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April 18, 1994

DIRECT DIAL NUMBER

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VIA HAND DELIVERY

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Perchloroethylene Release Investigation

Tien's Unocal: 20405 Redwood Road, Castro Valley
Marshall Steel Cleaners: 20457 Redwood Road, Castro Valley
Safeway: 20629 Redwood Road, Castro Valley

Dear Sirs:

On February 15, 1994, the Alameda County District Attorney convened a pre-enforcement review panel to determine which parties are responsible for investigating and cleaning up contamination near a gas station and shopping center in Castro Valley. These comments are submitted on behalf of Joseph and Josephine Sorani, the owners of the strip shopping center located at 20457 Redwood Road, Castro Valley. The Soranis are very elderly and their son, Ralph Sorani, is handling this matter on their behalf. This firm is providing legal representation.

I. Factual Background

Over one year ago, Ralph Sorani received a letter from the Alameda County Department of Environmental Health ("Alameda County"). The letter explained that perchloroethylene ("PCE"), a chemical used by dry cleaners, had been found in a groundwater monitoring well on the Safeway Store's property next door to the Soranis' shopping center. The January 19, 1993 letter set forth Alameda County's finding that Marshall Steel Cleaners, a tenant

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at the Sorani shopping center, appeared to be a potential source for the PCE contamination found on the Safeway property.

The Soranis' property had already been contaminated by a gasoline spill originating on the neighboring gas station located at 20405 Redwood Road. The R.T. Nahas Company owns the property on which this gas station, Tien's Unocal, is located. R.T. Nahas has been conducting an investigation of the gasoline plume, although no active remediation has begun. The elderly Soranis were very distressed to learn that their property might now be contaminated both by the neighboring gas station and one of their tenants, Marshall Steel Cleaners. ~~Marshall Steel Cleaners is owned and operated by Howard [REDACTED]~~

Marshall Steel Cleaners has been located at the 20457 Redwood Road property since the Soranis purchased the property in April 1963. ~~This business was operated by Steel & Castro Valley Company until May 1974 when the Kelly family acquired it.~~ The Kelly family has operated the dry cleaning business for the past twenty years.

Ralph Sorani attended a meeting on February 2, 1993 to discuss the finding of PCE contamination believed to have been caused by the Marshall Steel Cleaners. Representatives of Alameda County and the Regional Water Quality Control Board, San Francisco Bay Region ("the Regional Board") convened the meeting to discuss the contamination and possible courses of action.

Mr. Sorani was very surprised to learn at the conclusion of the 1993 meeting that his parents, and not the business suspected of causing the PCE contamination, were to be held solely liable for investigating this problem. At the conclusion of the meeting, Mr. Sorani met with representatives of Safeway and Marshall Steel Cleaners. Because Regional Board staff suggested that more data would be helpful, the Soranis shared in the cost of performing further monitoring of the wells located on the Safeway and Sorani properties. These test results were submitted to the Regional Board on April 7, 1993.

The Soranis contacted Alameda County several times to learn the status of this matter, but were told that no regulatory action had yet been taken. On February 15, 1994, one year after the first letter from Alameda County, the Alameda County District Attorney convened the pre-enforcement review panel to discuss liability for the PCE contamination and to solicit comments on how the two contamination problems -- the gasoline spill and the PCE contamination -- should be addressed.

Following are comments submitted by the Soranis regarding those two issues.

II. Liability for the PCE Contamination

A. The Tenant Should Be Primarily Liable for the Cleaner. Alameda County has made a finding that Marshall Steel Cleaners is the potential source for the PCE contamination discovered at the Safeway property. Marshall Steel Cleaners should be named as the party primarily responsible for investigating the problem it may have caused.

The Soranis own the 20457 Redwood Road property, but they did not handle PCE on the property or operate the dry cleaning business suspected of causing the release. They did not cause the environmental harm. In fact, their property has been damaged by the gasoline spill and potential PCE release.

B. The Soranis Are Not Liable if the Release Did Not Occur on Their Property. There is no evidence, at present, to show that the PCE release occurred on the Sorani property. A study of dry cleaner contamination sites done by the Central Valley Regional Board¹ concludes that most releases occur through the sewer line. It is entirely possible that PCE discharged by Marshall Steel Cleaners to the sanitary sewer was released through a leak in the sewer line off of the Sorani property. If there was no release of PCE on their property, the Soranis would not be liable as dischargers under California Water Code § 13304. Initial investigations by Marshall Steel Cleaners will likely reveal whether the PCE release originated on the Sorani property or offsite.

C. The Policy of Holding Landowners Secondarily Liable is Well Established. If site investigations show that a PCE release occurred on the Sorani property, the Soranis should be named on any order, if at all, only as secondarily liable. Treating landowners who did not cause a contamination problem as secondarily liable is a well-established practice of various California Regional Boards. This policy has been consistently upheld, and in some cases, mandated by the State Water Resources Control Board ("State Board").²

Under this policy, the person who caused a contamination problem is primarily liable to investigate and clean it up. A landowner who neither caused nor permitted the activity that lead to the contamination is held secondarily liable. If the primarily liable party does not

Soranis permitted the activity by leasing the site to KeVey

¹ A copy of this study entitled "Dry Cleaners - A Major Source of PCE in Ground Water" (March 27, 1992) has been submitted to Alameda County by the R. T. Nahas Company.

² See *Petition of Southern California Edison, SWRCB Order No. 86-11; Petition of Vallco Park, Ltd., SWRCB Order No. WQ 86-18; Petition of U.S. Department of Agriculture, SWRCB Order No. 87-5; Petition of Prudential Insurance Co., SWRCB Order No. WQ 87-6; Petition of Arthur Spitzer, SWRCB Order No. 89-8; Petition of Wenwest, Inc., SWRCB Order No. 92-13.*

perform the cleanup, the landowner can then be required to step in and ensure that the environmental problem is properly addressed. In effect, the landowner guarantees the performance of the discharger who caused the problem. This is a policy that is both sensible and fair.

The State Board articulated the policy this way in *Petition of Schmidl*, SWRCB Order No. WQ 89-1:

"The initial responsibility for cleanup is with the operator, but according to Vallco, it is appropriate to look to the owner to assure cleanup in the event the operator fails in its obligations."

As noted in our letter dated April 1, 1993 (copy enclosed), the State Board considered a very similar case which also involved a release of PCE from a site where a dry cleaner had operated for many years. In that case, *Petition of Spitzer*, SWRCB Order No. WQ 89-8, the owner was held secondarily liable, along with another entity called L.A. Land. The State Board described the situation as follows:

"Although L.A. Land should be named as a discharger in the Orders, it should have the same status as Owners. It should be required to take responsibility for the cleanup only if the other dischargers fail to perform. This would be the equitable conclusion because, L.A. Land had no connection with the activities which initially caused the pollution, [and] the parties directly responsible for the PCE release have been identified and are making some progress toward cleanup..."

In *Petition of Wenwest, Inc. et al*, SWRCB Order No. WQ 92-13, the State Board considered an appeal concerning a gasoline spill site in Concord. The owner of the property, Susan Rose, had been named as primarily liable for the cleanup along with other parties, including the operator of the service station. ~~The State Board superceded the Regional Board decision and mandated that the owner be held secondarily liable.~~ In several cases, the State Board has applied the policy of secondary liability over the wishes of the Regional Board.³

Recently, the Regional Board issued an order for a site in Livermore involving PCE contamination from two dry cleaning businesses. ~~The Regional Board held the dry cleaners who caused the problem primarily liable. The landowner was made secondarily liable.~~⁴ Thus, it is clear that this continues to be the policy of the Regional Board.

³ See, also, *Petition of Prudential Insurance Co.*, Order No. WQ 87-6.

⁴ *Site Cleanup Requirements Order No. 93-139 (October 20, 1993).*

This is an appropriate case for secondary liability. Neither Alameda County nor the Regional Board has yet issued any directives requiring technical work. However, Marshall Steel Cleaners, the Soranis, and Safeway cooperated to perform initial sampling suggested by Regional Board staff. The Soranis are willing to further cooperate by providing reasonable access to the site for any required technical work. The Soranis have tendered claims to their insurance companies to see whether coverage is available and have encouraged Marshall Steel Cleaners to do the same. Legislation is being considered in Sacramento which may establish a special fund to clean up contamination from dry cleaning businesses. There is no reason to believe that the tenant, Marshall Steel Cleaners will not obey a directive to initiate a site investigation. For all of these reasons, the Soranis should be held secondarily liable, if at all.

As discussed at our meeting on February 15, 1994, the Soranis have a right to appeal the action of Alameda County to the State Board.⁵ We would advise the Soranis to seek State Board review of any order that did not name the operators of the Marshall Steel Cleaners as primarily liable. Such an appeal could delay the site investigation and take time and money away from the important task of addressing the environmental problem. *

III. Liability of Current Dry Cleaner Tenant

At the pre-enforcement review panel meeting on February 15, 1994, Mr. William Kelly's lawyer suggested that his client had no responsibility for the family business he has worked in since 1977. This position is wholly untenable.

William Kelly is a corporate officer of Howard W. Kelly & Son, Inc. the owner of the Marshall Steel Cleaners business. Mr. William Kelly is the son of Howard W. Kelly and has worked at the Marshall Steel Cleaners establishment since 1977. When Howard W. Kelly passed away last year, we understand that William Kelly assumed control of Howard W. Kelly & Son, Inc.

Howard and Eva Kelly, William Kelly's parents, acquired the Marshall Steel Cleaners business in 1974. **On May 21, 1974, Howard and Eva Kelly were assigned the lease to the Marshall Steel Cleaners store.** The lease requires the tenant to maintain the premises in good condition, it prohibits the tenant from committing waste or maintaining a nuisance, and it requires the tenant to comply at its sole expense with any government requirements pertaining to

⁵ Cal. Health & Safety Code § 25297.1(a)(3).

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the premises.⁶ When the Kellys were assigned the lease, they took it with full knowledge of a clause that states:

The covenants and conditions herein contain . . . shall apply to and bind the heirs, successors, executors, administrators and assigns of all parties hereto; and all of the parties hereto shall be jointly and severally liable hereunder.

In March 1981, Joseph and Josephine Sorani entered into a ten-year lease with Howard and Eva Kelly. Mr. William Kelly continued to work at the family dry cleaning business. At some point between 1981 and 1991, the Kellys created a corporation called "Howard W. Kelly & Son, Inc." We understand that Mr. William Kelly was initially Vice President of this company. In March 1991, the Soranis entered into another lease with Howard W. Kelly & Son, Inc. that allowed the Kelly family to continue to operate Marshall Steel Cleaners at the Redwood Road shopping center. Mr. William Kelly signed the 1991 lease.

It is amply clear that Mr. William Kelly has responsibility for the operations of the family business he has worked in, for which he is a corporate officer, and to which he has now succeeded.

Mr. Kelly's attorney also suggested that the Kellys would not have any liability if it were shown that the PCE release was caused solely before 1974 when the Kellys acquired Marshall Steel Cleaners. We disagree. Howard W. Kelly & Son, Inc. has liability as the operator in control of the dry cleaning facility from which there was a release of hazardous substance. This issue is extensively discussed in Lincoln Properties Ltd. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992). This case involved PCE contamination where past and present owners of three dry cleaners disputed their liability. The court found that evidence of releases from all three businesses had occurred.

Do we have such evidence?

IV. The Source of the PCE Found on the Safeway Property

The R.T. Nahas Company has been investigating a gasoline spill that occurred on the Tien Unocal property next door to the Sorani shopping center. To date, only relatively low concentrations of chlorinated compounds have been detected on the Nahas property located upgradient of the Sorani property. Based on analytical results from the soil and groundwater samples collected from test borings and monitoring wells installed on the Nahas and Sorani

⁶ June 15, 1965 lease between Joseph and Josephine Sorani and Steel-Castro Valley Co. ¶¶ 7, 8, 10, 11. May 21, 1974 assignment of lease from Steel-Castro Valley Co. to Howard and Eva Kelly.

~~properties, it appears unlikely that Tien's Unocal is the source for the PCE detected in MW-7 discharges from the Sorani property.~~

Although there are many possible sources for the PCE detected in MW-7, given the volume of PCE used everyday at the dry cleaners and the fact that the dry cleaning business has been operating at the site for some 30 years, we believe that the most likely source for the PCE is the Marshall Steel Cleaners operations. Additional investigations will be needed to determine the source and pathway for the PCE detected in MW-7.

In order to conduct an efficient and focused investigation of the PCE release, Alameda County should request factual information from Marshall Steel Cleaners about the type of equipment used at the business, the chemical usage history at the facility, the nature of any discharges of PCE to the sanitary sewer, the method by which PCE is delivered to the dry cleaners⁸, and the history of upgrades to the dry cleaning processes at the facility. This information will allow for a more intelligent site investigation and will shed light on whether an offsite sewer investigation is warranted. It will also be important to determine whether Marshall Steel Cleaners' wastewater continues to contain PCE to determine whether any PCE releases may be ongoing.

V. The Investigation of the Tien Unocal Gasoline Spill

The Soranis' technical consultant has reviewed the reports produced by BSK Associates, the consultant for R.T. Nahas Company. Several conclusions emerge from this review. ~~First, the full extent of the gasoline plume has not yet been fully defined and this work should be completed. Second, significant concentrations of gasoline and gasoline constituents exist in soil and groundwater along the southern boundary of the Tien Unocal property where it adjoins the Sorani shopping center. Thus, it is very likely that the gasoline contamination extends beneath the Sorani property and will require active remediation. Third, releases of 1, 2-DCA, a chlorinated compound, have occurred on the Tien Unocal site which BSK Associates concludes are associated with the gasoline release.~~

not necessarily

BSK Associate's letter of March 14, 1994 reports that subsurface conditions create a preferential pathway for groundwater flowing south from the Tien Unocal property across the Sorani property passing between monitoring wells MW-5 and MW-6. If true, this pathway would serve as a channel for the gasoline plume (as well as any PCE releases originating

⁷ We do not, however, find the aquifer flushing analysis presented in BSK & Associates letter of March 14, 1994 persuasive.

⁸ We understand that PCE may be delivered to Marshall Steel Cleaners through a vacuum hose that is extended through a window. If the vacuum hose were dropped, a spill could occur.

upgradient). The R.T. Nahas Company should conduct further investigations on the Sorani property to determine whether their consultant's hypothesis is correct. If it is, there may be significant petroleum contamination between monitoring wells MW-5 and MW-6, possibly extending onto the Safeway property. Additional investigations and quarterly monitoring of wells on the Sorani and Safeway properties should be conducted by the dischargers responsible for the Tien Unocal gasoline release.

We also urge Alameda County to require interim remedial measures at the Tien Unocal site which will contain and begin the process of remediating the gasoline spill that has been under study for several years.

VI. Coordination of PCE and Gasoline Investigations

We suggest that Alameda County, or the Regional Board, consolidate the investigation of the Tien Unocal release with the investigation of a potential PCE release at Marshall Steel Cleaners. We understand that, in general, gasoline release sites are handled by a different regulatory unit from solvent spills. However, several factors suggest that these two investigations should be coordinated.

First, 1,2-DCA, a chlorinated compound, has been released at the Tien Unocal site. BSK Associates attributes the 1,2-DCA to the gasoline spill. Because 1,2-DCA was historically used as a gasoline additive, this makes sense. Since both sites involve releases of chlorinated compounds, it makes sense to coordinate the investigations.

Second, it is likely that the same remedial technology could be used to clean up both the gasoline constituents and the chlorinated compounds. The design of a remedial system should be planned with that fact in mind.

Third, if the gasoline and PCE plumes are co-mingled, the dischargers should coordinate groundwater sampling and other technical work.

VII. Conclusion

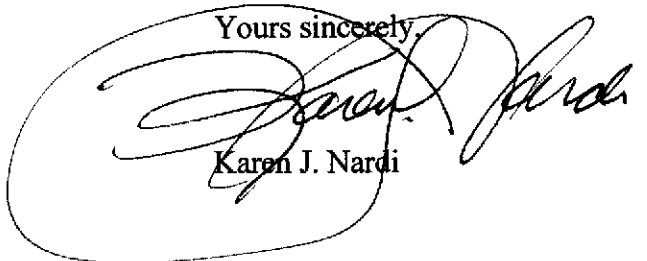
The Soranis are willing to cooperate in any needed investigation of PCE releases that may have occurred on their property. However, they urge Alameda County to use its enforcement discretion to hold the companies that caused the harm primarily liable for addressing any environmental problems.

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For the convenience of Alameda County and the Regional Board, we enclose a map showing the boundaries of the Sorani property.

We appreciate your consideration of these comments.

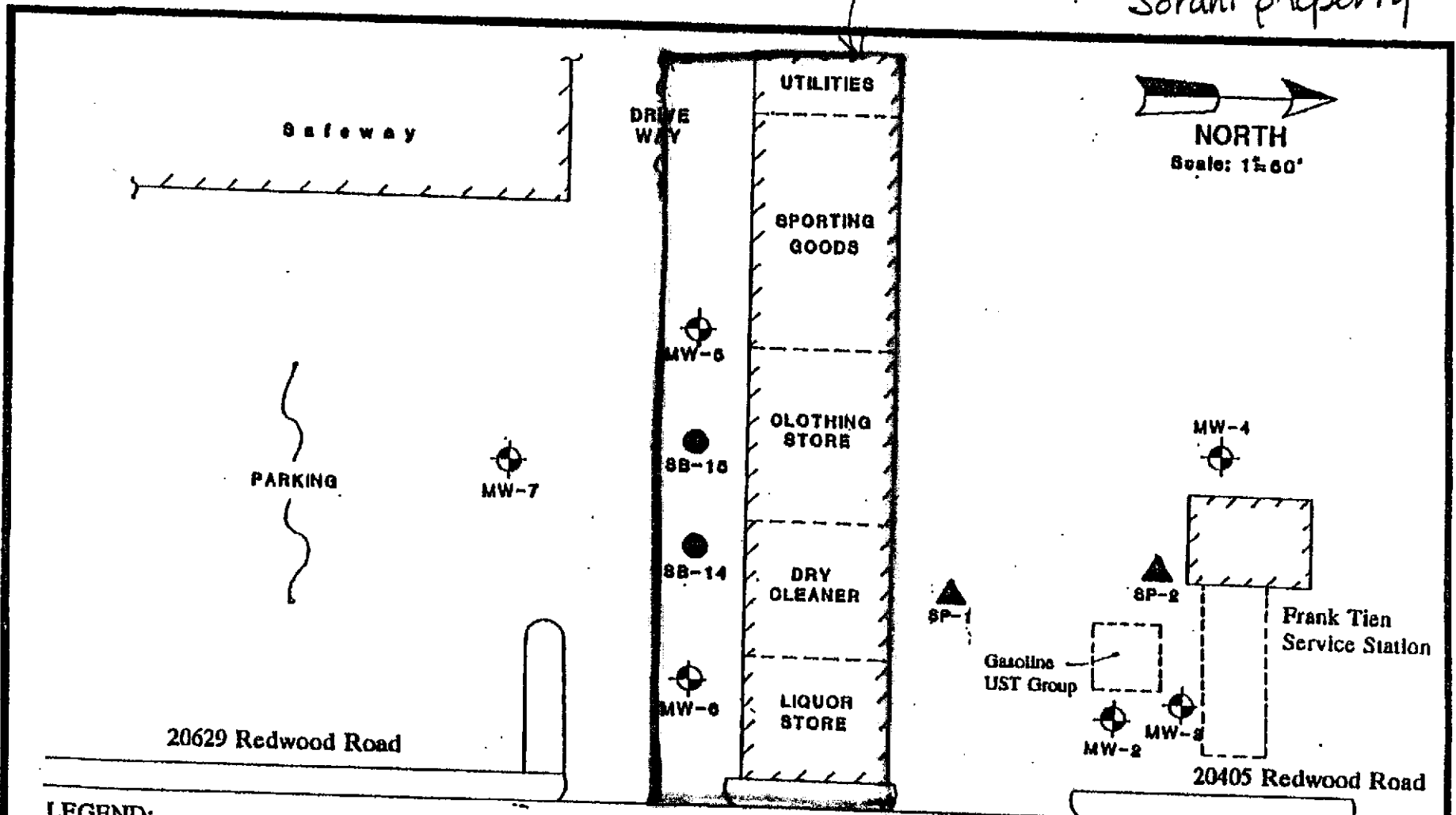
Yours sincerely,

A handwritten signature in cursive script, appearing to read "Karen J. Nardi", is written over a large, hand-drawn oval. The signature is fluid and somewhat stylized.




Karen J. Nardi

cc: Mr. William Kelly
Christine K. Noma, Esq.
Kevin Haroff, Esq.
Mr. Edgar Howell
Mr. Thomas Peacock
Mr. Rich Hiatt
Mr. Ralph Sorani

Approximate boundaries of Sorani property



LEGEND:

-  Location and Designation of Groundwater Monitoring Well
-  Location and Designation of Temporary Sample Point
-  Location and Designation of Soil Boring

SITE AREA MAP

BSK Job No. P92057.3
March 1994
FIGURE: 2

BSK
& ASSOCIATES