Keith

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of **WENWEST, INC., SUSAN ROSE, WENDY'S INTERNATIONAL, INC. AND PHILLIPS PETROLEUM COMPANY** For Review of Cleanup and Abatement Order No. 92-041 by the California Regional Water Quality Control Board, San Francisco Bay Region. Our Files Nos. A-799, A-799(a), and A-799(b).	**ORDER NO. WQ 92-13**

BY THE BOARD:

On April 15, 1992, the California Regional Water Quality Control Board, San Francisco Bay Region (RWQCB), adopted Cleanup and Abatement Order No. 92-041 directing the cleanup of soil and ground water at a site in Concord. The contamination consists of gasoline and dissolved hydrocarbons at and near a former service station. The site is now occupied by a Wendy's hamburger restaurant. The RWQCB named five parties in its order: the former operators of the service station, the oil company whose predecessor owned the property, Wendy's International, Wenwest--the franchise owner, and Susan Rose, a retired school teacher in Hawaii who has inherited the real property from her mother. All but the former operators have filed timely petitions with the State Water Resources Control Board (State Water Board). All argue that it is improper to name them in the order and, in the alternative, that the RWQCB abused its discretion when it refused to place them in a position of secondary responsibility.

I. BACKGROUND

There has been a service station on the site since near the end of World War II. From 1960 until 1980, the property was owned by a subsidiary of Aminoil USA, Inc. and leased to Redding Petroleum, Inc. (Redding). Aminoil USA, Inc. merged with Phillips Oil Company which became Phillips Petroleum Company in 1985. Redding operated a service station at this location from 1960 until 1984. Redding bought the property from Aminoil in 1980 and transferred title to Mr. and Mrs. Redding. They transferred it back to their corporation for sale to Wendy's International in 1984. Later that same year, after Wendy's found that Wenwest was qualified to build and run a restaurant, it sold the site to the franchisee. The following year, Wenwest sold the property to the mother of Susan Rose and immediately leased it back. Before escrow closed, the woman died leaving her daughter to take title. Ms. Rose still owns the property subject to a lease with Wenwest.

Contamination problems first came to light in the early 1980's. A neighbor began to detect floating gasoline in his well located some 150 feet downgradient of the service station. In 1983, responding to a complaint from that neighbor, Redding determined that an inventory loss of 600-800 gallons had taken place. Redding did some cleanup work with an extraction well and closed the underground tanks. When the property was sold in 1984, Redding claims it told Wendy's of the problem. Wendy's consultant noted in a report that "a gasoline layer was noticed floating on the groundwater in the borehole." However, no

remediation was recommended or undertaken. In 1985, after Wenwest bought the property and built the restaurant, strong hydrocarbon odors were found in the women's restroom. An investigation by a different consultant was inconclusive and no action was taken. A subsequent and more extensive investigation by the second consultant began about three years later. By 1990 they had found strong evidence of gasoline contamination. Levels as high as 210,000 ppb total petroleum hydrocarbons were found in ground water. Those findings are the basis of the order RWQCB's order we now review.

II. CONTENTIONS AND FINDINGS

Contention: Each petitioner makes the same basic claim that the RWQCB should have left them off the order or that they should have been treated as secondarily responsible for the cleanup.[1]

Findings: The RWQCB properly included Phillips Petroleum as a fully responsible party. Wendy's International should not have been included as a discharger in the cleanup and abatement order. Wenwest and Susan Rose are properly included in the order but should be treated as secondarily responsible for the tasks in the order.[2]

---

1 All contentions not discussed in this order are denied for failure to raise substantial issues appropriate for review. Title 23, California Code of Regulations, Section 2052(a)(1). People v. Barry (1987) 194 Cal.App.3d 158, 139 Cal.Rptr. 349.

2 At the time the RWQCB issued its order, work was not progressing on the cleanup. This led the RWQCB to decide that the primary/secondary distinction was inapplicable. This was not an unreasonable conclusion for the RWQCB to reach. We now take notice that work is progressing satisfactorily and will address the case as it stands before us.

1. Phillips Petroleum

Although the Phillips name was not associated with the service station during its years of operation, the entity which owned the property from 1960 until 1980 was a subsidiary of what has since become Phillips Petroleum. The question before us is whether Phillips' predecessor acted in such a way as to obligate Phillips to participate in the cleanup. Under precedent established by this Board (see Petition of John Stuart, Order No. WQ 86-15), we apply a three-part test to former owners: (1) did they 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?; and (3) did they have the legal ability to prevent the discharge? The answer to all three questions is affirmative as regards Phillips' predecessor.

While the only documented discharge of gasoline occurred in 1983, the record shows clearly that discharges took place much earlier. Phillips has offered no evidence to rebut the reports made by Wendy's and Wenwest's consultant that, considering the soil in the area and the distance the gasoline has travelled to reach the neighbor's well, discharges took place at least 12 years before it was detected by the neighbor. That places the time of discharge well within the ownership of the property by Phillips' predecessor. Phillips' argument that the 1983 leak somehow caused the pollution of the well that same year flies in the face of common sense and the laws of nature.

That Phillips' liability arises because of discharges which took place before 1980 is of no legal significance. The discharge of hydrocarbons into the State's ground water was a violation of the law long before 1980.

2. Wendy's International

We have issued many orders addressing the question of who is responsible for ground water cleanups. No order issued by this Board has held responsible for a cleanup a former landowner who had no part in the activity which resulted in the discharge of the waste and whose ownership interest did not cover the time during which that activity was taking place. Considering those facts and the existence of other fully responsible parties, we see no reason to establish that precedent in this case. We have applied to current landowners the obligation to prevent an ongoing discharge caused by the movement of the pollutants on their property, even if they had nothing whatever to do with putting it there. (See Petition of Spitzer, Order No. WQ 89-8; Petition of Logsdon, Order No. WQ 84-6; and others.) The same policy and legal arguments do not necessarily apply to former landowners.

In this case, the gasoline was already in the ground water and the tanks had been closed prior to the brief time Wendy's owned the site. They were told about the pollution problem by their consultant and perhaps by Redding. They took no steps to remedy the situation. On the other hand, they did nothing to make the situation any worse. Had a cleanup been ordered while Wendy's owned the site, it would have been

proper to name them as a discharger. Under the facts as presented in this case, it is not.

In short, we conclude that it is inappropriate to include Wendy's as a discharger based on a number of considerations. Among the factors unique to this case are:

- Wendy's purchased the site specifically for the purpose of conveying it to a franchisee.
- Wendy's owned the site for a very brief time.
- The franchisee who bought the property from Wendy's is named in the order.
- Wendy's had nothing to do with the activity that caused the leaks. (In previous orders in which we have upheld naming prior owners, they have been involved in the activity which created the pollution problem. [See Logsdon Petition, op. cit., Petition of Stinnes-Western, Order No. WQ 86-16, and Petition of The BOC Group, Order No. WQ 89-13.])
- Wendy's never engaged in any cleanup or other activity on the site which may have exacerbated the problem.
- While Wendy's had some knowledge of a pollution problem at the site, the focus at the time was on a single spill, not an on-going leak.
- Wendy's purchased the site in 1984 at a time when leaking underground tanks were just being recognized as a general problem and before most of the underground tank legislation was enacted.

- There are several responsible parties who are properly named in the order.
- The cleanup is proceeding.

3. Susan Rose

As we indicated above, the current landowner, however blameless for the existence of the problem, should be included as a responsible party in a cleanup order. We have taken that position many times in the past and have never ruled to the contrary. Thus, we find that the RWQCB was correct in naming Susan Rose in its order.

The issue of secondary liability remains. This concept is one which we have discussed in a relative few of our orders. We first used it, without that label, in our order concerning the development of solar power plants in the Southern California desert. (See Petition of Southern California Edison, Order No. WQ 86-11.) Later we applied the principle to a mining operation on federal land. (See Petition of U.S. Department of Agriculture, Order No. WQ 87-5.) In both cases, the Regional Water Board had decided to place the petitioner in a position of secondary responsibility and we concurred.

We first applied this principle over the wishes of the Regional Water Board in another 1987 order. (See Petition of Prudential Insurance Company of America, Order No. WQ 87-6.) There we found that the unique facts of that case (a long-term lease with little actual access along with a cleanup that was well under way) justified putting the landowner in a position where it would have no obligations under the order unless and

until the other parties defaulted on their's. In 1989, we again affirmed a Regional Water Board order which utilized the secondary liability approach. (See Petition of William R. Schmidl, Order No. WQ 89-1.) We have also required a Regional Water Board to include a previously unnamed party and to give that person secondary liability status in circumstances similar to the Prudential petition. (See Petition of Arthur Spitzer, Order No. WQ 89-8.)

Based on our earlier decisions and the information in the record, we find it appropriate that Susan Rose be listed in the cleanup and abatement order as secondarily responsible party. While she is the current landowner, it is clear that she neither caused nor permitted the activity which led to the discharge. The order will be redrafted to reflect that change.

4. Wenwest, Inc.

The situation with regard to Wenwest is a little bit more complicated. Because Wenwest had nothing to do with the activity which caused the discharge and is, like Wendy's International, a former owner of the land, it could be argued that it does not belong in the order at all. However, we find that the controlling interest which Wenwest has in the property, springing as it does from a sale/lease back arrangement with an absentee landowner, places it in a position of some responsibility. Wenwest exercises all the normal attributes of day-to-day ownership of the property. We see no reason to treat Wenwest any differently from Susan Rose. Wenwest should be named as a secondarily responsible party.

III. CONCLUSION

The cleanup and abatement order issued by the RWQCB must be modified to remove one party and change the status of two others. The RWQCB properly included Phillips Petroleum whose predecessor owned the property and leased it to a service station operator during a time when leaks from the underground storage tanks were clearly taking place. Wendy's International has no present interest in the property and never owned it during the time the tanks were actually leaking. There is no basis to include Wendy's International in the order. Wenwest, the operator of the restaurant on the site, and Susan Rose, the owner of the property at present, both belong on the order as responsible parties. However, because they had nothing to do with the actual discharge and because the two primarily responsible parties are capable of and willing to undertake the cleanup, Wenwest and Ms. Rose should be required to perform the cleanup only in the event of default by Redding and Phillips.

IV. ORDER

It is hereby ordered that Cleanup and Abatement Order No. 92-041 be amended to remove Wendy's International, Inc. from the list of dischargers and to state that Wenwest, Inc. and

///

///

///

///

///

Susan Rose are only to be held responsible for the performance of the listed tasks in the event that Redding and Phillips fail to fulfill their obligations.

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 October 22, 1992.

AYE: W. Don Maughan
John Caffrey
Marc Del Piero
James M. Stubchaer

NO: None

ABSENT: Eliseo M. Samaniego

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board