjacent to the waste oil tanks located in the basement of the structure encountered soils possessing relatively strong hydrocarbon odors. Soil samples taken from depths of about nine feet below the basement floor, which was just above groundwater, indicated hydrocarbon (as kerosene) concentrations up to 140 mg/kg. In addition, a very low concentration of PCBs (9 ug/kg) as Arochlor 1260 was reported by the laboratory to be present in the soils. In our opinion, the hydrocarbon source is most likely the adjacent waste oil tank(s). (SCI Report, October 19, 1990, p.5; emphasis added.)

No one has ever contradicted SCI's findings, which link the contamination in the soil with use of the waste oil tanks. Later investigations confirmed that there were also releases of oil and grease and other petroleum hydrocarbons all along the waste oil drain line in the

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[6] Trinkle Letter to Mark Thomson, January 15, 1993, p.10-11.

[7] Declaration of William A. Thompson, III, ¶6. There is evidence that other subtenants of Douglas also used the waste oil system and lift, but at least Thompson's use has been confirmed. As to other subtenants' use, see our October 14, 1992 letter to Mark Thomson, pp. 9-11.

basement. The range of TOG in soils along the drain line was 54 to 221 ppm. See, RGA Report, April 2, 1992, p.4.

As we discussed during our meeting, the relatively even distribution of contaminants in soil beneath the drain line suggests recurring leakage over time. It is therefore highly probable that some leakage occurred during Douglas' 16-year tenancy. Moreover, we know from William Thompson's Declaration that he used the waste oil system, and there is reason to believe that at least some of the 300 gallons of waste oil Thompson dumped into the fill pipe ended up in the soils beneath the drain line and around the oil storage tanks.

Again, Douglas cannot deny its subtenant's use of the waste oil system or the contamination of surrounding soils. Instead, Douglas' position seems to be that the low levels of contamination do not present a threat to "public health, welfare and safety."[8] This argument, however, misses the point. The County has deemed the contamination in the basement serious enough to warrant further investigation and has required unusually elaborate health and safety precautions for any investigative work in this area. If the contamination is serious enough to warrant these measures, then it is serious enough to warrant naming the parties responsible for it. As discussed in more detail on pages 6-8, there is no question that Douglas is legally responsible for the activities of its subtenant, Thompson.

In short, the County has all the facts necessary to name Douglas with regard to the waste oil system. There is undisputed use of the waste oil system during Douglas' tenancy. There is undisputed leakage from the waste oil drain line and tanks. It is reasonable to believe that at least some of the 300 gallons disposed of by Douglas' subtenant leaked into the soil. And, there is absolutely no reason to believe that leakage from the drain line and waste oil tanks did not occur at some time over this 16-year period.

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[8] Trinkle letter to Mark Thomson, January 15, 1993, p. 6.

## III. LEGAL BASES FOR NAMING DOUGLAS A RESPONSIBLE PARTY

We have previously submitted to the County a detailed analysis of Douglas' responsibility under the State Board's legal standards. As we reviewed in our February 24 meeting, there are two main points: (1) the legal proof required for naming responsible parties is minimal; and (2) apart from Douglas' own use of the property and use by Douglas' subtenants, Douglas is legally responsible for any contamination which occurred during its control of the property.

### A. The "Substantial Evidence" Test

Mr. Bacharach and Ms. Borsuk do not need to "prove" that releases in the hydraulic lift and waste oil tank areas occurred during Douglas' 16-year tenancy. Instead, Mr. Bacharach and Ms. Borsuk need only meet the "substantial evidence" test. Substantial evidence is a low legal threshold and has been defined by the State Water Board as "evidence upon which a reasoned decision may be based."[9] Douglas should therefore be named a responsible party if, from the evidence presented, a person could reasonably conclude that some releases in these areas occurred during Douglas' tenancy.

### B. Douglas Is Liable For Releases Which Were (1) Caused by Douglas' Subtenants or (2) Which Otherwise Occurred During Douglas' Control Of The Property

We have already discussed Douglas' subtenant's use of the hydraulic lift and waste oil system. William Thompson stated that he used the lift on a daily basis and he acknowledged dumping some 300 gallons of oil into the waste oil system. This quantity is substantial in itself and, particularly, when compared to the total of 1,300 gallons later pumped out of the tanks.

As previously discussed, there is good reason to believe that at least some of the contamination around the hydraulic lift, waste oil drain line, and oil storage tanks occurred as a result of Thompson's activities. Given the quantity of oil Thompson disposed of, it is highly probable that some of it leaked out of the drain line or oil tanks. There can be no dispute that Douglas is legally responsible for these releases caused by its subtenant. Under a long line of

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[9] *In re: Taylor,* SWRCB Order No. WQ 92-14 (October 22, 1992) (emphasis added).

State Water Board decisions, it is clear that parties -- both landlords and tenants -- are responsible for discharges which occur while those parties are in control of the property, even if those parties did not personally "cause" the discharges. For example, in *In re: Spitzer*, SWRCB Order No. WQ 89-8 (May 16, 1989), property owners were held responsible for discharges which occurred on their property even though they were not involved in causing the discharges. Likewise, in *In re: U. S. Cellulose*, SWRCB Order No. WQ 92-04 (March 19, 1992), the State Board ruled that tenants "may be characterized as dischargers despite the lack of any direct action causing a discharge," if they exercise control over the tanks or other source of the discharges. Here, Douglas during its 16-year lease had possession and control of the entire garage, including the hydraulic lifts and waste oil system. Thompson's sublease of the hydraulic lift area was with Douglas, not the owners. Any leakage from use of the hydraulic lift and waste oil system by Thompson is therefore the responsibility of Douglas under the State Water Board's decisions.[10]

Furthermore, Douglas is legally responsible for any other on-site releases which occurred during its tenancy, even releases which were unrelated to Douglas' own use of the property or use by Douglas' subtenants. Under the State Water Board's decisions, a party is legally responsible for discharges which occurred during its ownership or control of the property, even if that party did not cause the contamination. Here, quite aside from Thompson's use of the lift and waste oil system, there is every reason to believe that leakage from the hydraulic lift, waste oil drain line, and waste oil tanks continued throughout Douglas' tenancy. Since Douglas had legal control over the property throughout this period, Douglas is responsible for this on-going contamination. Certainly, Douglas has presented no evidence that the continuing leakage in these areas miraculously "ceased" during the 16 years Douglas leased the garage.

## C. Public Policy Also Requires That Douglas Be Named A Responsible Party

Aside from the legal bases discussed above, public policy as declared by the State Water Board indicates that Douglas should be named a responsible party. The State Water Board has repeatedly declared that, "multiple parties should properly be named in cases of

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[10] See also, *In re: San Diego Unified Port District*, SWRCB Order No. WQ 89-12 (August 17, 1989) (party with knowledge of and ability to control activity leading to discharge is responsible); *In re: Stuart Petroleum*, SWRCB Order No. WQ 86-15 (September 18, 1986) (lessee liable for cleanup of pollution caused by sublessee where lessee knew of sublessee's activities at the site during releases).

disputed responsibility."[11] The rationale behind this policy is two-fold: (1) those responsible for releasing contamination should pay to clean it up; and (2) naming more responsible parties ensures more financial resources to pay for cleanup.

These public policies are applicable here. Mr. Bacharach and Ms. Borsuk have complied with the County's directives and have not shirked their responsibilities. On the other hand, Douglas has sought to evade its responsibilities at every turn, claiming alternatively that the soil contamination is "of minimal significance," "somewhat suspect," "cannot reasonably be deemed to be even remotely threatening to public health," "totally anomalous," and "cannot logically and reasonably be attributed to Douglas Motors."[12] The County should not permit Douglas to avoid its responsibilities in this manner.

The County should name Douglas to comply with both the State Board's decisions on identifying responsible parties and the State Board's policy of naming all responsible parties whenever the evidence supports it. To confirm the State Board's policies on naming responsible parties, you may wish to contact Ms. Loretta Barsamian, Assistant Executive Officer of the San Francisco Bay Regional Water Quality Control Board, at (510) 286-3978.

## IV. CONCLUSION

The hydraulic lift and waste oil system are an integral part of this site investigation, and the County, as the lead oversight agency, should address responsibility for these areas in the County's Order. We therefore respectfully request that the following language be substituted for the County's Order of February 5, 1993:

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[11] *In Re: Stinnes-Western Chemical Corporation*. SWRCB Order No. WQ 86-16 (September 18, 1986).

[12] Trinkle Letter to Mark Thomson, January 15, 1993, pp. 3, 4, 6 and 7.

> **"ORDER: There is substantial evidence that unauthorized releases of hazardous substances occurred at this property during the time Douglas Motor Service was a tenant and an operator of the property. Pursuant to Health & Safety Code Section 25299.37(c) and other applicable provisions of law, Alvin H. Bacharach, Barbara Jean Borsuk, and Douglas Motor Service and its Partners shall take all appropriate corrective action in response to such unauthorized releases at the property."**

This Order will ensure that the owners and Douglas participate in the investigation and, if necessary, cleanup of all areas of the garage contaminated during Douglas' tenancy. This proposed Order is fair and even-handed to both parties and does not require the County to determine their relative responsibility. The parties themselves can do that in Court. Meanwhile, by issuing this Order, the County will have fulfilled its own responsibilities to the State Board and to the public.

Very truly yours,

Randall D. Morrison

RDM:ma

cc: Gilbert A. Jensen, Esq.
William J. Trinkle, Esq.
Mr. Thomas Peacock