STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – OFFICE OF CHIEF COUNSEL
FEBRUARY 3, 2009

ITEM 12

SUBJECT

IN THE MATTER OF THE PETITION OF ULTRAMAR, INC. FOR REVIEW OF SONOMA COUNTY'S RESPONSIBLE PARTY DESIGNATION. (**SWRCB/OCC FILE P06-230**.)

DISCUSSION

Sonoma County participates in the underground storage tank (UST) Local Oversight Program and is the agency that oversees corrective action at this UST release site. Ultramar, Inc. is a primary responsible party at the site and three other parties have been designated as secondary responsible parties. This determination was based upon Sonoma County's conclusion that the existing contamination at the site is due only to a historic release for which Ultramar, Inc. is clearly responsible. Ultramar, Inc. contends that the existing contamination is due in part to a more-recent release from USTs that are presently located at the site and requests that the three other parties (owners and operators of existing UST) be designated as primary responsible parties as well. The proposed order finds there has been a release from the USTs that are currently located at the site and that two of the three parties should be identified as primary responsible parties. The proposed order finds that there is insufficient evidence in the record to identify the third party as a responsible party at all at this time.

POLICY ISSUE

State Water Board orders have found secondary-liability status appropriate where, among other things, the discharger or responsible party did not initiate or contribute to the unauthorized release. Generally, a secondary responsible party need not comply with a cleanup order unless the primary responsible party fails to comply. If, on the other hand, a responsible party does contribute to an unauthorized release (e.g., owns or operates the UST that leaked), it is appropriate to identify the parties as primary responsible parties. The proposed order is consistent with this policy.

FISCAL IMPACT

None.

REGIONAL BOARD IMPACT

Yes. San Francisco Bay Regional Water Quality Control Board.

STAFF RECOMMENDATION or ADVICE OF STAFF ACTION

Adopt proposed order.

D R A F T Revised January 14, 2009

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2008-XXX-UST

In the Matter of the Petition of

ULTRAMAR, INC

For Review of Sonoma County's Notice of Revision
to Responsible Party Designation

SWRCB/OCC FILE P06-230

BY THE BOARD:

Ultramar, Inc. (petitioner) seeks review of a decision by the Sonoma County Department of Health Services, Environmental Health Division (County) to remove Saied Molavi (Molavi), Dolores Hansen Trust (Hansen), and Sonoma Super Gas as primary responsible parties for corrective action at the underground storage tank (UST) release site located at 18618 Sonoma Highway, Boyes Hot Springs, California. Petitioner contends that all three parties should be identified as primary responsible parties. After a review of the record and for the reasons set forth below, the State Water Resources Control Board (State Water Board) grants the petition with respect to Molavi and Hansen, and denies the petition with respect to Sonoma Super Gas.

I. STATUTORY, REGULATORY, PROCEDURAL, AND FACTUAL BACKGROUND

This petition arises from the State Water Board's UST Local Oversight Program (LOP). The State Water Board'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 State Water Board is authorized to enter into contracts with local agencies to oversee site cleanup of unauthorized releases. (Health & Saf. Code, § 25297.1, subd. (b).) The County has a contract with the State Water Board 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, § 25296.10.) Chapter 16 of division 3 of title 23 of the California Code of Regulations (UST regulations), defines a responsible party as one or more of the following:

> (1) Any person 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.)

A person means "an individual, trust, firm, joint stock company, corporation, including a government corporation, partnership, limited liability company, or association." (Health & Saf. Code, § 25281, subd. (l).) It is appropriate for an LOP agency to designate a person as a responsible party for corrective action if the agency has credible and reasonable evidence that indicates that the person has responsibility. (See State Water Board Order WQ 85-7 [*Exxon Company, U.S.A. et al.].*) Where one or more responsible parties exist at a UST site, local agencies sometimes distinguish between parties who are primarily responsible and those who are secondarily responsible. Generally, a secondary responsible party is a responsible party that need not comply with a cleanup order unless the primary responsible party fails to comply.[1]

A release means "any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into or on the waters of the state, the land, or the subsurface soils." (Health & Saf. Code, § 25281, subd. (p).) 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

[1] State Water Board orders have found secondary liability status appropriate where, among other things, the discharger did not initiate or contribute to the discharge. (See State Water Board Orders WQ 89-8 [*Arthur Spitzer et al*.] and WQ 86-18 [*Vallco Park, Ltd.].*) These orders relate to cleanups directed by regional water boards under Water Code section 13304. Many LOP agencies apply the same principles and distinguish primary responsible parties from secondary responsible parties.

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.

Any aggrieved person, including a responsible party, may petition the State Water Board for review of the action of a local agency in the LOP. (Health & Saf. Code, § 25297.1, subd. (h); State Water Board Resolution 88-23.) On September 13, 2006, the State Water Board received the petition in this matter. The State Water Board's petition procedures provide that if the State Water Board does not act on a petition within 270 days after receipt, the petition shall be deemed denied. (State Water Board Resolution 88-23.) The State Water Board did not take action on this petition within this time period; therefore, the State Water Board is considering this petition on its own motion. (See *ibid.*)

A. UST Case History

The UST site that is the subject of this petition is located at 18618 Sonoma Highway in Boyes Hot Springs, California. Petitioner owned the site and operated a service station at the site until December 1991. When petitioner installed three monitoring wells in March 1991, an unauthorized release was discovered. The County issued corrective action orders to petitioner and petitioner initiated corrective action. Petitioner removed and replaced its UST system in November 1991 and sold the site to Molavi and Hansen in December of that year. Molavi began operating the USTs in 1992, and petitioner proceeded with corrective action while Molavi operated the service station at the site. The service station is commonly referred to as Sonoma Super Gas.[2]

In November 2005, the County determined that a second release had occurred from the USTs that are currently at the site. The County issued a Notice of Responsibility dated November 8, 2005, to Molavi and Hansen as UST owners and Sonoma Super Gas as the UST operator.[3] The County's determination that a second release occurred was based upon data submitted to the County, including regular groundwater monitoring data and results from an

[2] Some documents in the record refer to this facility as California Food and Fuel Store #2.

[3] During the review of this petition, documents were obtained and added to the record that indicate that Molavi, and not Sonoma Super Gas, is the operator of the USTs at the site. As discussed below, all parties have had an opportunity to comment on the new documents.

Enhanced Leak Detection (ELD) test.[4] The groundwater monitoring data relied upon by the County showed increasing concentrations of methyl-tertiary-butyl-ether (MTBE) and decreasing concentrations of benzene, toluene, ethyl-benzene, and xylenes (BTEX).

In a letter dated August 14, 2006, the County informed petitioner that the theory of a second release at the site could no longer be supported. The County explained that its earlier determination that a second release occurred was based upon a review of a trend analysis of contaminant concentrations and ELD test results from December 2004. The County further explained that one of the operative assumptions was that ELD test results from December 2004 indicated a release from the UST system, but that after minor repairs, a January 2006 ELD test indicated that the UST system passed. The County concluded that the trend analysis data alone were insufficient to make a positive determination that a release from the existing UST system was occurring or had occurred, and reversed its earlier determination that a second release had occurred. The County informed Molavi that his status as a secondary responsible party was still valid since he remained the owner of the subject property.[5] On September 13, 2006, petitioner filed a petition with the State Water Board seeking review of the County's August 14, 2006 decision.

During the petition process, petitioner, Molavi, and Hansen submitted additional evidence that did not appear to be in the County's record when the County issued its August 14, 2006 decision. On June 7, 2007, this information was distributed to all parties interested in this matter and they were given the opportunity to submit comments. The information included results of a UST system test from October 8, 2002, and documentation related to the repairs to the UST system.

Petitioner indicated that the information did not change the position from that asserted in the initial position. On June 26, 2007, the County responded to the information and concluded that the evidence of a failed leak test in October 2002 appeared to substantiate that

[4] ELD is a test method that ascertains the integrity of a UST system by introduction, and external detection, of a substance that is not a component of the fuel formulation that is stored in the UST system. (Cal. Code Regs., tit. 23, § 2644.1.)

[5] The County's letter was addressed to Molavi only and no similar letter was issued to Hansen or Sonoma Super Gas. The record indicates, however, that the County treated Hansen and Sonoma Super Gas as secondary responsible parties as well from this point on.

a release from the existing USTs had occurred and that a soil/groundwater investigation by the "responsible party" was warranted.[6]

Molavi and Black Point Environmental, Inc., on behalf of Molavi and Hansen, both responded to the additional evidence and the County's June 26, 2007 letter. On July 16, 2007, the County changed the conclusion that they had reached in their June 26, 2007, letter. The County explained that after issuing the June 26, 2007, letter, it had received additional information about the 2002 UST system failure and subsequent repairs performed by Whiteman Petroleum. The County stated that the letter from Whiteman Petroleum indicated that there was no evidence of a product release at any of the points of repair. The County also noted that leak tests conducted after the repairs indicated that all UST components passed. The County noted that it generally concludes that a release has occurred if the UST system has failed leak tests but that the additional information provided by Whiteman refuted this. The County concluded that there was insufficient evidence to conclude that a second release occurred.

B. Corrective Action and Site Setting

As indicated earlier, petitioner initiated corrective action in 1991 after discovering an unauthorized release from the USTs that it had owned and operated. In November 1991, petitioner excavated the area of the UST pit to about 20 feet below ground surface (bgs). Petitioner installed groundwater monitoring wells (MW) as follows: MW-1, MW-2, and MW-3 in 1991; MW-4 and MW-5 in 1992; MW-6 and MW-7 in 1997; and MW-8 and MW-9 in 2002. (See site map for location of groundwater monitoring wells.) From October 1992 through February 1994, about 60 gallons of non-aqueous phase liquid gasoline (NAPL) was recovered from wells MW-1, MW-3, and MW-4. From September 1994 through March 1996, petitioner performed soil vapor extraction from wells MW-1, MW-3, MW-4, and the UST excavation backfill recovering the equivalent of about 50 gallons of gasoline. Maximum NAPL thicknesses in wells MW-1 and MW-3 measured in 1991 were 0.25 feet and 2.78 feet, respectively; 0.01 to 0.02 feet of NAPL was measured in well MW-4 in 1992.[7] By February of 1994, NAPL was no longer measurable in these wells and the analyses of groundwater samples indicate that any remaining residual NAPL was immobile.[8]

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[6] This letter did not specify which responsible party(ies) should proceed with the soil and groundwater contamination.

[7] Third Quarter Monitoring Results Report. Aegis Environmental, Inc., August 18, 1992.

[8] Concentrations of TPH-g were less than half its effective solubility (100 to 120 mg/l) in groundwater samples collected in February of 1994 and thereafter from the three wells.

The nearest surface water feature, Aqua Caliente Creek, is located about 800 feet to the southeast of the site. The geology of the area is mapped as dissected old alluvial fan (Qoal) and consists of beds and lenses of clay through gravel size sediments.[9] In the vicinity of the site, the Qoal unconformably overlies older alluvial sediments of the Pleistocene Glen Ellen Formation (Qge). At the site the contact between the two geologic units occurs at about 20 feet bgs.

There are presently three water-bearing zones within the depth investigated at the site: a shallow perched water-bearing zone at about 10 to 13 feet bgs; a basal lag gravel deposit at the Qoal/Qge contact;[10] and a deeper zone at about 27 to 30 feet bgs. Groundwater in the perched zone is unconfined and is inferred to flow southeasterly toward Agua Caliente Creek and, near the USTs, vertically to the gravel zone at the contact and then southeasterly toward the creek. Groundwater in the deeper zone is under confined conditions and is inferred to flow in a general southwesterly direction toward Sonoma Creek. The hydrogeology at the site is complex due to the occurrence of multiple zones with high and low hydraulic conductivities and because these zones were compromised by the UST excavation and monitoring wells.[11] Groundwater samples from site wells were first analyzed for MTBE in May 1996; Tert-Butyl Alcohol (TBA) was first quantified in June 2003.

II. CONTENTIONS AND FINDINGS

Contention: Petitioner contends that the County's decision not to identify Molavi, Hansen, and Sonoma Super Gas as primary responsible parties at the site is improper because the evidence indicates that a release occurred at the site from USTs owned by Molavi and Hansen and operated by Sonoma Super Gas. Petitioner argues that two lines of evidence support this position: (1) MTBE and TBA are present in significant and increasing concentrations in some of the site monitoring wells while total petroleum hydrocarbons gasoline (TPH-g) and BTEX have been decreasing in concentration over time; and (2) Failed leak tests have been reported for various components of the currently-operating UST system and these reports indicate that a release occurred after 1991, even if the UST system is not currently leaking.

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[9] United States Geological Survey 1973. Preliminary Geologic Map of Eastern Sonoma County and Western Napa County, California. Miscellaneous Field Studies Map MF-483.

[10] Boring logs show that when MW1, MW-2, and MW-3 were installed, these sediments were not saturated.

[11] With the exception of well MW-1, all site wells are screened across the Qoal/Qge contact.

Molavi, Hansen, and Sonoma Super Gas argue that the monitoring data indicate that there has been no release from the current UST system. They explain that if there was a release, the concentrations in groundwater would be increasing for all gasoline constituents, not just MTBE. Molavi, Hansen, and Sonoma Super Gas argue that failed UST tests do not necessarily mean that a release has occurred from the UST system, but that often it means that a component of the detection system is malfunctioning. They argue that there is no evidence that a release occurred after 1991 because the UST system passed every integrity test performed after repairs were made to the detection or secondary containment systems.

Findings: After conducting an independent review of the record, we find that there is reasonable and credible evidence that indicates there was a substantial release of vapor-phase gasoline from the USTs that are currently located at the site. As explained below, both the groundwater monitoring data and ELD test results and related documentation indicate that a gasoline release occurred from the existing USTs and the groundwater monitoring data are consistent with a release of vapor-phase gasoline. Molavi and Hansen clearly are responsible parties. In addition to owning the property where an unauthorized release has occurred, they own, and in the case of Molavi operate, the USTs that leaked. Consistent with State Water Board orders, they should be designated as primary responsible parties.

Based upon the record before us, Sonoma Super Gas cannot be identified as a responsible party at this time. There is insufficient evidence in the record to find that Sonoma Super Gas is a distinct legal entity – a “person” for purposes of the responsible-party definition contained in the UST regulations. Furthermore, the record indicates that Molavi is the only operator of the existing UST and the record does not indicate that Sonoma Super Gas falls within any other category of responsible party contained in the UST regulations. It is important to note, however, that Sonoma Super Gas has not challenged responsibility on these grounds. Also, the definitions of “person” and “responsible party” are broad and evidence outside of the record before us may support identifying Sonoma Super Gas as a responsible party. Our conclusion today does not preclude the County from identifying Sonoma Super Gas as a responsible party in the future if sufficient evidence exists to do so.

Concentrations of MTBE in groundwater samples from wells MW-1, MW-2, MW-3, and MW-4, which are located 10 to 50 feet from the USTs, show two periods where concentrations of MTBE increased, peaked, and then declined: February 1997 through November 1998 and May 2000 through May 2005. The data from well MW-2, which is further from the UST location than wells MW-1, MW-3 and MW-4, demonstrate that the MTBE plume

was stable before these periods. When these data are viewed in the context of the spatial and temporal distribution of MTBE in site groundwater, they show that an MTBE release is first detected at wells MW-1 and MW-3 and then sequentially at wells in relation to their distance and groundwater flow direction from the USTs. During this same period, BTEX concentrations were decreasing. Because MTBE tends to diminish from a source area more readily than BTEX, a transitory and spatial increase in MTBE concentrations, while BTEX concentrations are decreasing, indicates an addition of MTBE mass to groundwater.[12] A release of gasoline vapor from a UST would be enriched with MTBE and detectable in groundwater relative to BTEX because of its greater vapor pressure and solubility. A pulsed MTBE plume with the absence of BTEX indicates an addition of MTBE mass to groundwater and is consistent with a vapor-phase release. Any MTBE associated with the pre-1991 unauthorized release would have been largely depleted from the source area and would not produce the temporal and spatial concentration distributions of MTBE detected during the peak periods identified above.

Molavi, Hansen, and Sonoma Super Gas argue that the fluctuations in concentrations of MTBE can occur for many reasons, including fluctuations in groundwater levels or as a consequence of rebound. The record shows that long-term (i.e., four or more quarters) concentration trends of MTBE in groundwater samples from wells MW-1 and MW-3 increase and decrease independently of groundwater fluctuations, suggesting an ongoing release. Rebound is a phenomenon that is typically complete within a few months of a remediation system shut-down. Increasing concentrations in groundwater several years after the cessation of the remediation system cannot be reasonably attributed to rebound.

In addition to the groundwater monitoring data, results from UST system testing and information accompanying those results also indicate that a release occurred from the existing USTs at the site.

[12] MTBE diminishes from a source area more readily than BTEX due to its partitioning characteristics - high solubility and low organic carbon partition coefficient (K_{oc}).

On October 8, 2002, the secondary containment was tested by Tanknology. The annular spaces for the USTs passed, but the secondary containment of the product lines from the USTs to the dispensers failed, and the under-dispenser containment failed the test. On November 14, 2002, a pressure test was performed on the primary containment of the product lines and they passed. The record indicates that there were repairs made to the under-dispenser containment in January of 2003. On March 19, 2003, the under-dispenser containment and the product lines were tested again and they both passed. On December 13, 2004, a Tracer Tight® ELD test was performed on the UST system. This test showed that the primary and secondary containment systems for two of the three USTs (regular and premium gasoline) were faulty. Eleven of the 14 vapor samples collected at depths ranging from 4.9 feet to 10.8 feet bgs from the backfill around the USTs reported concentrations of the tracer gas.[13] The presence of tracer in the backfill indicates that the UST system was not tight. On March 28, 2005, the product lines were tested and they passed. On January 25, 2006, a second ELD test was performed on ~~the regular and plus~~ all three of the USTs. ~~The premium UST was not re-tested.~~ The USTs passed, but the testing summary states that: "[d]etected leaks were repaired by contractor and re-tested tight before the end of the testing event."[14]

The argument advanced by Molavi, Hansen, and Sonoma Super Gas, that there is no evidence that a release occurred after 1991 because the UST system passed every integrity test performed after repairs were made to the UST system, is without merit. The backup data for the ELD test performed on December 13, 2004, show that tracer was detected in the backfill and the testing summary for the January 25, 2006, ELD test indicates that the ~~two~~ USTs passed the ELD test after the leaks were repaired.

III. SUMMARY AND CONCLUSION

After an independent review of the record and for the reasons previously discussed, we conclude as follows:

1. There is reasonable and credible evidence that indicates there was a release of vapor-phase gasoline from the USTs that are currently located at the site;

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[13] It should be noted that six additional samples were taken from interstitial spaces within the UST system (sumps and tank annular spaces). The inoculant for the premium UST, Tracer G, was found in the turbine sump of the premium UST as well as in the turbine sump of the regular gasoline UST. Tracer G was also found in two of the eleven samples collected from backfill referenced above.

[14] Praxair Services, Inc. February 7, 2006. In Service Enhanced Leak Detection (ISELD), Test Summary, page 2.

2. Molavi and Hansen should be added as primary responsible parties for the unauthorized release at the subject site because they own the USTs that leaked and property where an unauthorized release has occurred and, with respect to Molavi, because he operates the existing USTs that leaked;

3. Sonoma Super Gas cannot be identified as a responsible party at this time because there is insufficient evidence in the record to support a finding that Sonoma Super Gas is a "person" or that it falls within one of the category of persons who may be identified as a responsible party pursuant to section 2720 of the UST regulations. The County may identify Sonoma Super Gas as a responsible party in the future if sufficient evidence exists to do so.

IV. ORDER

IT IS HEREBY ORDERED THAT the County's Notice of Responsibility dated November 8, 2005, be either amended or reissued to add Saied Molavi and the Dolores Hansen Trust to the list of primary responsible parties for the UST site located at 18618 Sonoma Highway and that Sonoma Super Gas be removed as a responsible party.

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 ~~December 2, 2008~~February 3, 2009.

AYE:

NO:

ABSENT:

ABSTAIN:

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Jeanine Townsend
Clerk to the Board