

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
THE BOC GROUP, INC.)
For Review of Cleanup and Abatement)
Order No. 88-146 of the California)
Regional Water Quality Control Board,)
Santa Ana Region. Our File No. A-591.)

ORDER NO. WQ 89-13

BY THE BOARD:

On November 10, 1988, the California Regional Water Quality Control Board, Santa Ana Region (Regional Board), adopted Cleanup and Abatement Order No. 88-146 to address the effect of discharges from an abandoned underground storage tank. The Order directed the current property owner, the Koll-Columbia Venture (Koll-Columbia), and the prior owner, The BOC Group, Inc. (BOC), to conduct a subsurface investigation and to take remedial action.

On November 30, 1988, the State Water Resources Control Board (State Board) received a timely petition from BOC seeking review of the Order. BOC contends that it should not be named in the Order.

I. BACKGROUND

Koll-Columbia owns property located in Irvine, California. It recently implemented a dewatering project at the

site as part of the development and construction of an athletic club facility. The Regional Board had waived the requirement for a Report of Waste Discharge for the project because it appeared that no significant pollutants would be present in the discharge. The waiver was conditioned on the discharge not causing a nuisance or pollution.

On September 20, 1988, the Koll Construction Company, acting as contractor for the development, commenced grading activities on the property. On September 27, 1988, its earth-moving equipment struck a previously abandoned and undocumented 1,000 gallon underground storage tank, without causing the contents of the tank to spill. The storage tank contained approximately 500 gallons of liquid chlorinated hydrocarbons, including tetrachloroethylene (PCE) at 7,000,000 parts per billion (ppb) and trichloroethylene (TCE) at 1,500,000 ppb. Soil surrounding the tank was contaminated with levels of PCE up to 670,000 ppb, 1,1-dechloroethane up 380 ppb, and total petroleum hydrocarbons up to 49,000,000 ppb. Ground water samples from the dewatering wells surrounding the tank contained concentrations of TCE and 1,1-dichloroethane in excess of state drinking water action levels and PCE below action levels.

After discovery of the leaking underground storage tank, the Regional Board staff informed Koll-Columbia that the waiver from the Report of Waste Discharge Requirements was rescinded because of the pollution problem. In the meantime,

Koll-Columbia had removed the contents of the tank, the tank, and the contaminated soil. On October 19, 1988 it submitted a workplan to investigate the extent of the ground water pollution.

Prior to 1966, the property was owned by the Irvine Industrial Complex (the Irvine Company). At that time, there were no structures on the property and it was used for agricultural purposes. It was sold to BOC (formerly called the Air Reduction Company) in three separate purchases in August 1966, December 1968, and April 1971. BOC constructed, owned, and operated a facility on the property for the manufacture of oil exploration and mining equipment. The maintenance of service equipment was routinely performed in the building adjacent to the underground storage tank.

Aerial photographs of the property indicate that in 1966 there were no buildings on the property; in 1968 there were two large industrial buildings, parking lots, and several smaller structures; in 1972 the parking lots were larger, a third large building had been constructed, and an unpaved storage area of large equipment existed; in 1975 there were no new buildings but the storage areas were larger and large equipment was present near the three buildings; in 1983 a new large structure was present in the unpaved storage area; in 1986 all structures had been demolished. The record contains no documentation of when the storage tank was placed in the ground, but it was located

next to the two large buildings existing on the property as early as 1968. Evidence in the record suggests that the tank was less than 20 years old when discovered by Koll-Columbia.

II. CONTENTION AND FINDING

Petitioner has made the following contention in support of its request that it be relieved of the obligation to comply with the cleanup and abatement order.

Contention: Petitioner contends that it owned and sold the property without ever detecting or having reason to detect the underground storage tank and therefore it is not liable for the pollution because it is an "innocent prior owner".

Finding: Petitioner argues in its Memorandum of Points and Authorities that it is not liable for the pollution caused by the underground storage tank under what it considers the applicable law. It argues that under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. Section 9607, which is explicitly incorporated into the Health and Safety Code,¹ it is not a liable party because it owned and sold the property without having any knowledge of a hazardous waste problem.

Petitioner is incorrect. First, Section 107 of CERCLA and Section 25323.5 of the Health and Safety Code do not control whether petitioner should be held liable. The cleanup and

¹ Section 25323.5 of the Health and Safety Code (the Carpenter-Presley-Tanner Hazardous Substance Account Act) explicitly incorporates Section 107 of CERCLA into the state law for purposes of defining liable parties.

abatement order was issued under the authority of Section 13304 of the Water Code (Porter-Cologne Water Quality Control Act). Thus, the Porter-Cologne Act, not CERCLA and the Health and Safety Code, is the applicable California law.²

Section 13304 of the Water Code authorizes the Regional Board to issue a cleanup and abatement order against 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 the waters of the state and creates, or threatens to create, a condition of pollution or nuisance . . ."

The central question in this matter is whether BOC caused the waste to be discharged where it creates or threatens to create a condition of pollution or nuisance. BOC would be liable under Section 13304 if it placed the tank in the ground where it was abandoned and thus threatens to create a pollution or nuisance.

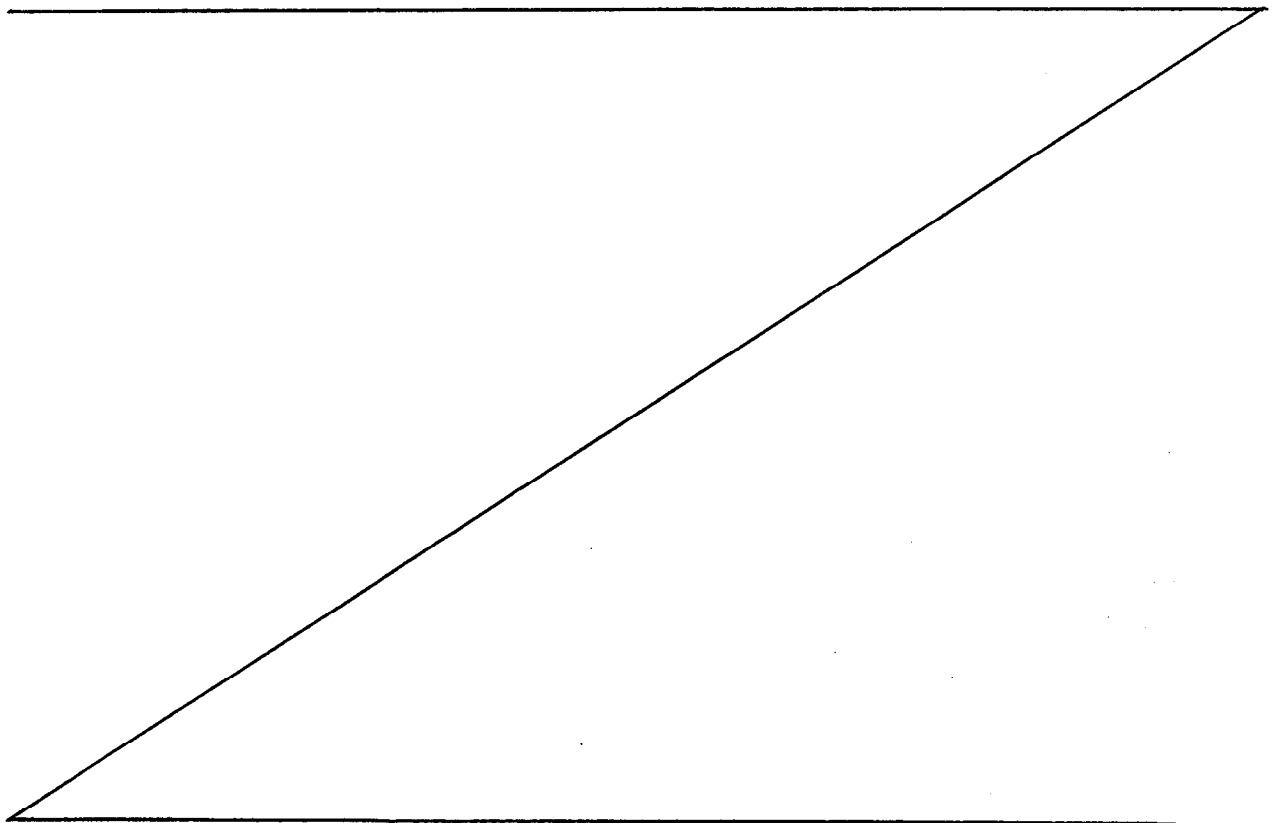
² Even if CERCLA were applicable, the petitioner incorrectly interprets Section 107(a)(2) as it applies to prior owners. Section 107(a) of CERCLA places liability on "any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of" from which "there is a release" of a hazardous substance. Section 101(22) of CERCLA defines the term "release" to include the abandonment of containers containing any hazardous substance. BOC owned the property at the time the storage tank was abandoned; under CERCLA such abandonment constitutes a "release" of a hazardous substance and thus constitutes the disposal of a hazardous substance. BOC is not an innocent prior owner because it appears from the record that the storage tank was placed on the property while it was owner.

While no written documentation appears in the record indicating who placed the tank in the ground, it is reasonable to infer from the record that BOC is the only person who would have placed the tank on the site. The record and the aerial photographs indicate that prior to BOC's purchase of the property, there had been no development of the property; it was used only for agricultural purposes. Immediately after purchasing the property, BOC constructed the manufacturing facility. Koll-Columbia purchased the property in 1983 (although BOC continued to lease the property for a year) and the structures were removed in 1986, presumably by Koll-Columbia. Koll-Columbia has not placed any structures, including tanks, on the property since it acquired it. The substances identified in the soil and ground water are the same type of substances as those found in the tank. Investigation of the soil and ground water indicate that the source of the pollution is the tank. The solvents found in the tank are used as cleaning or degreasing agents in manufacturing finished metal products or in repairing or maintaining mechanical equipment. Such substances would be used in the type of operation conducted by BOC at the property. In fact, BOC maintained equipment in a building adjacent to the location of the tank. In addition, no other activity of this type was conducted on the property by anyone else. Neither the prior owners or the subsequent owners would use those types of substances in their activities. Therefore, it is reasonable to conclude that BOC was responsible for placing the tank at the property.

It is not possible to establish when the tank began leaking its contents to the soil and ground water because of the effect of the dewatering operations on the ground water flow. However, the existence of the tank in the ground and the fact that it was abandoned constitutes a threat to create a condition of pollution or nuisance. Thus, even though the tank may not have leaked while BOC still owned the property, BOC caused the discharge because the existence of the abandoned tank threatened to cause and is still causing pollution.

III. CONCLUSIONS

The cleanup and abatement order adopted by the Regional Board was appropriate and proper. The Regional Board properly named BOC as a party to the order.



IV. ORDER

IT IS HEREBY ORDERED THAT 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 August 17, 1989.

AYE: W. Don Maughan
 Darlene E. Ruiz
 Edwin H. Finster
 Eliseo M. Samaniego
 Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board

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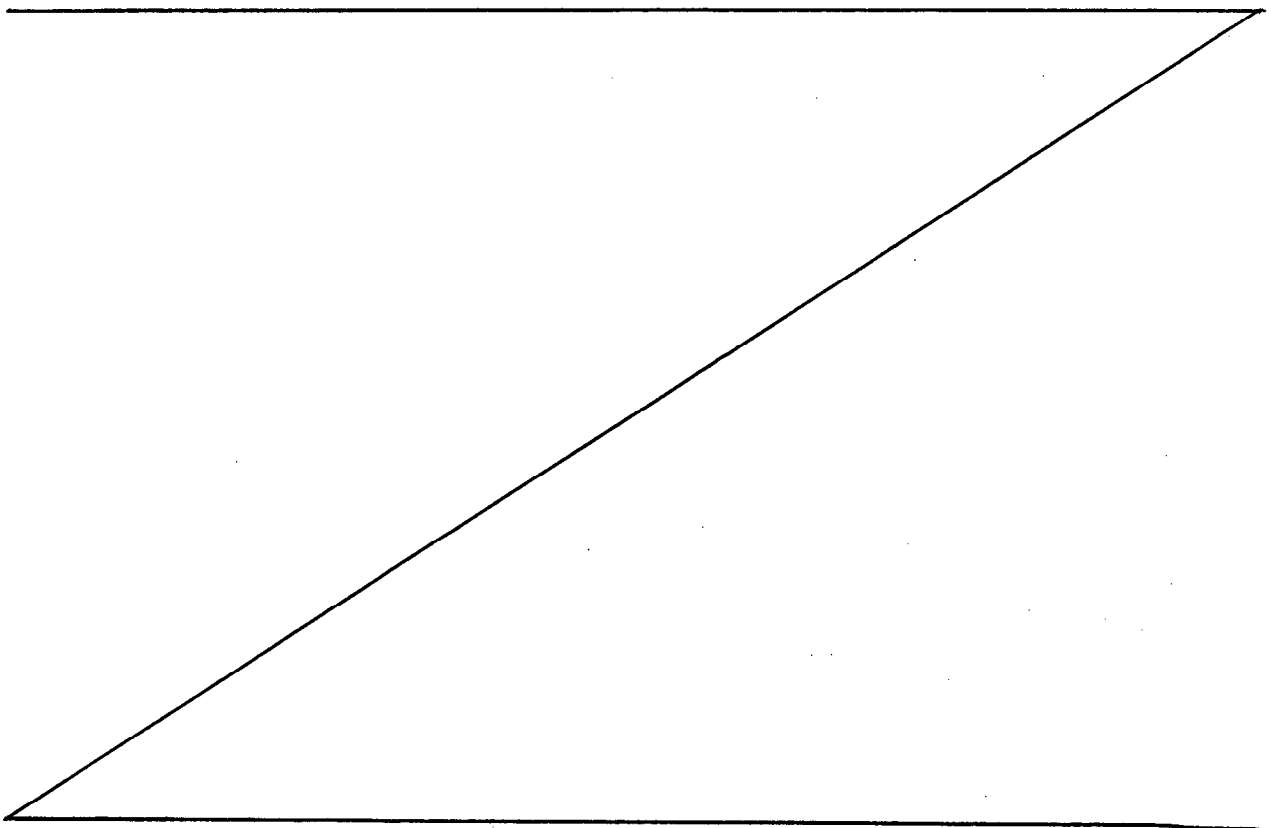
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NO: None

ABSENT: None

ABSTAIN: None



Maureen Marché
Administrative Assistant to the Board