

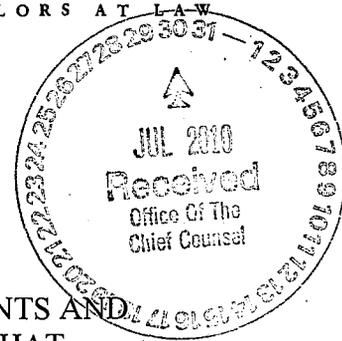
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CALIFORNIA REGIONAL WATER  
QUALITY CONTROL BOARD  
LOS ANGELES REGION



VIA HAND DELIVERY

July 28, 2010

Mr. Ken Harris  
Interim Assistant Executive Officer  
California Regional Water Quality Control Board  
Los Angeles Region  
320 W. 4th Street, Suite 200  
Los Angeles, California 90013

SHELL COMMENTS AND  
REQUEST THAT  
DEVELOPER PARTIES BE  
ADDED TO CLEANUP AND  
ABATEMENT ORDER AND  
IDENTIFIED AS  
RESPONSIBLE PARTIES

RE: *Former Kast Property Tank Farm Located in Carson, California (Site Cleanup No. 1239; Site ID. 2040330): Shell Oil Company/Shell Oil Products US Comments on Tentative Cleanup and Abatement Order No. RB4-2010-XXX Regarding Parties that Should be Added to the Cleanup and Abatement Order*

Dear Mr. Harris:

For the reasons articulated below, any material located above the concrete floor of the former Kast Property reservoirs was left there by the entities that owned and developed the property after Shell sold it to them in 1966. Their construction activities altered the property from decommissioned storage reservoirs to residential housing in 1967 and 1968. Therefore, it would be equitable and appropriate for these former owners and developers to be: 1) added to the Tentative Cleanup and Abatement Order; and 2) required to have a role in implementing the work requested by the Regional Board. This request is supported by the fact that the developers' activities substantially exacerbated the environmental condition of the property.

We represent Shell Oil Company ("Shell") and Shell Oil Products US and provide the following comments and information in support of Shell's request that the Regional Board add Dole Food Company, Inc. and Barclay Hollander Corporation, both individually and as successor in interest to Lomita Development Company, (the "Developer Parties") as responsible parties with respect to the ongoing cleanup of petroleum hydrocarbons at the former Kast Property Tank Farm located in Carson, California (the "Property"). Specifically, Shell respectfully requests that the Developer Parties be identified as responsible parties to which the Tentative Cleanup and Abatement Order is issued when it is finalized by the Regional Board.

As explained herein, this request is based upon the evidence surrounding the transfer of ownership of the Property to Lomita Development Company; the agreements by the Developer Parties to take responsibility for cleanup activities and disposal of wastes; the Developer Parties' actions in connection with exercising control over the reservoir cleaning, demolition and fillings,

site grading, and related construction of the Property during their development activities; the requirements of the Tentative Cleanup and Abatement Order (which focus on addressing petroleum impacts in the top ten (10) feet of soil, an area heavily impacted by the actions or inactions of the developers); and applicable law regarding liability for distribution or dispersal of contamination and corporate successorship.

## **I. History of the Property**

In 1923, Shell's predecessor-in-interest, Shell Company of California, purchased the Property from Mary Kast. Shell and/or its predecessor intermittently stored petroleum in reservoirs located on the Property, until Shell decided to offer the Property for sale in 1965. In October 1965, Shell negotiated with Richard Barclay for the purchase of the Property. The parties executed a Purchase Option Agreement, wherein Richard Barclay (or his nominee) agreed to purchase the Property, subject to a favorable engineering report and other restrictions.<sup>1</sup> Richard Barclay was a principal in Barclay-Hollander-Curci ("BHC"). Lomita Development Company ("Lomita"), a California partnership, was designated as Mr. Barclay's "nominee"<sup>2</sup> and purchased the property. Title of the Property was transferred from Shell to Lomita via Grant Deed recorded on October 14, 1966.<sup>3</sup>

Richard Barclay and BHC remained involved in the Property development. As discussed in greater detail below, BHC sought and obtained permission to enter the Property prior to closing in order to begin decommissioning of the reservoirs and site preparation work. BHC and Lomita jointly requested extensions of deadlines under the original October 20, 1965 purchase agreement.<sup>4</sup> Other documentation supports the contention that BHC exercised control over the grading and other activities at the Property beyond December 1965, when Lomita was designated. In one such letter, BHC describes "our [BHC's] original purchase of the Kast Fee Property."<sup>5</sup>

BHC requested and was granted written permission to install retaining walls and re-grade the Property to County specifications.<sup>6</sup> Ed Barfield, for BHC, specifically stated in this request, "We accept responsibility for putting in [the] retaining wall and regrading [the] lot." BHC also provided the registered supervising grading engineer required to be in charge of site grading

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<sup>1</sup> Purchase Option Agreement, attached hereto as Exhibit 1.

<sup>2</sup> December 28, 1965 letter from BHC nominating Lomita Development Company as purchaser, attached hereto as Exhibit 4.

<sup>3</sup> Grant Deed, attached hereto as Exhibit 2.

<sup>4</sup> August 17, 1966 letter from Shell to BHC and Lomita, with executed acknowledgment, attached hereto as Exhibit 3.

<sup>5</sup> See March 2, 1967 letter from BHC to Shell ("We are submitting herewith a map showing our original purchase of the Kast Fee Property."), attached hereto as Exhibit 11.

<sup>6</sup> Request and reply regarding retaining walls and regarding, attached hereto as Exhibit 5.

work.<sup>7</sup> Finally, it is noteworthy that BHC and Lomita shared the same address, 6151 West Century Boulevard, Suite 700, Los Angeles, California.

As explained herein, Lomita and BHC developed the Property into residential housing beginning in December 1965 through 1969. As detailed in Section VIII herein, based on documents recently produced to Shell, Lomita was dissolved by operation of law when its partners were merged into Barclay Hollander Curci, Inc. Barclay Hollander Curci, Inc. – which is now named Barclay Hollander Corporation and is wholly-owned by Dole Foods Company, Inc. – succeeded to the liabilities of Lomita.<sup>8</sup>

## **II. The Developers Began Site Preparation and Cleanup in 1965 and Agreed to Remove Liquid Waste and Residues in Compliance with Laws**

On December 1, 1965, BHC proposed in a letter to Shell to begin cleanup and site development work.<sup>9</sup> Because it desired to begin development work before the sale closed, BHC needed permission of Shell to access the Property, as set forth in the December 1965 letter:

At our meeting last week we discussed the desirability of receiving permission from Shell Oil Company, prior to the close of sale, to do site clearing work on the property we are purchasing from you.

At your suggestion, I am putting this request in writing as follows:

Phase 1 – We would like to begin immediately to remove the liquid waste and petroleum residues from the property....

As we discussed, the removal of waste should improve the value of your property and, therefore, there should be no exposure to Shell Oil Company other than possible public liability, which may be incurred during the course of the work. To protect Shell against this possibility, we will furnish you with liability insurance in such form as you may require.

Phase 2 – Beginning in about January, we would like permission to start removal of metal and wood wastes....

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<sup>7</sup> See County of Los Angeles Acknowledgement Concerning the Employment of a Registered Civil Engineer and Technical Consultants dated October 19, 1967, attached hereto as Exhibit 6; and County of Los Angeles Acknowledgement Concerning the Employment of a Registered Civil Engineer and Technical Consultants, dated March 13, 1968, attached hereto as Exhibit 7, both naming George Bach of BHC as Supervising Grading Engineer.

<sup>8</sup> See Agreement and Plan of Reorganization, attached hereto as Exhibit 8.

<sup>9</sup> December 1, 1965 letter from BHC to Shell, attached hereto as Exhibit 9.

Phase 3 – Beginning either February or as late as March, we would like to begin grading the property and restoring it to its natural grade.

\* \* \*

[W]e would ... appreciate receiving approval for Phase 1 as soon as possible. We are anxious to get this part of the project started immediately.

Shell agreed to BHC's requests and allowed BHC to begin its development and site preparation/cleanup work, subject to a number of conditions, which BHC accepted.<sup>10</sup> Among other things, BHC agreed:

1. That [Shell does] not make any representation or warranty concerning the safety or condition of said lands or any improvements or property located therein or thereon; that [BHC] enter and work upon said lands at [BHC's] sole risk; that [BHC] shall bear and pay all costs and expenses arising out of [BHC's] work thereon and the disposition of wastes and residues removed therefrom; and that [Shell] shall not be liable to [BHC] or any other person or persons for the cost or value of any work or improvements performed by or for [BHC] on said lands even if [Shell's] sale thereof to [BHC] is never consummated.

2. That ... [BHC] shall take all necessary precautions to protect all property (including, but without limitation, [Shell's] property) and persons (including, but without limitation, [Shell's] employees) from damage or injury arising out of [BHC's] work on said lands. While on said lands or in the vicinity thereof, [BHC] agree[s] to observe and comply with all fire, safety, and other rules and regulations heretofore or hereafter imposed by or under authority of law or prescribed by [Shell]; and [BHC] shall be responsible for the observance thereof by all [of BHC's] employees, agents, contractors, and other persons on or in the vicinity of said lands at [BHC's] request or with [BHC's] permission (express or implied).

3. That [BHC] shall reimburse [Shell] for any and all injury, damage, expense and/or loss suffered by [Shell], and agree[s] to indemnify and hold [Shell] and said lands free and harmless of, from and against any and all claims, liens, suits and

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<sup>10</sup> December 15, 1965 letter from Shell to BHC, with executed confirmation of BHC, attached hereto as Exhibit 10.

proceedings (hereinafter collectively referred to as "actions"), causes of action, and liabilities of whatsoever nature for damage to or loss, or loss of use of, any property and/or injury to or death of any persons (including, but without limitation, [Shell's] and [BHC's] employees and those of [BHC's] contractors), directly or indirectly caused by or arising out of or resulting from or in any way connected with [BHC's] entry or work on or in the vicinity of said lands or the disposition of wastes and residues removed therefrom, irrespective of any negligence of [Shell's]...

\* \* \*

5. That all work done by or for [BHC] on said lands or in disposing of wastes and residues removed therefrom shall be done in a good, lawful and workmanlike manner. That [BHC] shall secure and keep in effect any and all permits and licenses required by any and all public bodies in connection therefrom.

A few days later, Richard Barclay of BHC formally named Lomita, as his "nominee for the purchase of the property [he was] purchasing from Shell Oil Company pursuant to [the] agreement dated October 20, 1965."<sup>11</sup> Also in December 1965, BHC and Lomita engaged Pacific Soils Engineering, Inc. ("PSE") to conduct a preliminary soil investigation, and otherwise took steps to initiate Phase I of the cleanup and site development work.<sup>12</sup>

### **III. Developers Obtained Permission to Develop for Residential Use Knowing of Prior Industrial Operations**

Lomita purchased the property with knowledge of its prior use for petroleum storage and after investigation of the site conditions. Change in zoning from industrial to residential was necessary for the intended development. In August 1966, Donald Barclay, on behalf of Lomita, prepared a notice<sup>13</sup> relating to the public comment requested regarding the zoning change for the property, explaining:

You have been asked by a representative of Lomita Development Co. to sign a petition requesting the County of Los Angeles to change the zoning of a 40 acre parcel, lying between Main Street and Avalon Boulevard, on the north side of Lomita Boulevard....

It is the purpose and intent of Lomita Development Co. to develop this parcel into a walled community of 286 high quality homes,

<sup>11</sup> December 28, 1965 letter from BHC nominating Lomita as purchaser, attached hereto as Exhibit 4.

<sup>12</sup> See December 1, 1965 letter from BHC to Shell, attached hereto as Exhibit 9; and January 7, 1966 PSE Report, attached hereto as Exhibit 12.

<sup>13</sup> Notice regarding public comment and zoning change, attached hereto as Exhibit 13.

The report recommended that, "All sludge and water remaining in the reservoirs be wasted from the site" and "All concrete shall be wasted from the site or buried deep enough in the fill so as not to interfere with future construction."

The January 7, 1966 report was supplemented by a January 27, 1966 Addendum soils report for Tract 24836, which identified specific proposed site development work and was also sent to the County of Los Angeles. PSE recommended to Lomita that:

All concrete shall be wasted from the site or buried deep enough in the fill so as not to interfere with future construction. The technique for placing the concrete shall be as follows. (a) break up in place the bottom slabs sufficiently to allow drainage, (b) place one foot of clean compacted fill over the broken slab, (c) place cut side wall panels (maximum size 31' x 50') flat on compacted fill surface. The placing of the concrete shall be such that the finished surface of the placed concrete shall not be more than six inches above the compacted fill. Place compacted fill over the top of these slabs. No concrete shall be placed within 4 feet from the final finished grade.<sup>17</sup>

This report also indicated that prior to placing fill on the bottom slab, hand auger holes would be drilled to examine existing underlying soils.

At the request of the County, the allowable depth that concrete fill could be placed below grade was **increased** from four (4) to seven (7) feet below finished grade. In other words, it appears the County required at least seven (7) feet of compacted fill above the concrete.<sup>18</sup> The Regional Planning Commission – County of Los Angeles Subdivisions and Highways Division's conditions for development of Tract No. 24836 provide that:

18. 1. A grading permit for property encompassed by this subdivision has been issued. This permit provides for the disposal of concrete slabs, previously existing at this site as walls and floors of the oil sumps, within the compacted fill. ***As a condition of this permit, no concrete is permitted within seven (7) feet of the finished grade.***<sup>19</sup>

A few months later, on March 11, 1966, PSE provided Lomita a further letter report of a subsurface drainage study of Tract 24836. This report reflects an additional six (6) soil borings to depths ranging from twelve (12) to fifteen (15) feet. According to PSE:

<sup>17</sup> See January 27, 1966 PSE report, attached hereto as Exhibit 14.

<sup>18</sup> See January 31, 1966 letter from PSE to Lomita, attached hereto as Exhibit 15; and Los Angeles County Lettergram, dated February 2, 1966, including Plan Correction Sheet, attached hereto as Exhibit 16.

<sup>19</sup> County of Los Angeles Conditions for Development of Tract, attached hereto as Exhibit 17, emphasis added.

The field investigation reveals that the soils beneath the reservoir conform to those found in our original exploration. Generally, the first three feet found directly beneath the slab tend to be silty and clayey sands which are highly oil stained. The underlying soils are fine to medium clean sands. All soils are in a dense state and suitable to receive fill. Most of the soils in the borings had a petroleum odor, however the amount of actual oil contained in the soil is unknown.<sup>20</sup>

As stated in the March 11, 1966 report, PSE punched **nearly 6000 linear feet of trenches through the reservoir concrete floors** in annular rings eight inches wide, in an effort to improve percolation of water through the slab. PSE concluded that, "If the slab is left as is (utilizing the 6000 linear feet of open trench), the percolation volume should be on the order of 26,500 cubic feet . . . . Based on these calculations . . . it is considered that the available drainage area is sufficient to handle all expected percolating water."

A September 20, 1966 letter from PSE to Lomita, reflects changes to the initial recommendation that the side wall concrete slabs could be placed intact into the floor of the reservoir. Instead, **PSE advised Lomita to mix broken concrete side wall slabs with soil and compact:**

Preliminary grading has revealed that our recommendations concerning concrete burial are not feasible. It was originally thought that the concrete slabs could be placed intact in the fill; however, it has been found that the slabs tend to break up during removal. *We are therefore recommending that the concrete be thoroughly mixed with soil, watered and compacted with a heavy vibratory roller.* Following compaction the mixture should be watered thoroughly to insure proper filling of all voids. The maximum thickness of the soil-concrete lift should be one foot and be restricted to the bottom foot of proposed fills. No concrete shall be placed within 7 feet of the final finished grade. This method has been utilized in a test area and found to be successful.<sup>21</sup>

Subsequent reports and filings include similar recommendations and describe site development work at the other parcels within the Property.<sup>22</sup>

<sup>20</sup> See March 11, 1966 PSE "Subsurface Drainage Study," including boring log, attached hereto as Exhibit 18.

<sup>21</sup> September 20, 1966 PSE report, attached hereto as Exhibit 19, emphasis added.

<sup>22</sup> See, e.g., April 26, 1967 letter from PSE to Lomita, recommending the same drainage system and concrete burial procedures for the central reservoir as recommended in the September 20, 1966 report regarding the southernmost reservoir, attached hereto as Exhibit 20. See also June 8, 1967 letter to Lomita regarding the northern reservoir, attached hereto as Exhibit 21.

In summary, Developer Parties undertook an investigation of subsurface soils and were aware of oil impacts below the reservoir. . It appears to have been Developer Parties' decision (among other things) to:

- . Remove the contents of the reservoir
- . Leave the reinforced concrete reservoir floor in the ground
- . Punch trenches through the reservoir floor to promote percolation through the floor
- . Dispose of the broken up concrete side walls into the bottom of the reservoir covered by at least seven (7) feet of fill
- . Place fill inside the former reservoirs

Later soil engineering reports evidence Developer Parties' actual work preparing the site for residential use. The October 12, 1967 and March 1, 1968 PSE reports<sup>23</sup> reflect that the concrete reservoir floors were left in place. Prior to placement of compacted fill in the reservoir, trenches were punched into the bottom of the reservoirs, which were then filled with broken concrete from the reservoir wall. The minimum cover of compacted fill, as set forth in these two reports, was **seven (7) feet**. Two previous reports, from July and August 1967, stated that the minimum cover was **nine (9) feet**.<sup>24</sup> In some areas, Developer Parties elected to bury additional concrete pedestals.<sup>25</sup> All of these reports reflect work that was performed in developing the property **after** the transfer of ownership from Shell to Lomita, which took place on October 15, 1966.<sup>26</sup>

**V. The Tentative Order Focuses on Surface Soils and Potential Removal of Concrete Left in Place by Developer**

The focus of the tentative order issued on June 28, 2010 is the shallow soils in the Carousel neighborhood. "Shallow soils" are defined by the Regional Board in paragraph 3, page 8, as "soils found to a nominal depth of 10 feet." The order contemplates that respondent would "Remediate the shallow soils in the unpaved areas" and "Restore the impacted shallow soil and remove the entire reservoir concrete slab buried beneath the unpaved soil and associated sludge."<sup>27</sup>

**VI. Lomita and BHC Caused, Contributed to and Exacerbated the Presence and Distribution of the Contamination that is the Subject of the Tentative Order**

The environmental data collected so far in the Carousel housing development, as well as the documents outlined above, indicate that as a result of the developers' activities, petroleum-

<sup>23</sup> October 12, 1967 PSE Interim Supervised Compaction Report, No. IV, attached hereto as Exhibit 22; and March 1, 1968 PSE report, attached hereto as Exhibit 23.

<sup>24</sup> July 31, 1967 PSE Interim Supervised Compaction Report, No. I, attached hereto as Exhibit 24; and August 8, 1967 PSE Interim Supervised Compaction Report, No. II, attached hereto as Exhibit 25.

<sup>25</sup> See October 19, 1967 PSE report, attached hereto as Exhibit 26; and November 14, 1967 letter from PSE to Lomita, attached hereto as Exhibit 27.

<sup>26</sup> See also January 29, 1968 PSE report and February 7, 1968 addendum thereto, attached hereto as Exhibit 28.

<sup>27</sup> See Tentative Order, paragraph 3.a. and 3.b., page 8.

impacted soils are being found above the floor of the reservoirs and outside of the footprint of the three original reservoirs. For example, the following locations at the Property contained TPH in shallow surface soils outside the reservoir footprint: 1) back yard of 24433 Marbella, at 1,700 mg/kg TPHd and 37,000 mg/kg TPHo; 2) back yard of 24420 Panama, at 6,000 mg/kg TPHd and 19,000 mg/kg TPHo; and 3) back and front yards of 24744 Marbella, at 4,300 mg/kg and 12,000 mg/kg TPHd, respectively, and 15,000 mg/kg and 16,000 mg/kg TPHo, respectively.<sup>28</sup> There are also numerous samples containing elevated TPH in shallow soil above the floor level of the historical reservoirs.<sup>29</sup> Examples of these are listed in Exhibit 29.

The records obtained from the City of Carson do not identify the source of the fill material placed inside the reservoirs by the developer. However, one document obtained does indicate that "native soil" was used to backfill sewer and storm drain trenches on Tract Nos. 24836, 28441 and 28564.<sup>30</sup> In any event, the native soil or other material utilized by Lomita or BHC may have been contaminated with petroleum. Moreover, based on the preliminary investigation to date, Lomita's and BHC's activities appear to have caused the contamination to be spread across the Carousel housing development, including outside the former reservoirs, and at depths as shallow as between ½ and 2 feet.<sup>31</sup> This is consistent with the tentative finding by the Regional Board that the distribution of hydrocarbons may "be due to the nature of previous development activities at the Site (i.e., the construction and demolition of the former reservoirs and site grading in preparation for development of the residential tract)."<sup>32</sup> Thus, if there is currently petroleum-impacted soil above the concrete floor and at depths as shallow as two or three feet, it could only be there as a result of the developer's activities in filling and grading the site.

Accordingly, the present location of the contamination in the shallow subsurface soils above the former reservoir floor and outside the former reservoir walls was caused by Lomita and BHC or, at a minimum, Lomita's and BHC's activities substantially exacerbated pre-existing conditions at the site.

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<sup>28</sup> See "Select Elevated TPH Diesel and Motor Oil Range Within Former Kast Property," attached hereto as Exhibit 29.

<sup>29</sup> See January 7, 1966 PSE report, attached hereto as Exhibit 12 (indicating that the reservoirs were thirty (30) feet deep).

<sup>30</sup> See December 2, 1968 letter from PSE to Lomita, regarding the soil engineering report for backfill, attached hereto as Exhibit 33.

<sup>31</sup> See, e.g., "Select Elevated TPH Diesel and Motor Oil Range Within Former Kast Property," attached hereto as Exhibit 29, reflecting eight testing locations where TPHd and TPHo were detected at depths ranging from ½ foot to 2 ½ feet below the surface.

<sup>32</sup> Tentative Order, paragraph 11.b., page 6.

**VII. State Water Board Decisions, Other California Law and Analogous Federal Caselaw Support Naming Developer Parties as Responsible Parties<sup>33</sup>**

As demonstrated by the attached Exhibits cited herein, with respect to the development of the Property from a petroleum storage reservoir into a residential housing development, Lomita Development Company was the owner and developed the Property with Barclay-Hollander-Curci.

Pursuant to Water Code Section 13304, a regional water board may issue orders compelling cleanup activities to any person:

[W]ho has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution of nuisance....

The meaning of the word “caused,” as used in Water Code section 13304, has been interpreted based upon principles of nuisance, and primarily turns on whether the defendant created or assisted in the creation of the nuisance. *City of Modesto Redev. Agency v. Superior Court*, 119 Cal. App. 4th 28, 37-38 (2004); *U.S. Cellulose et al.*, Order No. WQ 92-4 (SWRCB 1992), p. 4. The term “discharge” has been very broadly interpreted by the State Water Board. In the matter of *Zoecon Corporation*, Order No. WQ 86-2 (SWRCB 1986), a landowner who had purchased contaminated property contended that it could not be liable for cleaning up the property because the disposal of waste had terminated before the purchase. The State Water Board disagreed, stating that the ongoing movement of waste throughout the property constituted a “discharge.” *Id.* at 7-8. Finally, the State Water Board has held that a landowner who is not directly responsible for a discharge nonetheless “permits” the discharge when he or she has knowledge of the discharge and the ability to control it. *Arthur Spitzer, et al.*, Order No. WQ 89-8 (SWRCB 1989), p. 8; *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1054 (1991).

**A. Lomita and BHC Had “Knowledge of the Discharge”**

As these principles are applied here, it is only proper that Lomita Development Company and Barclay-Hollander-Curci (together “**Developers**”) be subject to the Regional Board’s cleanup orders for the Property. The Developers were aware of Shell’s prior activities on the Property, as evidenced by the terms of the December 15, 1965 letter agreement and related correspondence. The Developers undertook and agreed to be responsible for the clean-up and development of the Property into a residential community.

**B. Lomita and BHC Had the Ability to “Control the Discharge”**

The second element for liability is established here as well. The Developers had the ability to “control” the petroleum hydrocarbons located on the Property, as they had accepted full

<sup>33</sup> An Appendix of Legal Authorities cited herein has been provided simultaneously with this letter.

responsibility for “disposing of wastes and residues removed ... in a good, lawful and workmanlike manner.”<sup>34</sup> Moreover, they were required to cover the Property with seven (7) feet of fill, as set forth in the City records relating to the development of the Property. As demonstrated by the efforts the Developers made in testing, grading, and construction of the site, both Lomita and BHC were in control of the details of the daily operations at the Property beginning in around December 1965.<sup>35</sup> In addition, contamination has been located at the Property at depths less than seven (7) feet below ground level, which seems to contradict the requirements that at least seven feet (7) of clean fill be added over broken concrete pieces.<sup>36</sup> The Developers were directly responsible for and exercised complete control over all aspects of the Property development.

C. *Comparable Environmental Regulations Have Been Interpreted to Find Developers Responsible Under Similar Factual Circumstances*

Holding Developers responsible under Section 13304, where they were actively involved in distributing contamination around the site, is consistent with analogous jurisprudence under the federal “Superfund” law, 42 U.S.C. § 9607(a)(2) (“CERCLA”). Several courts have concluded that, when contaminants are spread through the soil or into the groundwater during excavation or grading, the CERCLA requirements of “disposal” are satisfied. *See Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5<sup>th</sup> Cir. 1988) (construction of a housing subdivision resulted in “disposal,” giving rise to potential liability; disposal not limited to the first deposit of waste, but rather may include movement, dispersal or release of hazardous materials during excavation and filling); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9<sup>th</sup> Cir. 1992) (holding that company which excavated, moved and spread contaminated soil may be liable for cleaning up the property); *Burlington N. v. Woods Indus.*, 815 F.Supp. 1384, 1392 (E.D. Wash. 1993) (developer party held liable where it had demolished a contaminated building and pushed its walls into the basement, thereby contaminating the groundwater); *Portsmouth Redev. & Hous. Auth. v. BMI Apts. Assoc.*, 827 F.Supp. 354, 358 (E.D. Va. 1993) (moving “some dirt around in the course of constructing the apartment buildings” on the site was sufficient to establish factual issue regarding disposal); *Lewis Operating Corp. v. U.S.A.*, 533 F.Supp.2d 1041, 1044-45 (C.D. Cal. 2007) (party did not qualify as “innocent landowner” when it actively spread contaminated soil during development of property into residential housing).

These CERCLA cases and others have also specifically rejected defenses to liability based on a party’s arguments that it: 1) did not introduce the substance to the site (*Tanglewood* and *Kaiser Aluminum*), 2) did not intend to “dispose” of contaminants or did not make decisions regarding how, where or when to dispose of contaminated soil (*Redwing Carriers, Inc. v. Sara-Land Apts.*, 94 F.3d 1489, 1512(11<sup>th</sup> Cir. 1996)), 3) subcontracted part or all of the excavation, grading or

<sup>34</sup> See December 15, 1965 letter from Shell to BHC, with executed confirmation, attached hereto as Exhibit 10.

<sup>35</sup> See, e.g., various PSE reports and correspondence, attached hereto as Exhibits 12 through 28.

<sup>36</sup> See “Select Elevated TPH Diesel and Motor Oil Range Within Former Kast Property,” attached hereto as Exhibit 29.

filling in developing the site (*id.* at 1511), or 4) only minimal amounts of contaminants were dispersed (*The City of Gary, Indiana v. Shafer*, 683 F.Supp.2d 836, 863-64 (N.D. Ind. 2010)).

### **VIII. The Corporate History Establishes the Developers Should be Named as Responsible Parties for All Purposes**

Finally, it is consistent with prior State Water Board decisions for corporate successors of Lomita and Barclay-Hollander-Curci to be held responsible for the remediation of the Property, pursuant to Water Code section 13304. *See Ray v. Alad Corp.*, 19 Cal. 3d 22, 28-34 (1977) (describing the principles of successor liability). For example, the State Water Board has upheld a regional water board order naming, among others, a company which had purchased the assets of one of the direct dischargers. *Arthur Spitzer, et al.*, Order No. WQ 89-8 (SWRCB 1989), pp. 16-20. In another, the State Water Board upheld an order naming a dissolved corporation. *Trans-Tech Resources, Inc.*, Order No. WQ 89-14 (SWRCB 1989), pp. 3-8. In general, State Water Board decisions reflect a practice of seeking to name parties who structure transactions either intended to take away assets that would otherwise be available for cleanup, or transactions which only result in that effect.

Based upon the information currently available to Shell, it appears that Lomita Development Company was a partnership, created in 1965, with its express "sole business" purpose to be the "purchase, development and sale" of the Property.<sup>37</sup> It was comprised of four partners, all of which were corporations: Del Serro Sales Company, Burwood Land Company, Bygrove Land Company, and Eastwood Land Company. The four partners of Lomita Development Company were merged into Barclay Hollander Curci, Inc. on April 30, 1969.<sup>38</sup> Lomita thereafter ceased to exist by operation of law (statutory merger), and its remaining interest in all property in California was conveyed to Barclay Hollander Curci, Inc. Barclay Hollander Curci, Inc. also succeeded to Lomita's liabilities.<sup>39</sup>

In 1969, the surviving company was acquired by Castle & Cooke.<sup>40</sup> It was subsequently renamed Barclay Hollander Corporation on April 4, 1975.<sup>41</sup> Castle & Cooke merged with Flexi-Van Corporation in 1985, retaining the name "Castle & Cooke" for its operating division. In 1991, Castle & Cooke/Flexi-Van changed its name to Dole Food Company, Inc.<sup>42</sup> Based upon publicly-available SEC filings, Barclay Hollander Corporation remains wholly-owned by Dole Food Company, Inc.<sup>43</sup>

<sup>37</sup> See portion of Partnership Agreement, attached hereto as Exhibit 30.

<sup>38</sup> See Agreement and Plan of Reorganization, attached hereto as Exhibit 8.

<sup>39</sup> See Grant Deed, dated April 30, 1969, attached hereto as Exhibit 31.

<sup>40</sup> See Agreement and Plan of Reorganization, attached hereto as Exhibit 8.

<sup>41</sup> See Certificate of Amendment of Articles of Incorporation regarding name change, dated April 4, 1975, attached hereto as Exhibit 32.

<sup>42</sup> See Dole Food Company historical documents and corporate history information, attached hereto as Exhibit 34.

<sup>43</sup> See Dole Food Company, Inc.'s SEC filing S-4, dated June 25, 2003, attached hereto as Exhibit 35.

## IX. Conclusion and Request

Petroleum impacted soil being found at shallow depths of less than ten (10) feet, particularly within the footprint of the former petroleum storage reservoirs, is present due to the reservoir demolition and site grading/preparation activities of the Developers. These developers also left the four-inch thick, reinforced concrete reservoir in the ground, punched trenches through the reservoir floor, placed the broken up concrete walls in the bottom of the reservoir and placed soil inside the former reservoirs. Despite Developers' representations to the permitting entities, the enumerated data shows that the site was **not** covered by at least seven (7) feet of **clean fill**.

Lomita Development Company, the owner/developer, merged into the entity now known as Barclay Hollander Corporation, a division or subsidiary of Dole Food Company, Inc. It appears that a former principal of one of the partners of Lomita (Del Cerro Sales Co.) is still alive and may be available to provide information regarding the site preparation work. Barclay Hollander Corporation may have documents pertaining to development of the Property. Naming the Developer Parties as potentially responsible parties and adding them to the Order would facilitate access to important information. To date, the Developers have refused to cooperate with Shell's investigation, in part citing the absence of the name "Barclay" from orders and other correspondence from the Regional Board.

To date, Shell has been performing all work required at the Property. Shell continues to acknowledge its obligation to address any environmental conditions at the Property relating to Shell's former operations. However, as there is substantial additional work required, in all fairness Barclay Hollander Corporation and/or Dole Food Company, Inc. should share in the associated costs and be named as additional responsible parties, as well as added to the tentative Cleanup and Abatement Order before it is finalized by the Regional Board. If the Regional Board were to do otherwise – ignore the ample evidence that the developers were the former site owners and exacerbated the environmental conditions at the Site and permit Barclay/Dole to continue evading its responsibilities – it would both be inequitable and send the wrong message to the community and to companies, like Shell, who are working with the Regional Board.

Thank you for your time and attention to our request.

Very truly yours,



V. Thomas Meador, III