STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2002 - 0021

In the Matter of the Petition of

MEHDI MOHAMMADIAN

For Review of Alameda County's Notice of Revision
To Responsible Party Designation

BY THE BOARD:

Mr. Mehdi Mohammadian (Petitioner) seeks review of a decision by the Alameda County Department of Environmental Health (County) to remove Texaco Inc. (Texaco) and Jessen and Agnes Calleri (the Calleris) from the list of responsible parties for cleanup at Petitioner's Underground Storage Tank (UST) release site in San Lorenzo, California. After a review of the record and for the reasons set forth below, the State Water Resources Control Board (SWRCB or Board) denies the petition in part and remands the remaining matters raised by Petitioner to the County for consideration and action consistent with this Order.

I. STATUTORY, REGULATORY, PROCEDURAL AND FACTUAL BACKGROUND

This petition arises from the SWRCB's Underground Storage Tank Local Oversight Program (LOP). The SWRCB's LOP provides for local agency abatement of, and oversight of the abatement of, unauthorized releases of hazardous substances from USTs. In implementing the LOP, the SWRCB is authorized to enter into contracts with local agencies to oversee site cleanup of unauthorized releases. (Health & Saf. Code, § 25297.1, subd. (b).) Alameda County has a contract with the SWRCB and is participating in the LOP.

Following an unauthorized release of a hazardous substance from a UST, local agencies in the LOP are required to identify the responsible party or parties and notify these parties of their obligation to take corrective action in response to the release. (See Health & Saf. Code, § 25299.36, subd. (b).) A responsible party is defined as one or more of the following:

"(1) Any person[1] who owns or operates an underground storage tank used for the storage of any hazardous substance;

"(2) In the case of any underground storage tank no longer in use, any person who owned or operated the underground storage tank immediately before the discontinuation of its use;

"(3) Any owner of property where an unauthorized release of a hazardous substance from an underground storage tank has occurred; and

"(4) Any person who had or has control over a [sic] underground storage tank at the time of or following an unauthorized release of a hazardous substance." (Cal. Code Regs., tit. 23, § 2720.)

Corrective action is "any activity necessary to investigate and analyze the effects of an unauthorized release, propose a cost-effective plan to adequately protect human health, safety and the environment and to restore or protect current and potential beneficial uses of water, and implement and evaluate the effectiveness of the activity(ies)." (Cal. Code Regs., tit. 23, § 2720.) Corrective action includes one or more of the following phases: (1) Preliminary Site Assessment; (2) Soil and Water Investigation; (3) Corrective Action Plan Implementation; and (4) Verification Monitoring.

The San Francisco Bay Regional Water Quality Control Board (Regional Board) Basin Plan designates existing and potential beneficial uses of groundwater in the East Bay Plain[2] as municipal and domestic (MUN) supply, industrial process supply, industrial service supply, and agricultural supply. (Regional Board & SWRCB, Water Quality Control Plan, San Francisco Bay Basin (1995) at p. 2-28.) The Basin Plan specifies a narrative taste and odor water quality objective[3] as follows: "Groundwaters designated for use as domestic or municipal supply (MUN) shall not contain taste- or odor-producing substances in concentrations that cause a nuisance or adversely affect beneficial uses." (*Id.* at p. 3-7.) The Basin Plan also contains the following water quality objective for organic and inorganic chemical constituents:

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[1] A "person," as the term is used in section 2720, includes an individual, trust, firm, joint stock company, corporation, including a government corporation, partnership, limited liability company, or association. (Health & Saf. Code, § 25281, subd. (k).)

[2] Petitioner's UST site is located in the East Bay Plain.

[3] Water Code Section 13050, subdivision (h) defines "Water quality objectives" as "…the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."

"groundwaters designated for use as a domestic or municipal supply (MUN) shall not contain concentrations of constituents in excess of the maximum [contaminant levels] (MCLs) or secondary maximum contaminant levels (SMCLs) . . . specified in . . . Title 22 of the California Code of Regulations." (*Id.* at p. 3-6.)

With regard to the water quality objective for organic chemicals, the State Department of Health Services (DHS) has set an MCL for drinking water of 1 part per billion (ppb) for benzene, 150 ppb for toluene, 700 ppb for ethylbenzene, and 1,750 ppb for xylene.[4] (Cal. Code Regs., tit. 22, § 64444.) DHS has set primary and secondary MCLs for methyl tertiary butyl ether (MTBE) at 13 ppb and 5 ppb, respectively. (*Id.* §§ 64444, 64449.)

Any aggrieved person, including a responsible party, may petition the Board for review of the action of a local agency in the LOP. (Health & Saf. Code, § 25297.1, subd. (h); SWRCB Resolution No. 88-23.) On June 28, 1999, the SWRCB received the petition in this matter. The SWRCB's petition procedures provide that if the SWRCB does not act on a petition within 270 days after receipt, the petition shall be deemed denied. (SWRCB Resolution No. 88-23.) The SWRCB did not take action on this petition within this time period; therefore, the SWRCB is considering this petition on its own motion. (*Ibid.*)

Petitioner's UST release site is located on property at 15595 Washington Avenue in San Lorenzo, California. The property has been operated as a retail gasoline service station under various owners since approximately 1964. Between 1964 and 1974, the property was owned by Gulf Oil (Gulf). Gulf installed the first generation USTs in 1965. In 1969, Gulf replaced the first generation USTs with a second generation of USTs. In August 1974, Gulf sold the property to Jessen and Agnes Calleri, and Stanley and Mildred Long.[5] During their ownership, the Calleris leased the property for use as a service station. In late 1982, the Calleris' lender instituted foreclosure proceedings against them and the service station was closed. Texaco purchased the facility at the foreclosure sale in August of 1983, but never operated the service station. Bertram Kubo purchased the property from Texaco on December 31, 1986. In February 1987, Mr. Kubo installed a third generation of USTs. Mr. Kubo then reopened the

[4] DHS has not established secondary MCLs for benzene, toluene, ethylbenzene, or xylene.

[5] The Longs conveyed their interest in the property to the Calleris in early 1979.

service station. Petitioner purchased the property from Mr. Kubo in June of 1990 and continued to operate the service station.

In January 1993, the County became aware that an unauthorized release had occurred at the property when it received an unsolicited groundwater sampling report dated December 1992, produced by Groundwater Technology, Inc. (GTI).[6] The 1992 Report indicated that benzene was detected in groundwater samples collected from site monitor wells in concentrations ranging from <0.3 to 3 ppb, toluene ranging from <0.3 to 0.5 ppb, ethylbenzene ranging from <0.3 to 1 ppb, total xylenes ranging from <0.5 to 1 ppb, and TPHg ranging from <10 to 720 ppb. There was no testing for MTBE. This 1992 report led the County to discover an earlier GTI report that had been prepared for Texaco, dated October 17, 1986.

The 1986 GTI report noted that six soil borings had been placed at the property, three of which were converted to groundwater monitor wells. Monitor Well No. 1 (MW-1) was placed within 10 feet of the two pump islands. Monitor wells MW-2 and MW-3 were placed roughly 55 feet south and southwest of MW-1, within 5 to 10 feet of the second generation USTs. The 1986 report indicated that hydrocarbon odors were detected in soil, and minor amounts of hydrocarbon constituents were found in groundwater at the site. (GTI Report (Oct. 17, 1986), pp. 8-10.) Specifically, analyses of groundwater samples from site monitor wells indicated that benzene and toluene were not detected above the detection limit of <50 ppb, and that total xylenes were detected at 82 ppb in MW-1. Analytical results of groundwater samples from MW-2 and MW-3 were non-detect (<50 ppb) for all petroleum constituents. However, analysis of a "grab" groundwater sample from soil boring SB-1, drilled less than 10 feet north of the pump islands and near MW-1, detected benzene at 220 ppb, toluene at 390 ppb, and xylene at 680 ppb. The report concluded that the "negligible concentrations of petroleum hydrocarbons in the soil samples and minor to negligible concentrations of petroleum hydrocarbons in the groundwater samples" were the result of an "older" pre-1986 release, caused by "a small localized loss [that] likely occurred at the pump island." (*Id*., p. 10.)

In April 1993, based on the information contained in the 1986 and 1992 GTI reports, the County named Texaco, Bertram Kubo, and the petitioner as responsible parties. (Alameda County Notice of Requirement to Reimburse (April 5, 1993).) Following several

[6] The 1992 GTI Report was prepared for Tracy Federal Bank when the Bank was considering a loan application for the site.

disputes among the parties concerning their status as responsible parties, the County formed a Pre-Enforcement Review Panel (Panel) made up of representatives from the County, the local District Attorney's Office, and the Regional Board. The Panel met once in October of 1994 and again in February 1995 in order to review, among other things, the County's responsible party designations. After reviewing the evidence and considering legal arguments submitted by the parties, the Panel determined that Texaco, Mr. Kubo, and the petitioner had all been appropriately identified as responsible parties. In addition, the Panel concluded that the Calleris should have also been named. In September 1995, the Regional Board notified the Calleris that they were added to the list of responsible parties.[7] The County followed the Regional Board's notification with its own notification on September 25, 1995, confirming that the Calleris had been added as responsible parties for cleanup at Petitioner's UST release site. (Alameda County Notice of Requirement to Reimburse (Sept. 25, 1995).)

Three groundwater sampling events took place between 1993 and 1995. Off-site soil borings B-1, B-2, and B-3 were drilled in August of 1993 across the property line to the north, from 45 to 60 feet from MW-1. Analytical results from a groundwater sample obtained from off-site boring B-3 showed 4900 ppb TPHg, 18 ppb benzene, 28 ppb toluene, 12 ppb ethylbenzene, and 26 ppb xylene. The three original monitor wells at the site were sampled in March 1994 and again in December 1995. The March 1994 sampling showed that groundwater obtained from MW-1 contained detectable concentrations of TPHg at 1300 ppb, benzene at 110 ppb and ethylbenzene at 19 ppb. Analytical results of groundwater samples from monitor wells MW-2 and MW-3 were non-detect (<0.5 ppb) for benzene, toluene, ethylbenzene and xylene (BTEX) constituents. Laboratory interpretation of chromatograms obtained by the Board for the 1994 sampling was inconclusive for MTBE. The analytical results of the December 1995 groundwater sample obtained from MW-1 show the presence of 350 ppb TPHg, 18 ppb benzene, 2.9 ppb toluene, 3.5 ppb ethylbenzene, and 2.8 ppb total xylenes. The analytical results of groundwater samples from monitor wells MW-2 and MW-3 showed no detectable concentrations of BTEX (<0.5 ppb). In addition, the 1995 report indicated that "unmodified or weakly modified gasoline is significant" as a component of the TPHg detected in monitor well MW-1, suggesting

[7] The Regional Board's notification was challenged by the Calleris in a petition to the SWRCB dated August 31, 1995. At the request of the Calleris' attorney, the SWRCB agreed to hold the petition in abeyance to allow for settlement discussions. As of February 4, 1998, the matter had neither been resolved nor was the subject of an active dispute. Therefore, on that date, the SWRCB dismissed the Calleris' petition without prejudice.

that the release(s) detected in 1995 was relatively fresh.[8] There was no testing or reporting for MTBE in 1995, however, laboratory interpretation of analytical results obtained by the Board for the 1995 sampling conservatively indicate the presence of MTBE in groundwater at or above 15,000 ppb in MW-1, 3,600 ppb in MW-2, and 8,200 ppb in MW-3.

Between July and September 1998, an expanded soil and water investigation (SWI) was performed at the site by Toxichem Management Systems, Inc. for Texaco. On July 30, 1998, a soil and groundwater assessment was performed, during which five new exploratory borings, SB-A through SB-E, were drilled. Two new monitor wells, MW-4 and MW-5, were also installed roughly 50 feet to the north and northwest of monitor well MW-1. Benzene concentrations detected in groundwater analytical samples obtained from soil borings SB-A through SB-E ranged from <0.5 ppb to 2,200 ppb, toluene from <0.5 ppb to <500 ppb, ethylbenzene from <0.5 ppb to 3,300 ppb, total xylenes from <0.5 ppb to 9,500 ppb, and MTBE from 7.2 ppb to 140,000 ppb. MTBE was detected in soil samples obtained from soil boring SB-B at 5 feet in depth (4,700 ppb), soil boring SB-E at 6 feet in depth (2,100 ppb), and at a depth of 10 feet in SB-B (440 ppb) and SB-E (16,000 ppb), in the immediate vicinity of the third generation USTs. MTBE was also detected in soil samples from soil boring SB-D to the northwest of the USTs at a depth of 10 feet (2,500 ppb) and to the west of the third generation USTs in the nominal downgradient groundwater flow direction in soil boring SB-C at a depth of 10 feet (4,700 ppb). On August 26, 1998, groundwater samples were obtained from both the new monitor wells and the original monitor wells at the site. The benzene concentrations detected ranged from <5 ppb to 240 ppb, toluene from 0.74 ppb to <50 ppb, ethylbenzene from 1.3 ppb to 380 ppb, and total xylenes from 1.0 ppb to 84 ppb. MTBE was detected in groundwater samples from monitor wells MW-1, MW-2, and MW-3 at concentrations ranging from 99,000 to
340,000 ppb. A subsequent sampling event in January 1999, confirmed the high concentrations of MTBE in groundwater samples from monitor wells MW-1, MW-2, and MW-3 (9,450 to 269,000 ppb). Benzene was not detected in the January 1999 sampling although the detection limit was 500 ppb for BTEX in monitor well MW-1, 500 times the MCL for benzene and more than 3 times the MCL for toluene. Benzene was, however, detected in a groundwater analytical sample from monitor well MW-5 at 11.7 ppb.

[8] McCampbell Analytical Corporation, interpretation of sample chromatograms.

Based in part on the MTBE detected in site soil and groundwater during the 1998 SWI, and the County's understanding that large-scale use of MTBE as a gasoline additive first began during the Winter of 1992, the County concluded that there had been a more recent and significant release at Petitioner's site than the one noted in the 1986 GTI report. (Alameda County Notice of Revision to "Responsible Party" Designation (May 28, 1999).) Because this more recent release had originated from the third generation USTs, which were never owned or operated by Texaco or the Calleris, the County removed Texaco and the Calleris from the list of responsible parties in May of 1999.[9]

II. CONTENTIONS AND FINDINGS

Contention**:** Petitioner contends that the County acted inappropriately when it removed Texaco and the Calleris from the list of responsible parties for Petitioner's UST release site. Petitioner maintains that the County's findings regarding the pre-1986 release in no way eliminated Texaco and the Calleris as responsible parties, as there is clear evidence that there were old as well as recent releases at the property. Petitioner argues that Texaco and the Calleris are responsible parties pursuant to California Code of Regulations (CCR) title 23, section 2720 because they had control over the site at the time of or following an unauthorized release of a hazardous substance from a UST.

Findings**:** After conducting an independent review of the record, we find that both Texaco and the Calleris owned the subject property at the time of or following an unauthorized release of hazardous substances from a UST, and were appropriately named as responsible parties by the County in 1993 and 1995, respectively. In addition, we find that a subsequent, more significant release or releases for which Petitioner is responsible occurred in the early to mid-1990s and that the pre-1986 release and this later release or releases have commingled. We remand the issue of whether Texaco and the Calleris should have been removed from the list of responsible parties to the County for reconsideration and action consistent with this Order.

The main issue presented in this petition is a variation on one that has been raised in many prior petitions to the Board: whether a person should be named as a responsible party

[9] In August 1999, the County removed Bertram Kubo from the list of responsible parties. No petition was filed with the Board challenging this action.

for remediation of petroleum constituents at a UST release site. Rather than considering whether a responsible party should have been named in the first instance, here we are asked to consider for the first time whether a properly named responsible party should have been removed as a responsible party.

The test for who should be included as a responsible party following an unauthorized release has been well developed by the Board. Following an unauthorized release, it is appropriate for an agency participating in the LOP to designate a person as a responsible party for cleanup at a site if it has "credible and reasonable evidence" to indicate that the person has responsibility. (See Board Order WQ 85-7, *In the Matter of the Petition of Exxon Company, U.S.A. et al.*) Credible and reasonable evidence that a person "has responsibility" at an LOP site exists if the person meets the definition of a "responsible party," as the term is defined in section 2720 of the California Code of Regulations. Until now, however, the Board has not had to consider when a party could be removed from designation as a responsible party after that credible and reasonable evidence has been established.

In this case of first impression we find that it is not appropriate for an LOP agency to remove a person who has been properly named as a responsible party for cleanup of an unauthorized release unless it finds, by a preponderance of the evidence, that constituents from that party's release, when taken in conjunction with commingled constituents from another release(s) that have similar effects on beneficial uses, do not contribute to the need for cleanup at the site.[10] Imposing a more stringent standard for removing an otherwise properly named responsible party than for naming responsible parties in the first instance is consistent with our well-established policy of ensuring that, when there is reasonable evidence of responsibility, multiple parties be named in order to promote cleanup of a demonstrated water quality problem. (See *Ibid.* See also SWRCB Order WQ 86-16, *In the Matter of the Petition of Stinnes-Western Chemical Corporation*.) Moreover, a balancing of the equities dictates that, whenever possible,

[10] This Order does not address the situation where there have been multiple releases on a single parcel, which may include releases originating off-site, but where a closure letter has been issued pursuant to Health and Safety Code section 25299.37, subdivision (h) for one or more of those releases. Because generally a person issued a closure letter under this section is relieved of responsibility for further remediation relative to the closed release, it would ordinarily be inappropriate for that person to be held liable for the cleanup of the other release(s) on site for which that person holds no responsibility, e.g., the person is not the current property owner and did not control the UST from which the other release occurred. Of course, an unauthorized release that has been closed may always be reopened if new information surfaces that changes the basis on which the decision to close that person's release was made, e.g., the discovery of new constituents from the release that had not previously been identified.

a responsible party should not be left to clean up constituents attributable to a different release for which that party is not responsible. The burden of producing evidence to support removal as a responsible party rests with the discharger.

Our review of the record, including the technical data available for the site, indicates that a release occurred at the property prior to or during the Calleris' ownership, and the constituents from that release persisted during Texaco's ownership. Both parties, therefore, were appropriately added to the list of responsible parties for cleanup pursuant to paragraph (3) of the definition of "responsible parties" in section 2720 of the California Code of Regulations as "owner[s] of property where an unauthorized release of a hazardous substance from a UST has occurred." The 1986 GTI report prepared for Texaco indicated that groundwater pollution was identified in close proximity to the pump islands. Specifically, analysis of a "grab" groundwater sample taken from soil boring SB-1, drilled less than 10 feet north of the pump islands, detected benzene at 220 ppb, toluene at 390 ppb, and xylene at 680 ppb. In addition, total xylenes were detected at 82 ppb in MW-1, also located within 10 feet of the two pump islands on site. Samples from MW-2 and MW-3, which had been placed roughly 55 feet south and southwest of MW-1, and within 5 to 10 feet from the second generation USTs, were non-detect for all petroleum constituents. The presence of petroleum constituents near the pump islands, rather than near the second generation USTs, is most reasonably explained by a release associated with a leak in the product piping or dispenser during operation of the system. Because Texaco never operated the second generation USTs,[11] this evidence suggests that the release identified in the 1986 GTI report most likely occurred during or prior to the Calleris' ownership of the property, which ended in 1983.

Our review of the record also indicates that a separate release or releases occurred beginning in the early to mid-1990s, and the constituents from that release or releases are currently or were at one time commingled on-site with the constituents from the first release. At the time of the first release, in the early 1980s, the use of gasoline containing MTBE was limited, and even in those limited areas of use, the concentration of MTBE in gasoline was low. It was

[11] Reports documenting the tank removal by Texaco are not part of the record before us. However, other evidence in the record supports a finding that Texaco did not operate the USTs. This evidence includes: (1) the fact that Texaco purchased the property at a foreclosure sale in order to protect their security interest; (2) Texaco's 1983 surplus property report which suggests that it did not use the property, but rather intended to sell it; (3) the lack of any records of inspection by the ALCO Department of Weights and Measures, who conducted annual inspections of

not until the early 1990s that gasoline contained MTBE in significant concentrations and was used widely throughout California. Because MTBE was not tested for in 1986, there is no direct evidence to show that MTBE was not present at the site following the minor release that occurred during the Calleris' ownership. However, even if MTBE were present in the first release, it is highly improbable that the levels of MTBE detected in groundwater at Petitioner's site between 1995 and 1999, up to 340,000 ppb, were due to that first release. It is much more probable that MTBE detected at that time was released into the environment beginning between approximately 1992 and 1995, at a time when MTBE was used in significant concentrations in California. Our conclusion that a separate release or releases occurred beginning in the early to mid-1990s is further supported by the fact that the highest detectable concentrations of MTBE in analytical results from soil samples in the 1998 soil and groundwater investigation were found in soil borings SB-B and SB-E, directly to the east and west of the third generation tank and piping system, between 5 and 10 feet below ground surface (bgs).[12] Detection of MTBE at 5 feet bgs in soil, directly to the east of the third generation tank system in soil boring SB-B (4,700 ppb), significantly above the high range of groundwater and upgradient of groundwater flow from any site monitor well, strongly implicates the third generation USTs as the source of the MTBE contamination detected in the 1998 SWI. Moreover, groundwater analytical results indicate that gasoline constituents detected in 1986 were degraded more than gasoline constituents detected between 1993 and 1999, providing further evidence that a separate and more recent release or releases occurred after 1986.

Because the pre-1986 release was detected in SB-1 and MW-1, and the spatial extent of the more recent release or releases is not fully delineated, but was detected near SB-1 and in MW-1, we conclude that these separate releases are currently or were at one time commingled.

According to the test set forth in this order, Texaco and the Calleris may be removed as responsible parties only if the constituents from the first release that occurred for which they are responsible, when taken in conjunction with constituents from the second release or releases for which Petitioner is responsible, do not currently contribute to the need for cleanup at the site. In 1999, the County, without having the benefit of the test set forth in this order,

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active retail fueling stations during the mid-1980s; and (4) the 1986 GTI report which states that the tanks were purged at the time of the report.

listed its reasons for removing Texaco and the Calleris from the list of responsible parties as follows:

> "(1) recent site assessment data document up to 340,000 ì/l of MTBE in sampled groundwater;
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> "(2) high MTBE concentrations are consistent with a 'recent' release from the current generation of fuel underground storage tanks (UST) at the site, as large-scale use of MTBE as a gasoline additive in California first began in the winter of 1992 in order to comply with the Federal Clean Air Act Amendments;
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> "(3) this 'recent' release occurred subsequent to the release first identified in 1986, as the USTs at the time were reported last used in the early 1980's, a period when MTBE was not in widespread use in California;
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> "(4) the USTs present at the site when owned by the Calleris, and then by Texaco, were removed prior to the site being sold to Bertram Kubo in 1986;
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> "(5) a new generation of USTs was installed in February 1987 during Mr. Kubo's ownership of the site; [and]
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> "(6) neither Texaco nor the Calleris were owners of the property or the USTs at the time the subsequent release occurred." (Alameda County's Notice of Revision to "Responsible party" Designation, (May 28, 1999).)"

From this, it appears that the County's primary reason for removing Texaco and the Calleris as responsible parties was the fact that a more significant release containing MTBE had occurred at the site following the earlier, pre-1986 release and that Texaco and the Calleris were not the owners or operators of the third generation USTs at the time of this more significant release. What the County did not consider, and what must be determined by the County on remand, is whether the constituents attributable to the release that occurred during or prior to the Calleris' ownership and which persisted at the site while Texaco owned the property, taken in conjunction with the other constituents at the site having similar effects on beneficial uses, are contributing to the current need for corrective action. If the County determines that the constituents from the first release do not contribute to the need for cleanup at the site, it may remove Texaco and the Calleris' designation as responsible parties. For example, if the County decides: (1) that the site would be closed but for the MTBE from the second release(s), and (2) that the BTEX constituents remaining from the first release do not have similar effects as MTBE on beneficial uses, it may remove Texaco and the Calleris as responsible parties.[13]

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[12] Toxichem Management Systems, Inc. *Soil and Groundwater Investigation Results*, October 16, 1998.

[13] We recognize that there may be instances where a person has been removed as a responsible party because constituents from his/her release do not contribute to the *need* for cleanup at the site, but where those constituents

Both Texaco and the Calleris, in response to the petition, contend that various other legal theories absolve them from liability as responsible parties. Texaco contends that its limited connection with the property dictates that it not be named a responsible party. The Calleris contend that they should not be designated as responsible parties because the corrective action provisions of the Barry Keene UST Cleanup Trust Fund Act (Act) were not enacted until 1989, after the Calleris had vacated the property and the tanks had been removed, and that the Act is not retroactive. In the alternative, the Calleris argue that any action by the County requiring corrective action is barred because all of the County's claims have been discharged in bankruptcy. As discussed below, these arguments are not persuasive and do not provide a sufficient basis for this board to conclude that the County acted appropriately when it removed Texaco and the Calleris from the list of responsible parties.

Texaco's contention that its limited connection with the property relieves it from responsibility is based on the Board's Decision, *In the Matter of the Petitions of Wenwest et al.* (*Wenwest*). (SWRCB Order WQ 92-13, *In the Matter of the Petitions of Wenwest et al*.) In *Wenwest*, Wendy's International (Wendy's) purchased property with a leaking UST for the purpose of selling the property to a franchisee in that same year. The San Francisco Bay Regional Water Quality Control Board (Regional Board) issued a cleanup and abatement order for the site and designated Wendy's as one of the responsible parties. Wendy's petitioned the Regional Board's designation to the SWRCB. The SWRCB found that the Regional Board had erred in naming Wendy's as a responsible party, basing its decision on the particular facts of that case, including that Wendy's no longer owned the property and had not owned the property when the activities that caused the discharge occurred, the source of the discharge (underground storage tanks) had already been closed prior to Wendy's ownership, and Wendy's did nothing to make the problem worse. The Board also pointed to several unique factors that led to its decision to excuse Wendy's from responsibility. These factors were that Wendy's purchased the property only to convey it to a franchisee, that it owned the property for a very brief time (four months); that the franchisee (also a former owner) and other parties were being named in the order; that Wendy's did not know of an ongoing leak; and that cleanup at the site was proceeding.

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nevertheless increase the *cost* of cleanup. We do not intend this order to be interpreted in such cases as insulating the removed party from liability for sharing in these increased costs.

Texaco's analogy of its situation to that of Wendy's is misplaced. The issue in *Wenwest* centered on whether the Regional Board had appropriately named Wendy's as a responsible party in the first instance. Here, the issue is whether the County appropriately *removed* Texaco and the Calleris as responsible parties, not whether it appropriately designated them as responsible in the first instance. (Emphasis added.) Nevertheless, we find that even if Texaco had petitioned the County's naming it as a responsible party in a timely manner, the equitable considerations extended to Wendy's would not apply to Texaco. It is true that Texaco, like Wendy's, no longer owned the property in question when it was initially designated as a responsible party, had not owned the property when the activities that caused the release occurred, and did not operate a service station. However, the other unique factors in *Wenwest* justifying the removal of Wendy's from the list of responsible parties would not apply in this case. Moreover, other factors unique to this case would have weighed heavily against excusing Texaco from responsibility. First, Texaco owned the property for three years, much longer than Wendy's four-month period of ownership. Even more significant, Texaco failed to report the release first discovered by GTI in 1986, when regulations at the time required all unauthorized releases from USTs to be reported within 24 hours to the local agency, and the State Office of Emergency Services or the Regional Board. (Cal. Code Regs. tit. 23, § 2652, subd. (b), (1985).) Texaco's lack of clean hands in this respect would have prevented this Board from extending to Texaco the equitable consideration shown to Wendy's.

The Calleris contention that they should not be designated as responsible parties because the corrective action provisions of the Barry Keene UST Cleanup Trust Fund Act (Barry Keene Act, or Act) are not retroactive lacks merit. As a general rule, a statute is considered retroactive if it substantially changes the legal effects of past events. (See *Kizer v. Hanna*, (1989) 48 Cal.3d. 1, 7 [255 Cal.Rptr. 412].) The theory against retroactive application of a statute is that the parties affected have no notice of the new law affecting past conduct. In this case, the Barry Keene Act does not have a retroactive effect on the Calleris responsibility to clean up the site. The Calleris mistakenly characterize the corrective action provisions of the Act as creating new liability that did not exist before its enactment. However, even before the Calleris owned the property, Water Code section 13304 provided for the issuance of cleanup and abatement orders to "dischargers." The Act's legislative history shows that the Legislature knew of the existing liability for dischargers. The Senate Rules Committee, in its analysis of the Act,

recognized that "any unauthorized leak of a hazardous substance from an underground storage tank is . . . for purposes of the Porter-Cologne Act, a waste discharge and therefore, subject to cleanup." (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 299 (1989-1990 Reg. Sess.) as amended Sept. 12, 1989, p. 3.) Because the Barry Keene Act did not change the legal effect for the Calleris of the unauthorized release that occurred prior to 1986, it is not being applied retroactively.

The Calleris contention that any order by the County requiring corrective action is barred because all of the County's claims have been discharged in its 1984 bankruptcy is also not persuasive. The Ninth Circuit has adopted a fair contemplation approach to decide when contamination from pre-petition conduct should give rise to a "claim" that can be discharged in bankruptcy. Under this approach, only future response costs that could be fairly contemplated by the parties before the petition in bankruptcy is filed are dischargeable claims. (*In re Jensen*, 994 F.2d 925, 230 (9th Cir. 1993); *In Re National Gypsum*, 139 B.R. 397 (N.D. Tex. 1992).) The National Gypsum court identified four factors relevant to whether environmental response costs were "fairly contemplated" when the bankruptcy petition was filed: (1) knowledge by the parties that the site was contaminated; (2) whether the site was listed on the National Priorities List; (3) whether the debtor had been notified that it was a potentially responsible person; and (4) whether site investigation or cleanup had begun. In this case, because there was no notice to anyone of a discharge until the 1986 GTI Report, we find that petroleum constituents attributable to the pre-1986 release were not "fairly contemplated" as of the date the petition in bankruptcy was filed and therefore any claim by the County relative to the release is not a dischargeable claim in the 1984 bankruptcy.

Contention: Petitioner contends that Texaco may be responsible for the current release at the site. Petitioner contends that the current release may not be from the USTs on the property, but rather from damaged groundwater monitor wells, which were under the control of Texaco's employees and contractors. Petitioner contends that testing of his UST system over the last six years has evidenced no leaks from the tanks, pipes, or valves. On this basis, Petitioner contends that Texaco was inappropriately removed from the list of responsible parties.

Findings: Petitioner's contentions lack merit. While the record does contain some evidence that, in April and June of 1999 monitoring wells MW-1, MW-2, and MW-3 were found to be damaged, substantial evidence supports the County's determination that the recent

release(s) is from Petitioner's USTs and not the damaged wells. In addition, testing results that indicate Petitioner's USTs have not leaked are insufficient evidence to support a finding that the USTs, in fact, have not leaked. Therefore, we find that Texaco is not responsible for the recent release(s).

Our review of the record indicates that MTBE detected in soil samples at the site was the result of a release or releases from the third generation USTs that occurred during Petitioner's ownership. As we noted previously, an analysis of the sampling results supports a finding that the petroleum constituents found in the soil and groundwater at the site in 1998, including high levels of MTBE, were the result of a release or releases from Petitioner's USTs beginning in the early to mid-1990s. The 1998 SWI detected up to 16,000 ppb MTBE in soil analytical samples from between 5 and 10 feet bgs in soil borings SB-B, SB-E, and at 10 feet bgs in soil borings SB-C and SB-D. Detection of 4,700 ppb MTBE at 5 feet bgs in soil boring SB-B is inconsistent with transport to that location by introduction of MTBE into downgradient water wells, as the sample was taken from significantly above the high range of the water table, upgradient relative to groundwater flow, and directly to the east of the third generation tank system. This result is, however, indicative of a release from the tank and piping of the third generation tank system. This finding is supported by the detection of 2,100 ppb MTBE in soil samples obtained from 6 feet bgs in soil boring SB-E, also significantly above the water table and directly to the west, directly downgradient of the third generation tank system, and from a sample obtained from 10 feet bgs (16,000 ppb), approximately 1.5 feet above the reported groundwater level.

Petitioner's contention that his tanks show no evidence of leaks, even if true, is insufficient to show that his USTs, in fact, have not leaked. As stated in Board Order WQ 87-1, *In the Matter of the Petition of Spencer Rental Service*:

> "[W]e cannot regard negative leak detection tests as conclusive evidence that a tank does not leak even if they are correctly performed. A leak detection test is only capable of detecting an existing major leak at the time the test is taken. It provides no information on the history of the tank. The test will not detect minor leaks less than approximately 0.05 gallons per hour. Over a year, a leak this size can release up to 438 gallons of gasoline."

Because we find the recent release most likely came from Petitioner's USTs rather than from the damaged groundwater monitor wells, Texaco is not responsible for the recent release. With respect to this issue, the petition is denied.

III. SUMMARY AND CONCLUSION

After an independent review of the record and consideration of the issues raised by the petitioner, and for the reasons previously discussed, we conclude as follows:

1. An unauthorized release of petroleum constituents occurred on Petitioner's property during or prior to the Calleris' ownership and the constituents from that release persisted at the site during Texaco's ownership.

2. It is not appropriate for an LOP agency to remove a person who has been properly named as a responsible party for cleanup of an unauthorized release at a site unless it finds, by a preponderance of the evidence, that constituents from that party's release, when taken in conjunction with commingled constituents from another release(s) that have similar effects on beneficial uses, do not contribute to the need for cleanup at the site

3. The recent release at the site is likely from Petitioner's USTs and not from damaged monitoring wells. Texaco is not a responsible party for the recent release that occurred at the site.

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IV. ORDER

IT IS HEREBY ORDERED THAT the petition is denied in with respect to Petitioner's second contention. The issue of whether Texaco and the Calleris should have been removed as responsible parties for cleanup at the site is remanded to the County for reconsideration and action consistent with this Order.

CERTIFICATION

The undersigned, Clerk 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 November 19, 2002.

AYE: Arthur G. Baggett, Jr.
Peter S. Silva
Gary M. Carlton

NO: None

ABSENT: Richard Katz

ABSTAIN: None

Maureen Marché
Clerk to the Board