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STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

IN RE: CLEANUP AND ABATEMENT ORDER R5-2004-0713, ISSUED TO TBS PETROLEUM, L.L.C., ANTLERS SHELL/SUBWAY, 20884 ANTLER'S ROAD, LAKEHEAD, SHASTA COUNTY	CAO No. R5-2011-0713 **STATEMENT OF REASONS OF TBS PETROLEUM, LLC FOR RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER NO. R5-2011-0713** CAO Issued Dec. 6, 2011 Hearing Date: June 7-8, 2012

Petitioner TBS PETROLEUM, LLC, through its legal counsel, submits this Statement of Reasons to the Central Valley Regional Water Quality Control Board for Reconsideration of Cleanup and Abatement Order No. R5-2011-0713, issued December 6, 2011 solely against TBS PETROLEUM, LLC, as current owner of Antlers Shell/Subway, 20884 Antler's Road, Lakehead, Shasta County, California (the "Property").

INTRODUCTION

This is not a situation in which there has been an "abuse of discretion," nor what any knowledgeable person would call "irresponsibility." Our client agrees with the reasoned judgment of the Executive Officer, and the staff, on behalf of the Board that insufficient evidence exists to name as "dischargers" owners and operators prior to Mr. Davis -- even those these earlier owners and operators likely contributed to the contamination of the Property. We also agree that the Board should consider the practicalities of access to the UST Cleanup Fund -- which both Mr.

Davis and TBS Petroleum, LLC have supported for years.

We believe it is simply not good public policy to allow an owner and operator of a gasoline service station such as Antlers Shell-Subway who clearly initiated and caused the main contamination of the Property to not be named as a discharger in the Cleanup and Abatement Order. The State Board's policy is clear,

> "a responsible party should not be left to clean up constituents attributable to a different release for which that party is not responsible." *In re Mohammadian,* Order WQO 2002-0021 (Nov. 19, 2002).

(We have looked for cases in which a Regional Board has not named a polluter who has the financial ability -- including access to the UST Fund -- to participate in a cleanup. We have found no cases.)

A second overriding concern should be the "precedent" that is set -- and the use of scarce resources not only of the parties to such a dispute, but for everyone involved. The message that will go out to the regulated community from a decision which does not name an acknowledged owner/operator of USTs that leaked may not be the message the Board wants to send out.

Finally, there is a significant difference between liability imposed by contracts interpreted by Courts and liability imposed by statutes and interpreted by Courts.

Petitioner addresses the specific issues in the following way:

1. The Board's change in rationale and findings leaves CAO R5-2011-0713 unsupported by findings of fact.

2. The findings of fact in the Order as issued December 6, 2011 are not supported by substantial evidence in the administrative record of this matter.

3. The new and additional "policy justifications" in the Statement of Rationale submitted by the Cleanup Team are not supported by substantial evidence in the administrative record of this matter.

4. The Cleanup and Abatement Order is unprecedented in expressly not requiring the

responsible party discharger, Mr. Bob Davis, to address his discharges of waste and threatened discharges of waste.

5. The Cleanup and Abatement Order is unprecedented in only naming the petitioner , TBS Petroleum, LLC as a responsible party discharger as current property owner addressing investigation and remediation of contamination on the property.

DISCUSSION

1. THE BOARD'S CHANGE IN ITS SUPPORTING REASONS REQUIRES RE-ISSUANCE OF THE CLEANUP AND ABATEMENT ORDER.

(THE ULTIMATE DECISION MUST BE SUPPORTED BY WRITTEN FINDINGS, AND THOSE FINDINGS MUST BE SUPPORTED WITH "SUBSTANTIAL EVIDENCE")

The Cleanup and Abatement Order No. R5-2011-0713 (the "CAO") is an adjudicatory decision of the Board. Adjudicatory decisions must be supported by adequate findings of fact. *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515-517 (findings must be in writing). Action by the Board must contain adequate findings which are supported by evidence in the administrative record.

It is a basic principle of California law that "the agency which renders the challenged decision must set forth findings of fact to bridge the analytical gap between raw evidence and the ultimate decision or order." *In re Petition of Las Virgenes Municipal Water District* (SWRCB. Feb. 15, 2001) Order No. WQ 2001-03.

The Board has issued CAO R5-2011-0713. The Executive Officer on behalf of the Board has decided that TBS Petroleum, LLC ("TBS"), as the current owner, is the only "discharger" that must comply with the terms of the CAO. The Executive Officer of the Board has also decided not to name the only "actual discharger," Bob G. Davis ("Davis"). Davis, at the time of the actual release of MTBE from the USTs on the property, caused or permitted "waste" (i.e., MTBE) to be "be discharged where it is, or probably will be discharged into waters of the State and creates or threatens to create a condition of pollution or nuisance." Water Code §13304(a).

The facts in the administrative record include:

1. The discharge occurred while the actual discharger Davis owned and operated a

gasoline service station on the Property before 2005.

2. MTBE was discovered in soil when Davis removed and replaced USTs in 1997.

3. In 2005 Davis sold the Property to TBS with an "as is" contract.

4. In 2007 TBS discovered the MTBE discharged by Davis in a domestic water well on the Property.

5. The contract between Davis and TBS for sale of the Property was interpreted by the Shasta County Superior Court and the 2d District Court of Appeal in a lawsuit filed by TBS against Davis. *TBS Petroleum, LLC v. Davis*, No. C062818 (3d DCA, Nov. 23, 2010).

6. The Court of Appeal ruled that "Any sale of real property 'as is' is a sale of the property in its present or existing condition. Use of the phrase relieves the seller of real property from liability for defects in that condition." As a result, Davis does not have to indemnify TBS for contamination of the property.

7. The Board in the CAO states, "...the Courts [i.e., the trial court and the appellate court] have determined that the contract between Davis and TBS allocated 100% of the responsibility for the cleanup to TBS."

The Board granted the request of TBS, through its legal counsel, for reconsideration of the CAO. The Board's Executive Officer (as part of the "Cleanup Team") has issued a Statement of Rationale ("SOR") to justify the naming of TBS and not the actual discharger Davis in the CAO. The SOR now states, in addition to the appellate court decision, more reasons in support of the CAO. These **additional and new "policy justifications" ("Additional Reasons")** include:

1. TBS is the Responsible Party Best Positioned to Implement the Cleanup.

2. The Superior Court Decision, and the Appellate Court's Affirmation, Conclude that TBS is Ultimately Responsible for Paying for the Cleanup.

3. It is Unlikely That the UST Fund Will Allow TBS to Access Funds.

4. The Board Still Retains the Ability to Name Mr. Davis in Future Orders, Should TBS Fail to Effectuate the Cleanup of the Site.

These new SOR Reasons were not stated in the CAO. A new CAO will be necessary whether or not the Board itself decides to include Davis in the Order. *In re Petition of City and*

County of San Francisco, et al., Order No. WQ-95-4 (Sept. 21, 1995) (the necessity for action required by a Regional Board issuing a NPDES permit must be articulated in the Board's findings).

Why must Orders be supported by Findings?

1. Findings "bridge the analytical gap between the raw evidence and ultimate decision or order." *Topanga Ass'n, supra,* 11 Cal. 3d 506, 515.

2. The Board's Findings must be supported by "substantial evidence."

3. The Board's ultimate decision must be supported by the Findings. *Id.*

When a Court reviews a Cleanup and Abatement Order, the Court compares both the evidence and the ultimate decision to the Findings -- and not to each other. *Id.*

In other words:

Ultimate Decision

▲

Findings

▲

"Substantial Evidence"

Why did the Cleanup Team Add a Rationale to Support the Cleanup and Abatement Order?

When the CAO was issued December 6, 2011, Davis, the actual discharger, was left off -- because, in the words of the CAO, "...the courts ...determined that the contract between Davis and TBS allocated 100% of the responsibility for the cleanup to TBS."

The Statement of Rationale -- unlike the Cleanup and Abatement Order -- acknowledges that the actual discharger, Davis, is liable to the State of California ("the Board") pursuant to Section 1304(a), Water Code. The Cleanup Team, in defending the CAO, admits that the CAO did not include sufficient Findings to support the Ultimate Decision that the actual discharger, Davis, should be left off the Cleanup and Abatement Order.

The CAO states that in 2007, CR Water Treatment (the operator of the water treatment facility on the domestic water well) reported MTBE in a sample from the well. *CAO, Finding*

No. 12

Finding No. 12 of the CAO quotes an undated "written notice" by CR Water Treatment as stating:

> *"In early 2007, the Shell station had a water leak over the fuel tanks which flooded the area for several months before it was located and stopped. The subsequent routine MTBE test started showing it's presence in the well water after this (flooding) incident."*

But Finding No. 12 ignores the Board's own conclusion, in its staff report of April 27, 2010 (Cleanup Team ["CT"] Exhibit No. 39, at p. 5):

"... soil sampling during the [1997] tank removal may have under represented maximum source concentration ... The above [information] suggests that an MTBE release near the UST, around 1997, dispersed continuously, and began to reach the domestic well beginning about 10 years later."[1]

[It is important to note that the CAO does acknowledge, in passing, the extensive work TBS has done investigating, controlling, and developing an effective cleanup plan. See Findings Nos. 14, 15, 16, 17, and 18.]

We have the following comments on the additional reasons stated in the SOR:

<u>ADDITIONAL REASON NO. 1</u>. TBS IS THE RESPONSIBLE PARTY BEST POSITIONED TO IMPLEMENT THE CLEANUP.

In this Finding, the Cleanup Team states:

a. TBS is the current owner. *Agreed.*

b. There are "no known access issues" that "impede" TBS from "implementing cleanup options." *Agreed.*

c. As the property owner, TBS will also benefit the most from the increased property value "that inheres to a fully-remediated property."

This Reason is not supported by any evidence. The CAO includes Findings (Nos. 8 and 11) that any pollutants known in 1997 and 2003 were at very low levels. In 1997, two soil samples, in the bottom (11 feet deep) of the UST excavation, were reported (presumably by Davis'

[1] The April 27, 2010 Report cautions that this analysis is preliminary and subject to revision, but states "However, predicted concentrations in the well are with range of those observed."

contractor) as having MTBE at 0.033 mg/Kg and 0.085 mg/Kg.[2] *No "BTEX" (benzene, toluene, ethylbenzene, xylenes), gasoline, or diesel were found. The Shasta County Health records include nothing about odors or discoloration of soils. Some scant traces of some chemicals were reported at the locations of the pumps. Shasta County closed the site by giving Davis a "no further action required" letter. Six years later, the County required Davis to install a chlorination system on the water supply well. Five months after that, contaminants, including MTBE were below reporting limits when the well water was sampled.*

It is hard to understand the SOR's conclusion that a cleanup of Davis' leak of MTBE would increase the value of the Property. It flies in the face of common sense to assume TBS received a discount on the purchase price in 2004 due to some known contamination of the Property. This Finding is simply not supported by "Substantial Evidence." Thus, it cannot support the Ultimate Decision (that only TBS should be on this Cleanup Order).

If Davis is named in the CAO TBS will fully cooperate in granting him access to the property for cleanup related activities.

ADDITIONAL REASON NO. 2: THE SUPERIOR COURT DECISION, AND THE APPELLATE COURT'S AFFIRMATION, CONCLUDE THAT TBS IS ULTIMATELY RESPONSIBLE FOR PAYING FOR THE CLEANUP.

In this Reason, the Cleanup Team states:

a. The Board should "get involved" in "contractual disputes between responsible parties" when "the Board has been provided with court decisions that ultimately conclude that TBS bears the ultimate responsibility for the environmental obligations that persist at the Site." *This is a unique decision, without precedent. "Ultimate responsibility for the environmental obligations..." misconstrues the applicability of the Courts' rulings. Does the Cleanup Team mean that the court decisions make TBS liable to third parties, such as downgradient property owners when the MTBE plume reaches their property? The MTBE contamination on the Property is a condition that pre-exists TBS' purchase of the Property. The courts' decision should*

[2] One milligram per kilogram = 1 part per million. So, 0.033 mg/Kg = 33/1,000 parts per million. 0.085 mg/Kg = 85/1,000 ppm.

be considered to be limited to Davis and TBS, not third parties, including the Board.

b. The Board has concern that Davis would need to negotiate an access agreement to enter TBS' Property. *The Board has the power of Section 13267 Orders,*[3] *and it is hard to understand why an owner of Property who did not cause or contribute to contamination would refuse to allow access.*[4]

c. The Board states that if it issued the CAO naming the actual discharger, Davis, there would be a need for further negotiations between Davis and TBS. The Board says, "Instead of going through this process, it is reasonable for the Board to look directly to the party that the Courts believe bear[s] the responsibility for the cleanup, which is TBS. *The concern the Board expresses does not adequately consider what funding may be available for the necessary work. The decision of the Board to name TBS and not name Davis may bar both of them from the UST Cleanup Fund -- which as gas station owners and operators they have supported with the throughput fees collected and paid to the Board of Equalization for over two decades. The decision also destroys the financial assurance that Davis would otherwise have, particularly as to claims from third parties. There are many good reasons why the Board does not ordinarily get involved in contractual relationships among private parties who qualify as dischargers. The State Board has repeatedly emphasized*

> "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. *[Board Order WQ 85-7, In the Matter of the Petition of Exxon Company, U.S.A. et al.]* See also SWRCB Order WQ 86-16, In the Matter of the Petition of Stinnes-Western Chemical Corporation.)"

<u>ADDITIONAL REASON NO. 3</u>: IT IS UNLIKELY THAT THE UST FUND WILL ALLOW TBS TO ACCESS FUNDS

In this reason, the Cleanup Team expresses opinions that are not supported by "substantial evidence."

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[3] In conducting an investigation as to water quality, the Board can issue orders requiring access in order to prepare technical reports. Water Code §13267(b).

[4] Also, some rents for access are often reimbursable by the UST Cleanup Fund.

a. "Both TBS and Davis have failed to undertake voluntary measures to remediate the contamination that exists at the Site, and have not complied with Board directives relating to the investigation and remediation of the Site."

While it is true that Davis has done nothing, TBS has spent over $90,000 for investigation and remediation, including interim remedial measures. The CAO includes findings that TBS has "complied with Board directives..."

Finding No. 13. "...On 25 June 2008, Central Valley Water Board staff jointly requested that TBS and Davis submit a Preliminary Site Assessment Work Plan..."

Finding No. 14. "On 17 November 2008, Central Valley Water Board staff approved the Letter Workplan: Boring Installation Antlers Shell-Subway (which was submitted by LACO Associates [TBS' agent]. ... Davis did not submit a work plan."

Finding No. 15. "On 4 March 2009 a Report of Findings, Initial Subsurface Investigation was submitted by LACO Associates."[TBS' agent']

Finding No. 16. "In conjunction with the site sensitive receptor study, LACO sampled 7 domestic wells located within 1,000 feet of the site...."

Finding No. 17. "On April 27, 2010, Central Valley Water Board issued an Order to Submit Information Pursuant to California Water Code Section 13267 (the "12367 Order"), jointly to TBS and Davis. ...TBS responded to this request. ..."

How could a party, such as TBS, that spends $90,000 on investigation and cleanup – without knowing whether it will ever be reimbursed by the UST Cleanup Fund – be considered to have not "...complied with Board directives relating to the investigation and remediation of the Site"?

Again, this Reason is not supported by "substantial evidence." Instead, the Findings in the CAO contradict this Additional Reason No. 3.

b. "Though the State Water Board has concluded that it is not improper for a responsible party to assign its grant to another responsible party..."

The UST Cleanup Fund program is in the Division of Financial Assurance of the State Water Resources Control Board. The Fund is not a "grant" program; it is a "reimbursement"

program. Other programs in the Division of Financial Assurance are "grant programs."

c. "…the Cleanup Team believes that nothing in the UST Fund regulations precludes Mr. Davis from transferring a UST Fund commitment (if he is eligible and does receive a commitment from the Fund) to TBS, *even if he is not named in the CAO.*"

This statement is speculation; and it appears from at least one expert (Mr. Holm) who has worked with the Fund for many years -- that Mr. Davis may not have access to the Fund unless he is named in the CAO.

TBS SHOULD BE NAMED AS SECONDARILY RESPONSIBLE

The cleanup appears to be proceeding well at this time. It is well within the discretion of the Board to assign secondary responsibility to TBS Petroleum, LLC in this situation.

CONCLUSION

The Cleanup and Abatement Order should be amended to include Mr. Davis as a responsible party. Mr. Davis and TBS Petroleum, LLC should be left to their own devices to sort out any contractual issues they may have. It would be unnecessarily punitive otherwise to issue a Cleanup and Abatement Order which would result in neither of them having access to the UST Cleanup Fund.

Dated: May 10, 2012

By:
JAMES R. ARNOLD

THE ARNOLD LAW PRACTICE

Attorneys for Petitioner
TBS PETROLEUM, LLC

PROOF OF SERVICE

I am employed in the County of Contra Costa, State of California. I am over the age of 18 am not a party to the within action. My business address is 3685 Mt. Diablo Boulevard, Suite 331, Lafayette, California 94549.

On May 10, 2012, I served the following document described as:

STATEMENT OF REASONS OF TBS PETROLEUM, LLC FOR RECONSIDERATION OF CLEANUP AND ABATEMENT ORDER NO. R5-2011-0713

on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as stated on the attached service list.

[ ] **BY MAIL** – I deposited such envelope in the mail at Lafayette, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Lafayette, California in the ordinary course of business.

[ ] **BY PERSONAL SERVICE** – I caused said document to be hand delivered to the offices of the addressee(s) shown on the attached service list.

[ ] **VIA FACSIMILE** – I faxed said document, to the office(s) of the addressee(s) on the attached service list, and the transmission was reported as complete and without error.

[X] **BY ELECTRONIC TRANSMISSION** – I transmitted a PDF version of this document by electronic mail to the party(s) identified on the attached service list using the e-mail address(es) indicated.

[ ] **BY OVERNIGHT DELIVERY** - I deposited such envelope for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices. I am "readily familiar" with the firm's practice of collection and processing packages for overnight delivery by Federal Express. They are deposited with a facility regularly maintained by Federal Express for receipt on the same day in the ordinary course of business.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 10, 2012, at Lafayette, California.

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Executed on May 10, 2012, at Lafayette, California.

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