

LAW OFFICES OF HANS W. HERB

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May 2, 1993

MAY

HANS W. HERB

David J. Kears, Agency Director
ALAMEDA COUNTY HEALTH CARE
SERVICES AGENCY
80 Swan Way, Room 200
Oakland, CA 94621

RE: Site: 10635 E. 14th St., San Leandro, CA
Site I.D. No: 4147

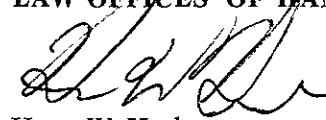
Dear Mr. Kears:

This letter is to advise you that Beatrice S. Gallegos and Gregory J. Garcia have filed the attached Petition with the State Water Resources Control Board, appealing your agency's decision to name them as responsible parties in connection with the underground storage tank investigation at the above-referenced site.

Pursuant to California Code of Regulations, §2050, please provide the State Water Resources Control Board with a list of all persons other than those shown in the Petition, if any, known by your agency to have an interest in this matter.

Further, please prepare your record in this matter and submit it as required by the State Board.

Very truly yours,
LAW OFFICES OF HANS W. HERB



Hans W. Herb

HWH/mca
Enclosure

cc: Ms. Beatrice S. Gallegos
Mr. Gregory J. Garcia

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: _____

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) 757-9562

Attorneys for
Gregory J. Garcia and
Beatrice S. Gallegos

INTRODUCTION

On April 6, 1993, Petitioners received notice from the Alameda County Health Care Services Agency ("Alameda County") that they had been named as responsible parties for the underground storage tank investigation at the property located at 16035 E. 14th Street in San Leandro, California. Petitioners had, at one time more than a dozen years ago, an ownership interest in the property, but never had any involvement with the operation of the underground storage tanks on the property. Petitioners are unaware of any unauthorized discharges from the underground storage tanks during the period of their ownership. Because petitioner's believe none of this Board's previous order's would require, or even authorize petitioners to be named as responsible parties, they respectfully bring this petition requesting that the State Board instruct Alameda County Health Care Services Agency to remove petitioners from the list of responsible parties.

BACKGROUND

In 1961, Joseph Raymond Garcia died and left the property located at 16035 E.14th Street in San Leandro, California, to the petitioners herein, Gregory J. Garcia and Beatrice S. Gallegos. At the time petitioners obtained the property, Seaside Oil Company, a Santa Barbara based oil jobber, had a lease on the premises. From information petitioners have discovered in historical documents, it appears that Seaside Oil

Company had leased the premises from the decedent and his predecessor owners for some period of time before 1940.

Seaside Oil Company continued its lease agreement on the property through December 21, 1965, and it continued operations on the station for several years after that. Specifically, after 1965, Seaside subleased the premises to a number of sub-operators, before finally leaving the property in the late 1960's. For a while thereafter (several months in early 1970), the station remained vacant. Later, it was leased by William and Peggy Gritzuk. The Gritzuks written lease indicates they leased the station from September of 1972 until at least March of 1979, but they are believed to have occupied the site for several years before that. The petitioners sold their interest in the subject property to the current owners, Jerry and Mary Petsas in March of 1979.

At no time did petitioners ever operate any of the underground storage tanks on the premises, nor did they operate any business on the site. Instead, all storage tank operations at the site were conducted by Seaside Oil Company and/or one of its subtenants and the Gritzuks.

Although petitioners have not yet been able to locate a copy of the written lease agreement between Seaside Oil Company and the late Joseph Raymond Garcia, they have located the 1972 lease between petitioners and the Gritzuks. Under the express terms of the lease, the Gritzuks were responsible to; at their own cost and expense, maintain the premises, "including the

plumbing", in good order and repair and, to; at their own cost and expense, make all repairs and replacements of whatever kind and nature to the premises. In addition to expressly agreeing to hold petitioners harmless from all costs and expense connected with the premises, the Gritzuks agreed not to use or permit the premises to be used in violation of any of the laws or ordinances, and to "comply with all federal, state or municipal regulations or ordinances now or hereinafter enacted concerning the conduct of the Gritzuks' business at the premises."

When the Petsases purchased the property in 1979, they insisted on taking the property as-is, accepting full responsibility for any defects on the premises. The tanks were obviously disclosed since the site was a service station. (However, as the Board can imagine, there was not the concern that exists today regarding the issue of underground fuel tanks.)

Following the sale of the property to the Petsases in 1979, fourteen years ago, petitioners had no further knowledge of or involvement with the site.

On April 6, 1993, petitioners received notice from the Alameda County Health Care Service Agency that they were responsible parties for the investigation of the underground storage tanks at their former San Leandro property. Petitioners have no knowledge whatsoever as to why or how they could have been named as responsible parties. Petitioners were given no opportunity to question or even address the agency that determined them to be responsible parties.

Because petitioners do not believe the federal or state regulations, nor prior decisions of the State Water Resources Control Board, authorize them to be named a responsible party, petitioners respectfully request the State Board reverse the decision of the Alameda County Health Care Agency and require the Alameda County Health Care Services Agency to provide substantial evidence before naming petitioners, or anyone else, as responsible parties for the cleanup of the site.

NAME AND ADDRESS OF PETITIONERS

Beatrice S. Gallegos, 4650 No. Palm Avenue, Fresno, California 93704; Gregory J. Garcia, 344 Rollingwood Drive, Vallejo, California 94591.

Petitioners request copies of all relevant correspondence be served on their counsel, Hans W. Herb, Law Offices of Hans W. Herb, 50 Santa Rosa Ave., 5th Floor, Santa Rosa, CA 95404; Telephone: (800) 767-9562.

SPECIFIC ACTION/COPY OF ORDER

A copy of the relevant documents received by petitioners is attached as Exhibit A. The letters are dated April 2, 1993.

THE DATE ON WHICH THE LOCAL AGENCY ACTED

April 2, 1993, according to their letters.

**STATEMENT OF REASONS WHY THE ACTION
WAS INAPPROPRIATE OR IMPROPER**

Petitioners contend that under well-established federal, state and local regulations, there is no basis for naming a responsible party for the cleanup of contamination of an unauthorized release, unless and until there is substantial evidence that the responsible party was the cause of an unauthorized release. By naming petitioners as responsible parties without any evidence, let alone substantial evidence, petitioners believe the Alameda County local agency exceeded its jurisdiction and is subject to reversal by the State Board.

THE MANNER IN WHICH PETITIONER IS AGGRIEVED

Petitioners are uniquely situated. Their last involvement at the site, some fourteen years ago, leaves them in a position where they have no information, nor the ability to obtain any information about any alleged discharges or spills on the property. One of the petitioners is disabled and the other lives month to month on income from Social Security. Being improperly named as responsible parties has created a huge financial burden on the petitioners and has caused extreme distress.

SPECIFIC ACTION REQUESTED

Petitioners request the State Board reverse the decision of the Alameda County Health Care Services Agency and require that agency to identify substantial evidence before

naming anyone as a responsible party for the cleanup of this site.

STATEMENT OF POINTS AND AUTHORITIES

It is now well-established that before naming a responsible party, a regional water board or local oversight agency must have substantial evidence. State Water Resources Control Board Resolution 92-49; In the Matter of the Petition of Wenwest, et al., Order No. 92-13; In the Matter of the Petitions of Robert S. Taylor, et al. and John F. Basta, Order No. WQ92-14; In the Matter of the Petition of Exxon Company, U.S.A., et al., Order No. WQ85-7.

The specific kinds of evidence to be considered are set forth in Resolution 92-49 and include such factors as hydrogeologic information, physical evidence, unauthorized release reports and complaints, agencies records of discharges, and, in limited cases, circumstantial evidence. However, in all cases, there must be substantial evidence to support the action. In this case, several factors indicate substantial evidence does not exist.

As the Wenwest opinion notes, the three factors this Board must consider in determining whether petitioners are properly named as responsible parties are:

- (1) Did the petitioners have a significant ownership interest in the property at the time of the discharge?

- (2) Did they have knowledge of the activities which resulted in the discharge?
- (3) Did they have the legal ability to prevent the discharge?

In this case, when that standard is applied, it is clear that petitioners have no responsibility for the alleged discharges at the site and should not have been named as responsible parties by Alameda County. Specifically, there is no evidence of any unauthorized release during the period of time petitioners had an ownership interest in the site.

Further, as noted, petitioner's ownership interest was solely that of an absentee landlord. Under the express terms of the written lease agreement, the tenants were required to comply with all laws, now and in the past, and were required to maintain all of the tanks and plumbing.

A number of other grounds exist, indicating a lack of liability on behalf of the petitioners. For example, Water Code §13304(f), by its express language, does not apply to actions occurring before January 1, 1981, if the acts were not in violation of the regulations at the time they occurred. There is absolutely no evidence whatsoever that petitioners had any responsibility for any discharges at the site. Assuming *arguendo* that the petitioners did have some responsibility, any such liability necessarily arose from conduct before 1979, when petitioners were last associated with the site.

Moreover, there is no evidence that petitioners ever operated the underground tanks at any time. At most, petitioners were passive landowners who had an ownership interest in a piece of property operated as a service station by an oil company. As the Wenwest opinion noted, it is not appropriate to name landowners where they have not been involved in the activity which created the pollution problem.

In this case, fairness and equity dictate that there should not be a blanket order naming anyone who was ever associated with a site as a responsible party for the site's investigation and cleanup. If that were to be the case, it would be more equitable and fair to name all those who purchased fuel from the site since they actually conducted operations at the service station, whereas petitioners never had anything to do with the service station's operations.

A number of equitable factors also indicate petitioners should not be named as responsible parties. For example, the persons who purchased the property from petitioners, expressly purchased the property as-is. This was a conscious decision by the purchaser of the property in order to have the price of the property reduced. In agreeing to accept a lower figure for the property, petitioners expressly agreed that the property would be sold as-is, and that the current owners, the Petsases, would be fully responsible for any defects then existing or thereafter occurring on the premises. Although the State Water Board is not bound by the "as-is clause" in the agreement, equity and fairness

dictate that someone who takes advantage of a situation and lowers a purchase price based on an as-is clause should not thereafter be entitled to seek the State Board's assistance in enforcing a contrary agreement with the seller.

Likewise, it is notable that petitioners' lease with the Gritzuks, and possibly with Seaside (we have not yet located the complete lease), requires that the risk of hazards such as environmental contamination be borne solely and exclusively by the lessee. In other words, the amount of control petitioners had over the oil companies was non-existent. As noted, petitioners had no knowledge of contamination until they received the Alameda County Agency's letter.

Finally, due process and fundamental fairness concerns indicate that petitioners should not be named as responsible parties for the cleanup. First, petitioners were never given the opportunity to review or even consider the alleged evidence against them (if there was in fact any evidence). Fundamental concepts of fairness and due process dictate that, as a minimum, petitioners should have been allowed the opportunity to review and comment on the evidence purportedly used against them.

In Staff's draft order, In the Matter of the Petition of The Phillips Petroleum Company, your file number A-828, the Staff recognized that in order to be accorded administrative due process and a fair hearing, a party should be given the opportunity to review and comment on the evidence presented and to be able to do so in the meaningful way. As the Staff

recognized, the rules of fair play require each side be given an opportunity to present, review and discuss the evidence to see if it meets the standard required (substantial evidence).

For the foregoing reasons, petitioners contend that the action by the Alameda County Health Care Services Agency was inappropriate and should be reversed by the State Board.

LIST OF INTERESTED PERSONS AND REGIONAL BOARD

Complete copies of the Petition have been provided to:

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

Mary Petsas
16518 Toledo 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

REQUEST FOR AGENCY TO PREPARE RECORD


Attached as Exhibit B is a copy of the letter requesting the Alameda Health Care Services Agency prepare their record.

CONCLUSION

Petitioners are not responsible for any unauthorized releases at the referenced property. There is no evidence, let alone substantial evidence, that petitioners are or should be responsible for any discharges at the site. For the foregoing reasons, petitioners respectfully request this Board grant the petition and reverse the action of the Alameda County Health Care Services Agency.

DATED: May 2, 1992

LAW OFFICES OF HANS W. HERB

BY: 

HANS W. HERB
Attorney for Petitioners

ALAMEDA COUNTY
HEALTH CARE SERVICES
AGENCY

DAVID J KEARS, Agency Director



RAFAT A SHAHID, ASST. AGENCY DIRECTOR

DEPARTMENT OF ENVIRONMENTAL HEALTH
State Water Resources Control Board
Division of Clean Water Programs
UST Local Oversight Program
80 Swan Way, Rm 200
Oakland, CA 94621
(510) 271-4530

Certified Mail # P 367 604 562

04/02/93
STID# 4147

Notice of Requirement to Reimburse

Mary Petsas
n/a
16518 Toledo St
San Leandro, C A 94578

Responsible Party #1
Property Owner

Beatrice S. Gallegos
4650 No. Palm Avenue
Fresno, Ca 93704

Responsible Party #2
Contact Person
Contact Company

Mary Petsas
16035 E. - 14th St.
San Leandro, CA 94578

SITE

Date First Reported 02/04/92
Substance: Gasoline
Petroleum: (X)Yes

The federal Petroleum Leaking Underground Storage Tank Trust Fund (Federal Trust Fund) provides funding to pay the local and state agency administrative and oversight costs associated with the cleanup of releases from underground storage tanks. The legislature has authorized funds to pay the local and state agency administrative and oversight costs associated with the cleanup of releases from underground storage tanks. The direct and indirect costs of site investigation or remedial action at the above site are funded, in whole or in part, from the Federal Trust Fund. The above individual(s) or entity(ies) have been identified as the party or parties responsible for investigation and cleanup of the above site. YOU ARE HEREBY NOTIFIED that pursuant to Title 42 of the United States Code, Section 6991b(h)(6) and Sections 25297.1 and 25360 of the California Health and Safety Code, the above Responsible Party or Parties must reimburse the State Water Resources Control Board not more than 150 percent of the total amount of site specific oversight costs actually incurred while overseeing the cleanup of the above underground storage tank site, and the above Responsible Party or Parties must make full payment of such costs within 30 days of receipt of a detailed invoice from the State Water Resources Control Board.

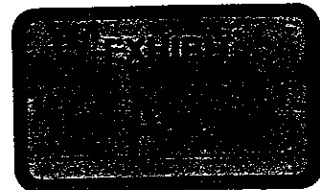
Please contact Scott SEERY, Hazardous Materials Specialist at this office if you have any questions concerning this matter.

Edgar B. Howell, III, Chief
Contract Project Director

cc: Sandra Malos, SWRCB

SWRCB Use:

Add: X Reason: New Case



ALAMEDA COUNTY
HEALTH CARE SERVICES
AGENCY

DAVID J. KEARS, Agency Director



RAFAT A. SHAHID ASST AGENCY DIRECTOR

DEPARTMENT OF ENVIRONMENTAL HEALTH
State Water Resources Control Board
Division of Clean Water Programs
UST Local Oversight Program
80 Swan Way, Rm 200
Oakland, CA 94621
(510) 271-4530

Certified Mail # P 367 604 563

04/02/93
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n/a
16518 Toledo St
San Leandro, C A 94578

Responsible Party #1
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Gregory J. Garcia
344 Rollingwood Drive
Vallejo, Ca 94591

Responsible Party #3
Contact Person
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cc: Sandra Malos, SWRCB

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May 2, 1993

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David J. Kears, Agency Director
ALAMEDA COUNTY HEALTH CARE
SERVICES AGENCY
80 Swan Way, Room 200
Oakland, CA 94621

RE: Site: 10635 E. 14th St., San Leandro, CA
Site I.D. No: 4147


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cc: Ms. Beatrice S. Gallegos
Mr. Gregory J. Garcia

