

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Review of Action of)
the California Regional Water Quality Control)
Board, North Coast Region, Regarding an Oil)
Spill to Baechtel Creek Involving Allyn)
Transportation Company, Phillips Petroleum)
Company, and Charles Persico)

Order No. WQ 77-8

A-332

BY THE BOARD:

On February 26, 1976, the California Regional Water Quality Control Board, North Coast Region (Regional Board), conducted a hearing regarding an oil spill to Baechtel Creek in Mendocino County allegedly involving Allyn Transportation Company, Phillips Petroleum Company (Phillips), and Charles Persico. The alleged spill occurred on December 12, 1975.

At the conclusion of the hearing, the Regional Board declined to refer the matter to the Attorney General for action and thereafter on March 18, 1976, the State Water Resources Control Board (State Board) adopted a resolution that the State Board review the matter on its own motion.^{1/}

I. BACKGROUND

At the time of the spill in question, Charles Persico operated an oil storage and distribution facility at 1236 South Main Street, Willits, California, on property which was owned by the Phillips Petroleum Company. It appears that subsequent to the spill, title to the property was transferred from Phillips to Persico. The property consists of a small bulk plant which receives, stores, and distributes petroleum products in Willits. One portion of the plant is devoted to a series of storage tanks which are connected by piping to a receiving point and to a loading rack. A concrete block retaining wall encircles the storage tanks to

1. State Board Resolution No. 76-19.

77-8

prevent uncontrolled discharge of spilled products in the event of leaks, tank ruptures or overflow accidents in accord with a spill contingency plan developed by Phillips Petroleum Company.

The retaining wall has been provided with a drain pipe and a manually operated valve to allow for removal of rainwater.

Deliveries to the plant are accomplished by highway transport trucks which are connected to a system which pumps, at about 90 gallons per minute, the delivered product to the proper storage tank, and, thereafter, the products are transferred to the local delivery trucks via the loading rack.

Allyn Transportation Company is a licensed common carrier which from time to time delivers petroleum products for Phillips Petroleum Company, hauling products to distribution points.

On the night of December 12, 1975, an Allyn Transportation Company truck operated by a company driver, Ted Wheeler, arrived with two 3,550 gallon tanks of diesel oil to make a delivery. The record of the hearing discloses that Mr. Wheeler transferred one tank load of diesel fuel to a nearly empty 5,000 gallon storage tank and then connected the second tank load to the storage tank. The Regional Board staff investigation revealed that the tank overflowed and approximately 2,000 gallons of diesel fuel was pumped through the system and onto the ground within the retaining wall. The drain pipe was open at the time and allowed a portion of the spilled product to flow out of the retaining wall and onto the street, down a storm drain and into Baechtel Creek. The driver was subsequently alerted by a city policeman who observed the spill and the driver then closed

the valves. (T. at 9)^{2/} Mr. Persico admitted at the Regional Board hearing that he had opened the valve in the retaining wall to drain rainwater and had not reclosed the valve. (T. at 36)

The staff investigation further disclosed that a portion of the spill entered Baechtel Creek which flows within the city of Willits for about one mile and thence into an area known as Little Lake Marsh which flows into Outlet Creek, a tributary of the Eel River. The area provides a natural habitat for fish and wildlife. The staff testimony indicated that because of the high wintertime water levels in the marsh, staff was not able to follow the course of the spill into the marsh and did not identify any spill-caused wildlife damage. (T. at 11.)

According to the testimony, Allyn Transportation notified the Coast Guard of the incident at around 9:00 a.m. on December 13, and the Regional Board received notification from the State Office of Emergency Services at about 10:00 a.m. December 13. Phillips Petroleum Company representatives contacted the Regional Board on December 15.

As a result of the incident, the driver of the truck, Mr. Wheeler, was cited by the Department of Fish and Game under Section 12015, California Fish and Game Code, and paid a fine through Allyn Transportation Company in the sum of \$625.00 after pleading nolo contendere.

2. Hereinafter, all such references are to the specified page of the transcript of the Regional Board hearing, dated February 26, 1976.

The testimony of Mr. Persico can be summarized as follows:

1. He had a total of approximately 10,000 gallons of capacity in two diesel fuel tanks (5,000 per tank) at the bulk plant at the time he placed the order with Phillips, the delivery of which resulted in the spill. Both tanks were nearly empty at the time of delivery.

2. 88⁰ gallons of diesel fuel were retrieved from inside the retaining wall after the valve in the wall was closed and a total of 1,916 gallons overflowed the tank; therefore, 1,027 gallons escaped from the retaining wall;

3. He (Persico) continues to be a consignee of Phillips for the purpose of sale of gasoline and bulk oil and that the tanks at the bulk plant are located within the retaining wall which surrounds the facility;

4. When he orders petroleum products for the Willits facility, he communicates only with Phillips, not with the trucking company which will make the delivery;

5. He has no knowledge of when deliveries will be made; after he places an order;

6. He opened the valve in the retaining wall on the morning of the day of the spill (December 12, 1975);

7. He was able to hear fuel splashing on the ground from his office when a previous spill occurred at the bulk plant;

8. The pump at his facility pumps at approximately 90 gallons per minute, so that it would have taken somewhat in excess of 20 minutes for the 2,000 gallons of fuel to spill;

9. There is a piece of equipment which can be purchased for about \$400 and installed in tanks such as the ones at the bulk plant which will automatically shut off the pump when the tank is full and;

10. Phillips gave him credit for the fuel lost in the spill. (T. generally at pages 34-42.)

11. Finally, Mr. Persico testified that the diesel fuel tanks are not labelled as to their capacity (T. at page 59); Mr. Pentoni, Mr. Persico's attorney, stated that the agreement which Mr. Persico had with Phillips was a "10 day tenancy" and that Mr. Persico could be "dispossessed" with 10 days' notice. (T. at page 41.) No other comment was made by any of the parties as to the terms of Persico's tenancy.

Mr. Wheeler, the driver for Allyn Transportation Company, testified, in summary, as follows:

1. He was never provided with any instructions either from Phillips, Allyn Transportation, or Mr. Persico regarding which tank the diesel fuel should be unloaded into or the capacity of the diesel fuel tanks at the bulk plant;

2. He is not required by Allyn Transportation Company to "stick" (measure the volume of liquid in a tank) prior to pumping

into it; rather, it is company policy that none of its employees should climb any tank;

3. In the last 10 years he has delivered to the Willits bulk plant 12-18 times but never delivered diesel fuel before;

4. There is nothing printed on either of the two diesel tanks to indicate their capacity;

5. For the last five minutes of pumping he climbed inside his truck with the door open to do some paperwork;

6. He arrived at the bulk facility at approximately 9:15 or 9:20 p.m. and stopped pumping at about 10 or 20 minutes to 11:00 p.m.;

7. He notified the Allyn Transportation dispatcher in Richmond of the spill prior to leaving the bulk plant at about 12:20 a.m.;

8. He stood near his truck during most of the transfer and that the second diesel tank (the one not filled) obscured his view of the tank that overflowed during the transfer process and that it is Allyn Transportation company policy that the driver must stand by his truck while it is unloading in order to shut off the valves in the truck in case of emergency and;

9. Other oil companies have locks on all of their storage tanks and transport truck drivers who pick up from these companies are given a key when they pick up their load that fits the appropriate tank only at the point of delivery. At the delivery point, the driver is given information as to the gross and net capacity of the tank into which he is to empty his load. (T. generally at pages 46-59.)

Finally, Mr. Wheeler testified that there was no one else at the bulk plant besides himself during his delivery until a police officer came to investigate the spill. (T. at page 69.)

We find that negligence has been clearly established by the record. The admitted forgetfulness of Mr. Persico, as the custodian of the plant, in failing to close the valve in the retaining wall, constituted a course of conduct that a reasonably prudent man would not follow under the circumstances. At the same time the failure of Mr. Wheeler, the truck driver, to take reasonable and necessary precautions to insure against an overflow of the 5,000-gallon capacity tank after he had already discharged one 3,500 gallon truck tank into it constitutes negligence. There is evidence in the record that such spills are audible and that the spill must have occurred over a period of twenty minutes. Further, for the last five minutes of his delivery Mr. Wheeler was sitting inside his truck in violation of Allyn Transportation Company policy, doing paperwork, which certainly would have distracted him and prevented him from paying proper attention to possible problems with the delivery. In addition, there is evidence in the record that Allyn Transportation neither sought nor conveyed to its driver any information regarding which tanks were to be filled at the delivery point or the net capacity of either tank or the proper delivery procedure. Also, there is evidence that Phillips is responsible for painting of the tanks and that the tanks were not labelled as to the capacity, that there are delivery procedures which have been implemented by other oil companies but not used in this case which aid transport drivers in determining the net capacity of the tanks which are to be filled, and that the transport driver, Mr Wheeler, was not informed by Phillips or any other party as to the location or capacity of the tanks to be filled.

In conclusion, therefore, we find that there was an oil spill caused by negligent acts or omissions of the three parties, that each of them was responsible for the discharge, that the spilled fuel made its way into waters tributary to the Eel River and that the incident clearly falls within the enforcement provisions contemplated by Sections 13350 and 13385 of the Water Code.

Although we are hesitant to reverse the findings and orders of the Regional Board in such matters, we find that this matter should have been referred to the Attorney General for such legal action as he might deem appropriate.

IV. CONCLUSIONS

After review of the record, and for the reasons heretofore expressed, we have reached the following conclusions:

1. That each of the parties to the Regional Board hearing (Charles Persico, Allyn Transportation Company, and Phillips Petroleum), negligently caused or permitted a discharge of oil to the waters of the State and the navigable waters of the United States as that term is defined in the Federal Water Pollution Control Act Amendments of 1972 [P.L. 92-500. See Section 502(7)] and;

2. That the action of the Regional Board in failing to refer the matter to the Attorney General for appropriate legal action was inappropriate and improper.


V. ORDER

IT IS HEREBY ORDERED that the State Board Executive Officer take all necessary action to refer the matter of the alleged oil spill of December 12, 1975, by Phillips Petroleum Company, Allyn Transportation Company, and Charles Persico to the Attorney General for legal action under Sections 13350(a)(3) and 13385 of the Water Code, and for such other relief as may be appropriate.

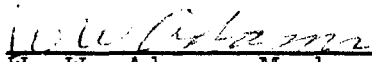
Dated: April 21, 1977



John E. Bryson, Chairman



W. Don Maughan, Vice Chairman



W. W. Adams, Member



Roy E. Dodson, Member



Jean Auer, Member

II. CONTENTIONS

Each of the parties involved in the Regional Board hearing argued, in essence, that the spill was not caused by its action or failure to act and that, in any event, it did not intentionally or negligently cause the spill.

III. FINDINGS

In the following paragraphs, the testimony of the witnesses for the three parties is summarized.

The testimony of Phillips Petroleum through its marketing representative for the northern counties of California, Mr. Nelson, can be summarized as follows:

1. As to diesel fuel, Mr. Persico was not a consignee of Phillips but simply a buyer and that, as a result, Phillips was not responsible for any spills of diesel fuel from the Willits bulk plant facility;
2. The Willits facility was leased to Mr. Persico who manages and operates it;
3. Phillips does not manage or operate the facility and has no employees there;
4. Mr. Persico has covenanted with Phillips to "protect Phillips against any loss or liability arising from his business operations there";
5. Phillips installed the retaining wall and valve around the bulk plant;
6. Phillips submitted an oil spill contingency plan to EPA for the bulk plant and;
7. That he assumes Phillips has responsibility for painting the tanks at the bulk plant. (T. generally at pages 20-31.)