STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of JOHN STUART, DOING BUSINESS AS STUART PETROLEUM For Review of Cleanup and Abatement Order Dated February 11, 1986, California Regional Water Quality Control Board, Central Valley Region. Our File No. A-424.	ORDER NO. WQ 86-15

BY THE BOARD:

On February 11, 1986, the Executive Officer of the California Regional Water Quality Control Board, Central Valley Region (Regional Board), using the authority delegated to him by the Regional Board, issued a cleanup and abatement order. The order concerned underground contamination caused by gasoline which the Executive Officer believed had come from a service station in Glenville (Kern County) known as Jerry's Automotive. The order directed the property owner, Paul Arnold, the lessee John Stuart doing business as Stuart Petroleum, and the operators and sublessees Jerry L. and Patricia M. Pitts, to begin taking remedial action and set up a schedule for compliance and reporting. Among the actions required by the order were providing alternative drinking water supplies, investigating the extent of the problem, and undertaking both immediate and long-term cleanup.

On March 10, 1986, the State Water Resources Control Board (State Board) received a petition from John Stuart doing business as Stuart Petroleum seeking review of the cleanup and abatement order. On July 10, 1986, the State Board received a request for stay and on August 1, 1986, the State Board

received points and authorities and a declaration supporting that request. Because this order deals with the merits of the petition, the stay request will not be discussed.

I. BACKGROUND

In July 1985, the Kern County Health Department discovered gasoline contamination of a water well near the Glenville Shopping Center Complex. Water wells within a 1/4 mile radius of the shopping center were subsequently sampled and eight wells were found to contain contaminants originating from gasoline. Two wells were found to contain several inches of gasoline.

Jerry's Automotive is at the corner of State Highway 155 and Dunlap Road in the Glenville Shopping Center Complex. Gasoline has been stored in underground tanks for retail sale at this location for several years.

II. CONTENTIONS AND FINDINGS

Petitioner has made the following major contentions in support of his request that the cleanup and abatement order not be applied to him.[1]

1. Contention: There is insufficient evidence that the underground tanks at the gasoline station are the source of the ground water pollution.

Finding: The City of Glenville is a small community in a rural setting. There is only this one gasoline station in town and no other apparent

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[1] Other contentions raised by the petitioner will not be considered. They do not raise substantial issues that are appropriate for review. (23 Cal.Admin.Code §2052(a)(1).) For example, petitioner asserts that the issuance of a cleanup and abatement order by the Regional Board's Executive Officer violated constitutional principles of due process. We have considered and rejected this issue previously in Order No. WQ 86-13.

gasoline sources near the station. Wells in the immediate vicinity of the station and downgradient from the station have become contaminated with gasoline. Solely on this basis it is reasonable to conclude that the gasoline station is the source of the pollution.

In October 1985, Kern County Health Department retained IT Corporation (IT) to investigate the presence of gasoline in ground water in Glenville. A draft ground water contamination assessment was released in May 1986 (Project No. 240030). The technical approach to accomplish the study objectives included the following field activities:

a. Performing soil borings to investigate vadose zone characteristics and to locate possible sources of gasoline constituents in the ground water system.

b. Performing a vapor probe survey to estimate the boundary of the free product plume.

c. Ground water sampling of wells to investigate ground water quality at the site.

d. Surveying well casing elevations and measuring water level elevations to determine hydraulic gradients and ground water flow directions.

All of these activities have provided information which is consistent with the finding that the underground tanks at the service station are the source of ground water pollution.

The soil samples from borings around the gasoline tanks showed high concentrations of benzene, ethyl benzene, tolune, and xylene (BETX) which is considered evidence of gasoline contamination. The vapor probe survey also found high hydrocarbon concentrations in the vicinity of the underground gasoline tanks.

Current water level measurements indicate a radial flow direction from the area of the underground tanks towards the southeast and southwest. Dissolved BETX has been found in a number of wells downgradient from the tanks and consistent with the anticipated flow direction.

The petitioner has presented a number of arguments which should be addressed. It was pointed out that Kern County identified five possible sources of gasoline in the area: the CALTRANS facility, the Glenville Fire Department, the Kern County maintenance yard, the Shopping Center gas station and three abandoned tanks. A site visit established that the CALTRANS facility and the Kern County maintenance yard are not logical candidates because they are too far from the polluted wells. In addition, the Fire Department is at least 40 feet downgradient from most of the pollution. There are what appear to be some abandoned underground tanks very near the gas station. However, soil probe analysis showed no significant pollution near the abandoned tank and engineers visiting the site have made the subjective observation that the free product found in surrounding wells was fresh gasoline. Consequently, all of the other known potential sources can be reasonably excluded from consideration.

The petitioner claims that an attempt by Kern County to chemically correlate the free product in wells with gasoline in the service station tanks provided evidence that the underground tanks were not the source of pollution. This study is not particularly reliable. Different batches of gasoline vary in chemical composition. Futhermore, the composition of gasoline will change after moving through a soil column and contacting ground water. Consequently, the composition differences found are not unexpected.

Another contention made by the discharger is that one of the wells (Well No. 6) containing free product is upgradient from the underground tanks.

Water level elevations taken in April 1986 show that Well No. 6 is actually hydraulically downgradient from the tanks. This condition may change at other times depending on pumping rates of surrounding wells and Well No. 6, but free product from the tanks can reach Well No. 6.

The final point raised by the petitioner on this issue is their assertion that the underground tanks do not leak. Several Petrotite leak detection tests were run on the tanks. These tests did not detect any leakage. While the results of these tests must certainly be considered in determining whether the tanks are the source of pollution, we find that such results are not sufficient to offset the evidence pointing the other way. It should be noted that this type of leak detection test can generate inaccurate results if proper procedures are not followed or if incorrect calculation of the temperature compensation occurs. There is also the possibility that the existing tanks or interconnecting piping may have leaked in the past and were subsequently repaired. A final possibility is that the pollution was caused by spills and not by leakage. According to County officials, at least one major spill incident has occurred at the station.

2. Contention: Petitioner, as lessee and sublessor of the property, is not responsible for any contamination which might have originated on the property.

Finding: Petitioner contends that neither the terms of the leases nor the legal doctrine of strict liability make him responsible for what happens on the property. He is mistaken on both counts.

Water Code Section 13304 contains the following language:

> "Any person who . . . has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state . . . shall, upon order of the regional board, clean up such waste or abate the effects thereof . . . ."[2]

The key question in assigning responsibility for the cleanup and abatement of this gasolene spill is whether petitioner caused or permitted it. There is no evidence in the record that petitioner caused the contamination. However, in our view, he did permit it.

In Order No. WQ 84-6, we held that "permitting" something to happen included failing to take action when "the ability to obviate the condition" existed. We reached a similar conclusion in Order No. WQ 86-2. The question is whether, under the lease between Arnold and the petitioner and the sublease between the petitioner and Pitts, petitioner was in a position to prevent the leak or spill if he had known about it.[3] In other words, did petitioner have the legal power to stop the contamination?

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[2] The legislative intent to provide strict liability in this section is clear, since the statute was amended in 1980 to remove the requirement that intention or negligence be present where the discharge does not violate a Regional Board order or prohibition. (Stats. 1980, Chap. 808, p. 2538 §3.) A change in wording imples legislative intent to change the effect of a statute. Sutherland on Statutory Construction 4th Edition, Section 22.30; People v. Dillon (1983) 34 Cal.3d 441, 194 Cal.Rptr. 390. See also People v. Chevron Chem. Co. (1983) 143 Cal.App.3d 50, 191 Cal.Rptr. 537, in which the court refused to read a requirement to show intent or negligence into a section of the Fish and Game Code which makes it a crime to place certain materials in waters of the state.

[3] Actual knowledge of the contamination need not be shown where it is reasonable for a person to be aware of the dangers generally inherent in the activity. In Order No. WQ 84-6 we examined factors involving general knowledge of the operation and normal dangers common to it and found that one who should have known is in the same position as one who did know. Problems of leaking underground tanks have become common knowledge, particularly in the oil

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It is not the province of this Board to assign rights and duties between various third parties based on their mutual contractual obligations. Those issues must be decided elsewhere. However, we are obliged to examine the two leases in this case to determine whether there is a threshold of responsibility to the public which can be imposed on the petitioner.

On January 11, 1984, the petitioner leased the property from Paul Arnold for one year with an option for another, at $250 per month plus a percentage of gasoline sales. The renewal option was exercised. Among other things the lease provided that the petitioner would comply with all statutes, ordinances, and requirements of all authorities and would be responsible for maintenance and repairs to the premises, including "plumbing and heating installations and any other system or equipment upon the premises." The petitioner subleased the property to Pat Littrell for most of 1984, then, on December 4, 1985, entered into a one-year sublease with Jerry Pitts. The sublease called for rent at $450 per month. Although some of the terms of the sublease were similar to those in the lease, many terms are different. For one thing, the sublessor was not made fully responsible for maintaining and repairing the premises.

Petitioner has cited several cases in support of his position that he should not be held responsible. On close examination none is compelling. Glen R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal.2d 666, 75 Cal.Rptr. 889

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[3] (FOOTNOTE CONTINUED)

business, in recent years and legislative responses (e.g. Health and Safety Code §25280 et seq.) have called further attention to the issue.

In some instances criminal penalties have been imposed despite the lack of actual knowledge. People v. Travers (1975) 52 Cal.App.3d 111, 124 Cal.Rptr. 728; Aantex Pest Control v. Structural Pest Control Board (1980) 108 Cal.App.3d 696, 166 Cal.Rptr. 763.

is cited for the proposition that a sublessee is responsible for complying with safety codes. The case relies on the general rule that the lessor must comply but finds exceptional circumstances that tipped the balance. There the sublease specifically relieved the sublessor of all duties to repair and maintain. That condition does not exist in the lease with which we are concerned.

Another case, Petroleum Collections, Inc. v. Swords (1975) 48 Cal.App.3d 841, 122 Cal.Rptr. 114, holds that a landowner has a responsibility to a lessee and a sublessee for dangerous conditions on the property. While this is true, it does not address the issue of responsibility to third parties. There the law remains clear that all three, lessor, lessee, and sublessee may be held responsible. (Restatement Property 2d; Landlord and Tenant, §18.1, Comment C.) Indeed, in the Loverde case previously discussed, the state Supreme Court said:

> "In such a case public policy requires that someone at all times be obliged to comply with such laws and orders, and parties to a lease will not be permitted to create a hiatus in their respective duties of compliance." 70 Cal.2d 666, 672.

Finally, the petitioner relies on an opinion of the Attorney General (26 Ops.Atty.Gen. 88) issued in 1955. This opinion stated (as we did in Order No. WQ 86-2) that waste discharge requirements should be placed on all persons with the present legal control over the property. Waste discharge requirements are not at issue here and the basic policy considerations behind Water Code Section 13304 are somewhat different. Petitioner's lack of present control is

not relevant. Responsibility for a problem created in the past is. The landowner has assured the Regional Board in writing that he will permit access to the property for the purposes of cleaning up the problem.

The petitioner argues that either Arnold, as the property owner, or Pitts, as the station operator, or both should be responsible, not him. He claims he "never did take physical possession of the premises" (Petitioner's Response, p. 12) and "does not now have any legal interest whatsoever in the subject premises" (p. 17). From those two literal truths he would have us infer that he never did have a legal interest. He confuses the legal distinction between the assignment of a lease where the lessee divests himself of all further benefits and burdens and a sublease where the lessee wears two hats and no direct contract exists between the lessor and the sublessee. (Witkin, Summary of California Law, Eighth Edition, p. 2163.) At all times during the lease period, petitioner had an important legal interest in the property and derived income from it. It is disingenuous for petitioner to argue that he had nothing at stake in the property. Accordingly, we find the action of naming the petitioner, along with the lessor and the sublessees, as a party responsible for the cleanup to be appropriate and proper.

III. CONCLUSIONS

The cleanup and abatement order issued by the Executive Officer was appropriate and proper. While the evidence of the source of gasoline contamination is not conclusive, it is a sufficient basis for the order. The contractual position of the petitioner as a lessee and sublessor of the service station give him enough legal control over the property to hold him responsible for what took place there.

IV. ORDER

The petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 18, 1986.

AYE: W. Don Maughan, Chairman
Eliseo M. Samaniego, Member
Danny Walsh, Member

NO: Edwin H. Finster, Member

ABSENT: Darlene E. Ruiz
Vice Chairwoman

ABSTAIN: None

Maureen Marche'
Administrative Assistant to the Board