

December 29, 2009

Law Offices of
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Via Email
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Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
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PO Box 100
Sacramento, CA 95812-0100

January 19, 2010 Board Meeting/UST Case Closure

Claim No. 2545	Site Address: 336 West College Ave, Santa Rosa
Claim No. 8532	Site Address: 1449 Highway 49, Auburn
Claim No. 8695	Site Address: 650 High Street, Auburn
Claim No. 9987	Site Address: 14091 Lakeshore Drive, Clearlake
Claim No. 13020	Site Address: 1101 N. Main Street, Lakeport
Claim No. 11567	Site Address: 2600 Rice Avenue, West Sacramento
Claim No. 14674	Site Address: 8991 Oroville Highway, Marysville
Claim No. 14739	Site Address: 16823 Willow Glen Road, Brownsville
Claim No. 14977	Site Address: 313 Rail Road Flat Road, Rail Road Flat
Claim No. 15471	Site Address: 116 Main Street W., Lone

Dear Chairman and Members of the Board:

We are writing on behalf of our numerous clients and the Environmental Resource Council ("ERC") to support the Underground Storage Tank Cleanup Fund ("USTCF") manager's intent to close a number of underground storage tank ("UST") cleanup sites. In our opinion, and that of the ERC, these types of closures are long overdue and greatly needed.

By way of background, our practice has been limited to leaking underground storage tank matters for approximately 20 years. We were one of the original co-founders of the ERC in the early 1990s.

The ERC is a nonpartisan, nonprofit, grass roots, public-private, advocacy organization, focusing on public policy related to leaking underground fuel tanks. The ERC came into existence when a number of local small businesses and nonprofits were forced into financial hardships and, in several cases, out of business as a result of minor leaks from petroleum underground storage tanks.

When our local Salvation Army had to make a choice between helping elderly and homeless families, on the one hand, and pouring hundreds of thousands of dollars

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into a questionable so-called environmental cleanup at a former service station lot, our local citizens and officials began to investigate what this UST problem was all about. The whole purpose of the inquiry was to focus on good sound science and common sense rather than politics and panic.

What they found, and what everyone else who has looked at the problem has found is a simple truth: No one has ever died from a leaking underground fuel storage tank, but hundreds of people have been killed and thousands more seriously injured dealing with the cleanup of these tanks. In other words, the "cure" in most cases is much worse than the claimed harm.

Separately, they learned that the owners and operators of USTs had fought vigorously to keep the tanks from being placed underground. In fact, the owners' claims went all the way to the United States Supreme Court in 1929!¹ Every one of the lower court judges that looked at the science of the tanks concluded it was better to leave the tanks above ground, where they could be properly monitored. However, at the government's insistence and after appeals to the nation's highest court, tank owners were forced to bury their tanks. Again, this was done despite arguments and evidence that the placing of such tanks underground could cause them to leak, causing contamination and fouling groundwater.

The net result was that the individuals who followed the law and did exactly what the government required them to do were now being held liable for the bad decision-making of that same government. In the late 1980s and early 1990s, thousands of small mom and pop service stations and small businesses were wiped out by this UST issue. The ERC wanted to know why.

Recognizing the need to take proactive efforts to find solutions to these governmental-caused problems, a number of tasks were implemented in the late 1980s and early 1990s to ameliorate the harshness of this situation. It was in that context that our local state senator, Barry Keene, created the original Underground Storage Tank Cleanup Fund.

Later, his successor, State Senator (now U.S. Congressman) Mike Thompson carried forth many of the updates to the current USTCF program. Included in all bills drafted by the ERC was the goal of bringing good science and common sense to California's fuel tank cleanup program.

Sadly, after putting the Fund in place and after making a number of improvements to the Fund in the early 1990s, the ERC thought its job was over. Science had finally been given a small seat at the table and we were confident that

¹ *Standard Oil v. City of Marysville*, 270 U.S. 582 (1929).

science would prevail and convince the other interests that science, not politics and financial interests, should be paramount. As originally envisioned, that was only supposed to take a few years. By then, the job would be done.

Ironically, one of the main reasons why the State never bothered to classify tank cleanup risks was that it was assumed all fuel tanks would be cleaned up to acceptable levels within the first ten years of the program, and hence the time spent on classifying risks would be wasted time. This was specifically expressed as State Board policy in response to a very critical USEPA audit of California's UST program in 1992.

As you know, most states completed their tank programs years ago. California is so far behind the rest of the country on this issue that its tank program has never even started to get approval from the USEPA! How could such a leading state be so far behind?

As we all know, along the way things changed. Former State Board member Marc del Piero said at the inception of the USTCF program that he was concerned that creating a new "tank bureaucracy" would make that bureaucracy more interested in continuing itself rather than solving the problem. Marc noted there is no such thing as a "temporary" bureaucracy.

However, he was assured at that time that one of the reasons that the State Board had contracted out much of the UST cleanup to local oversight agencies (mostly county environmental health departments) was that the program would only be in place for a few years and soon it would all be over. Unfortunately, Marc was dead right!

The agencies needed to keep these cleanups going or risk losing their jobs which are funded solely by money from the USTCF. If you do not believe us, check: most LOPs rely solely on USTCF funds for all operation expenses.

Unfortunately, the lure of billions of dollars being available has taken what was already a questionable program and created a full employment act for all kinds of public and private interests. As it turns out, in many cases, only the lawyers, regulators, and consultants have cleaned up. Rather than inviting good science and common sense into the process, the two have been banished and are currently excluded from the program. That must change!

Again, it is important to note that we are not talking about a situation where hundreds or thousands of lives are saved every year as a result of this program. In fact, we are endangering hundreds and thousands of lives every year by operating this program. Worse yet, we are creating long-term environmental problems (such as global warming), all in the name of environmental cleanup of leaking fuel tanks. We need to

look at the whole environment and what is best for all citizens, not just consultants and local regulators.

In short, we fully support the Fund management's decision to start closing sites aggressively. However, we offer a cautionary thought. Specifically, nibbling around the edges and closing a few sites here or there is not what is needed.

What is needed is wholesale aggressive action to make sure all sites are moved expeditiously to closure before more people are injured and before more harm is placed upon our precious environment.

We strongly support and recommend the State Board approve the decision to close all of these sites promptly.

Very truly yours,


Hans W. Herb

HWH:acl

Cc: Kirk Veale
Dave Zedrick
Lee Howard