

STATE OF CALIFORNIA  
ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition  
of Gregory J. Garcia and  
Beatrice S. Gallegos

\_\_\_\_\_ /

SWRCB No: \_\_\_\_\_

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11/1/88

**ADDENDUM TO THE  
PETITION FOR REVIEW  
OF DECISION BY ALAMEDA COUNTY  
HEALTH CARE SERVICES AGENCY  
NAMING PETITIONERS AS RESPONSIBLE PARTIES**

Hans W. Herb, Esq.  
LAW OFFICES OF HANS W. HERB  
50 Santa Rosa Ave., 5th Fl.  
Santa Rosa, CA 95404  
(707) 576-0757  
(800) 767-9562

Attorneys for  
Gregory J. Garcia and  
Beatrice S. Gallegos

## INTRODUCTION

On May 2, 1992, the Petitioners herein filed a Petition for Review of the Alameda County Health Care Service Agency's naming them as responsible parties for the cleanup of the property located at 16035 East 14th Street, in San Leandro, California. In their Petition, Petitioners maintained that they were not responsible for the contamination at the property because there was no evidence, let alone "substantial evidence," of their liability.

In a June 15, 1993 letter, Sandra L. Malos, Chief of the Local Oversight Program, responded to the Petition, declared the Petitioners were responsible for the cleanup, and stated, "if after reviewing the above information, [sic] you still wish to proceed with the petition, an amended petition must be submitted within 30 days from the date of this letter. The amended petition should include additional issues since the issue in the original petition has now been resolved." A copy of Ms. Malos' letter is attached hereto.

Petitioners bring this Amended Petition for two reasons. First, the factual basis relied on by the Division to establish the Petitioners' alleged liability is incorrect. Second, and more importantly, there is no provision in California law which allows one regulator to review the acts of another regulator as a substitution to an impartial review by an independent third party. By analogy, the response from the Division of Clean Water Programs is like a police sergeant

determining the guilt of a criminal arrested by a police officer. Basic and fundamental concepts of due process under constitutional law require that regulatory actions be reviewed by an impartial and neutral third party such as an elected or appointed official or Board. In light of the fact that representatives of local oversight programs have testified at public hearings that regulators attempt to handle these matters "in-house" without bringing this to the attention of the appropriate supervisory officials, Petitioners are deeply disturbed. For that reason, Petitioners request the due process they are entitled to under the United States and California Constitutions.

**FEDERAL LAW, 42 U.S.C. §6991(3)  
DOES NOT ESTABLISH LIABILITY,  
IT SIMPLY DEFINES THE TERM "OWNER"**

The purpose of the definition section of the statute is to identify how a term is used in the balance of the statute. A definition section, by its own design, cannot establish liability for anyone. Instead, only the regulations themselves can establish some liability. Nevertheless, the Division seeks to hold Petitioners liable based on a definition of "owner" found in federal RCRA statutes. (See letter.) This is incorrect and nonsensical. Consequently, in this case, there is no basis for establishing liability against the Petitioners based solely on a definitional statute.

**THERE IS NO "EVIDENCE" LET ALONE  
"SUBSTANTIAL EVIDENCE" THAT PETITIONERS  
WERE EVER THE "OWNERS" OF THE  
UNDERGROUND STORAGE TANKS**

After submission of the original Petition, Sandra L. Malos, Chief of the Local Oversight Program, wrote a letter to Petitioners, claiming that Petitioners were responsible parties for the investigation at the site in San Leandro because they met the definition of "owners" under RCRA. Petitioners challenge this assertion, factually and legally.

First, as was noted in the original Petition, Petitioners were owners of the property. Owners of the property are not necessarily owners of fixtures placed thereon by third parties.

While Petitioners are aware that the State Underground Storage Tank Cleanup Fund ("Fund") has allowed claims for "de facto" tank owners, neither federal nor state law recognizes any such basis for imposing liability.

By analogy, if a gasoline tanker truck was to crash into your home spilling gasoline, the responsibility for the cleanup would be solely on the trucking company and the driver. There would be no good legal reason, nor would it foster sound public policy, to require the owner of the property to clean it up simply because he or she owned the property.

From the information presently available to the Petitioners, it appears that the underground storage tanks were owned last by the Seaside Oil Company. Petitioners are not affiliated in any way with the Seaside Oil Company. Under these

facts Petitioners fail to see any legal basis in which liability could or should be imposed on them.

**FAILURE TO AFFORD PETITIONERS  
THE OPPORTUNITY TO HAVE THEIR CASE  
HEARD BEFORE AN IMPARTIAL AND NEUTRAL  
BOARD VIOLATES THE PETITIONERS' DUE  
PROCESS RIGHTS AND IS REPUGNANT TO THE  
AMERICAN AND CALIFORNIA CONSTITUTIONAL SYSTEM**

California Health & Safety Code §25297.1 provides that local oversight programs may exist subject to certain requirements. Among the requirements are those found at §25297.1(d)(3). This section requires local oversight programs to assure that responsible parties be given a meaningful procedure to petition the Board for review of the actions or decisions of the local agency. By statute, the local agency must follow the procedure set forth in Water Code §13320, *et seq.* Under §13320, *et seq.*, any aggrieved person may petition the "State Board" to review such action or failure to act. The "State Board" is defined in California Water Code §175. It includes the five-member California State Water Resources Control Board. Notably absent from the five members identified on the State Board is the Chief of the Local Oversight Program. In other words, only the five members of the State Water Resources Control Board ("SWRCB") may review a petition under California Water Code §13320 (See California Water Code §13100).

Administrative proceedings which affect property and personal rights are required to meet constitutional protections of due process. Anderson National Bank v. Lockett, 31 U.S. 233, 64 S.Ct. 599, 606, 88 L.Ed. 692, 705 (1944).

It is necessary that the right to a fair and open hearing be maintained as the right to such a hearing is one of the rudiments of fair play assured by the 14th Amendment as a minimal requirement. Blender, Robinson & Company v. Tom, 181 Cal.App.3d 283, 289, 226 Cal.Rptr. 339 (1986). Proceedings which wholly deny a hearing or provide inadequate review procedures, lack due process. Morgan v. United States, 298 U.S. 468, 56 Sup.Ct. 906, 80 L.Ed. 1288 (1936); Trans-Oceanic Oil Corporation v. Santa Barbara, 85 Cal.App.2d 776, 797, 194 Pac.2d 148 (1948).

The type of hearing required varies. The adequacy of administrative hearings is a creature of mostly judge-made law. The standards are the same whether judges are given meaning to statutory provisions (such as §25297.1(d)(3)) or whether they are developing a form of general administration "common law". Roth v. Los Angeles, 53 Cal.App.3d 679, 692, 126 Cal.Rptr. 163 (1975).

Consideration of the procedures which due process requires under a given set of circumstances begins with the determination of the nature of the government function involved and the private interest which has been affected by the governmental action. Matthews v. Eldridge, 424 U.S. 319, 96 Sup.Ct. 893 (903), 47 L.Ed.2d 18, 33 (1976). Here the action is severe. The Petitioners, who are disabled and on social security, will lose their life savings and their remaining property if the action is not halted.

It is a hallmark of administrative due process that hearing must be held before an impartial body or officer. See

Wang Yang Sing v. McGraff, 339 U.S. 33, 70 Sup.Ct. 445, 452, 94 L.Ed. 616, 626 (1950); Saks and Co. v. Beverly Hills, 107 Cal.App.2d 260, 264, 237 P.2d 32 (1951). In the leading case on administrative due process, Morgan v. United States, *supra*, the United States Supreme Court analyzed who may pass judgment on an administrative matter. The Court declared that the person who makes the determination must be impartial and must consider and appraise all the evidence. A fair hearing, and therefore due process, is denied where subordinates hold the hearing and the decision is thereafter affirmed by an officer who has not attended the hearing. *Id.* Due process demands that decisions be made by an impartial authority. Applebaum v. Board of Directors, 104 Cal.App.3d 648, 657, 163 Cal.Rptr. 831 (1980).

Here, Petitioners have been denied any hearing whatsoever. More repugnant is that their right to a hearing has been purportedly cut off by the same individuals whose decisions Petitioners seek to reverse. This procedure clearly violates fundamental notions of due process and fair play as well as the California and Federal Constitutions. *See, Volst v. Stockton*, 220 Cal.App.3d 265, 269 Cal.Rptr. 404 (1990).

It is clear from a review of these authorities that Petitioners have been denied due process. They have been denied due process substantively and procedurally.

CONCLUSION

Petitioners are victims of bad laws, bad facts and bad procedures. Because they were named in someone's will 30 years ago, Petitioners are now expected to participate in a financially devastating cleanup. As noted, one of the Petitioners is permanently disabled. The other is on Social Security. They last had any connection with the site more than a dozen years ago. They never used any underground storage tanks nor operated any business on the property. They were never given the opportunity to participate and defend themselves in a fair way. This action has sentenced them to financial and emotional ruin. It is unfair, unconstitutional, and unjust, to punish Petitioners in the manner proposed.

For the foregoing reasons, Petitioners respectfully request the Petition be granted, the decision of the Alameda Health Care Service Agency be reversed and that Petitioners be afforded the procedural and substantive due process guaranteed to all Americans.

DATED: July 15, 1993

Respectfully submitted,  
LAW OFFICES OF HANS W. HERB

By: 

HANS W. HERB

Attorney for Petitioners



STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing \_\_\_\_\_ and know its contents.

CHECK APPLICABLE PARAGRAPH

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am  an Officer  a partner \_\_\_\_\_  a \_\_\_\_\_ of \_\_\_\_\_

\_\_\_\_\_ a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason.  I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.  The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for \_\_\_\_\_ a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name

Signature

PROOF OF SERVICE

1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of Sonoma, State of California.

I am over the age of 18 and not a party to the within action; my business address is: 50 Santa Rosa Ave., Fifth Floor, Santa Rosa, California 95404

July 15, 1998 I served the foregoing document described as Addendum to the Petition for Review of Decision by Klameda County Health Care Services Agency Naming Petitioner as Responsible Parties on all parties \_\_\_\_\_ in this action

by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:  
 by placing  the original  a true copy thereof enclosed in sealed envelopes addressed as follows:

BY MAIL

\*I deposited such envelope in the mail at Santa Rosa, California. The envelope was mailed with postage thereon fully prepaid.

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Rosa California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 15, 1998, at Santa Rosa, California.

\*\*(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, California.

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.  
 (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Alicia Hinojosa

Type or Print Name

Alicia Hinojosa  
Signature

LIST OF INTERESTED PERSONS AND REGIONAL BOARD

Alameda County Health Care Services Agency  
80 Swan Way, Room 200  
Oakland, CA 94621

Ms. Mary Petsas  
16518 Toleda Street  
San Leandro, CA 94578

Bay Area Regional Water Quality Control Board  
San Francisco Bay Region  
2101 Webster St., Suite 500  
Oakland, CA 94612

Office of the Chief Counsel  
State Water Resources Control Board  
901 "P" Street  
Sacramento, CA 95814