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September 10, 2014

VIA E-MAIL AND HAND DELIVERY

Mr. Kevin Brown
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612
kevin.brown@waterboards.ca.gov

Re: Comments on Tentative Orders
(1) Adoption of Initial Site Cleanup Requirements, 1705 Contra Costa Boulevard, Pleasant Hill, Contra Costa County
(2) Adoption of Initial Site Cleanup Requirements, 1643 Contra Costa Boulevard, Pleasant Hill, Contra Costa County

Dear Mr. Brown:

I am writing on behalf of Jane A. Lehrman to provide comments regarding the above-referenced tentative order adopting initial site cleanup requirements for the property located at 1705 Contra Costa Boulevard, Pleasant Hill ("Property") ("Tentative Order") and the similar order concerning the nearby property at 1643 Contra Costa Boulevard, to be considered by the Regional Water Quality Control Board ("Regional Board") at its regular meeting on November 12, 2014.

As explained in detail below, there is no substantial evidence to support naming Ms. Lehrman as a discharger in the Tentative Order under either Water Code section 13267 or Water Code section 13304.

Moreover, the burden that would be imposed by the requirements of the Tentative Order on Ms. Lehrman – who is 82 years old, blind, and living in a long-term care facility in Nevada, has recently been diagnosed with dementia, is no longer capable of taking care of her personal and financial affairs, and has no insurance policy that could pay either her legal fees or the costs of complying with any Regional Board requirements – does not bear a reasonable relationship to the benefits to be obtained from naming her as a discharger under the Tentative Order. As such,

the Regional Board may not impose those requirements on Ms. Lehrman under Water Code section 13267.

Finally, certain factual assertions in the Tentative Order must be corrected or deleted, as they are either contradicted by undisputed evidence or are not supported by substantial evidence.

For these reasons, as more fully explained below and in the comment letters previously submitted by Marjorie Robinson on July 31, 2014 and September 9, 2014 ("Robinson Comment Letters"), Ms. Lehrman objects to the Tentative Order and reserves all rights to further challenge any Regional Board action adopting the Tentative Order or imposing other requirements on Ms. Lehrman related to the Property.

Ms. Lehrman will not be able to travel to Oakland to present testimony at the November 12, 2014 Regional Board hearing on the Tentative Order. For this reason, she is submitting with this letter a sworn declaration presenting key evidence. Ms. Lehrman reserves the right to supplement these comments and her declaration prior to or at the hearing, through legal counsel and/or her daughter and attorney-in-fact, Wendi Lutz.

I. RELEVANT FACTS AND EVIDENCE

A. Ms. Lehrman Was Not Provided With Timely Notice of the Tentative Order

On July 2, 2014, the Regional Board mailed copies of the Tentative Order to the parties named in the Order, including to Ms. Lehrman. However, the address used by the Regional Board – P.O. Box 4 in Genoa, Nevada – is associated with her former (and now deceased) husband, Philip M. Lehrman, not Ms. Lehrman.[1] Ms. Lehrman does not receive mail at that P.O. Box. As a result, Ms. Lehrman never received a copy of the Tentative Order directly from the Regional Board. She only received a copy on August 18, 2014, from a third party. For this reason, Ms. Lehrman had no ability to obtain legal counsel or submit comments on the draft order during the original comment period, which terminated on August 4, 2014.

B. Ms. Lehrman's Current Condition

Ms. Lehrman is 82 years old. She became blind in January 2014 and is currently living in a long-term care facility in Nevada. Moreover, in June 2014, Ms. Lehrman's doctors diagnosed her with dementia and determined that she is no longer capable of taking care of her personal and financial affairs. As a result, Ms. Lehrman's daughter, Wendi Lutz, functions as Ms. Lehrman's attorney-in-fact and is charged with managing most of Ms. Lehrman's personal and financial affairs.

[1] We request that the Regional Board send any future communications both to me (via email: des@bcltlaw.com) and to Ms. Lehrman's mailing address at 126 Lake Glen Drive, Carson City, Nevada 89703.

C. The Lehrman Declaration Demonstrates That Ms. Lehrman's Role Was Limited To Being the Spouse of a Real Estate Investor

Although Ms. Lehrman's dementia impairs her short-term memory and her decision-making ability, her long-term memory remains sound. With the assistance of legal counsel, Ms. Lutz, and a notary, Ms. Lehrman was able to complete a declaration that summarizes the extent of her knowledge about the Property and her lack of involvement with it. That declaration, made under penalty of perjury and attached as **Exhibit 1**, includes the following facts:

- She was married to Philip M. Lehrman from 1954 until 2000, when they were divorced. Philip died in January 2014, and she did not inherit any portion of his estate.

- She does not have any independent information or recollection regarding the Property or the dry cleaner and service station operations that existed there during the 1965 to 1986 time period.

- Philip was a real estate investor, and she was a teacher. She did not participate in making decisions related to Philip's investments – it was his business, not hers. She had no role in purchasing, leasing, or selling the Property and had no contact with the dry cleaner or gas station tenants at the Property.

- She does not know what role Philip may have played in managing the Property – he did not share information about his investments with her. Often he would ask her to sign documents, but would not explain anything to her about those documents or the investments that they related to.

- She does not recollect ever visiting the Property. She never brought any chemicals to the Property, used chemicals at the Property, or disposed of chemicals at the Property.

- She possesses no historical documents or records related to the Property or the businesses that operated there, and she has no information as to where any such documents or records would be located. Moreover, because she is not aware of any applicable insurance policy, all money that she must spend in responding to the cleanup order – including legal fees – is being paid out of her own retirement savings and income.

D. Property Records Demonstrate That Ms. Lehrman's Ownership Interest in the Property Was Limited to the Time Frame of 1965 to 1986

The deeds previously submitted to the Regional Board (See 7/31/14 Robinson Comment Letter, Exhibit 1 attachments) demonstrate that the Lehrmans held an undivided 1/2 interest in

the Property between 1965 and 1986, except with respect to some frontage that was deeded to the City of Pleasant Hill in 1971. The relevant chain of title documents, which also indicate that the Property (now parcel 150-103-016) was created from the merger of two parcels whose numbers changed over time, include the following:

- a grant deed dated June 25, 1965, recorded in July 1965, transferring two contiguous parcels (150-103-004 and 150-103-005) from William Fries, Stephen M. Heller, and Patricia S. Heller to Ned and Marjorie P. Robinson (an undivided 1/2 interest) and to Philip M. and Jane A. Lehrman (an undivided 1/2 interest);

- a grant deed recorded in July 1971, under which the Robinsons and Lehrmans deeded all of the frontage of the two parcels along Contra Costa Boulevard and Doris Drive to the City of Pleasant Hill, along with a drainage easement on the southern (004) parcel; and

- four grant deeds, all dated December 26, 1986 and all recorded at 2:00 p.m. on December 31, 1986, which accomplished the following:
  1) transfer of the Lehrmans' undivided 1/2 interest in the two parcels (now renumbered 150-103-011 and 150-103-012) to Max W. Parker;
  2) transfer of Parker's interest to Chevron, U.S.A., Inc.;
  3) transfer of the Robinsons' undivided 1/2 interest in the two parcels to the Merle D. Hall Company, a California Corporation; and
  4) transfer of the Merle D. Hall Company's interest to Chevron, U.S.A., Inc.

E. Other Relevant Evidence Demonstrates Ms. Lehrman's Limited Involvement with the Property from 1965 to 1986 and Fails to Show Any Releases of Contaminants During That Time Period

Since 2011, the Regional Board has identified only a limited amount of additional evidence relating to Ms. Lehrman's involvement with the property from June 1965 to December 1986:

- A 1971 lease agreement and amendment regarding a portion of the Property, signed by the Robinsons, Lehrmans, and Chevron's predecessor (Standard Oil of California), and a 1971 deed of trust for the Property, signed by the Robinsons and Lehrmans. See 7/31/14 Robinson Comment Letter, Exhibit 2.

- An agreement purporting to lease a portion of the Property to the Jorgensons for five years (1981-1986) for a dry cleaning business. The lease is not dated and is not fully executed (it was signed by the Jorgensons and Robinsons, but not by either Ms. Lehrman or her husband). See 7/31/14 Robinson Comment Letter, Exhibit 3.

The Regional Board has not identified any evidence of contaminant releases at the Property occurring between 1965 and 1986:

- As to the dry cleaning operation, not only is there is no evidence that a release specifically occurred during that time period, there is no concrete, site-specific evidence that PCE was used at the dry cleaners *at all*. In fact, on December 20, 2013, the Regional Board stated in a letter to Chevron: "We do not have any specific information to confirm PCE use at the former dry cleaner." On March 5, 2014, the Regional Board similarly stated in a letter to Chevron: "We have located no documents, such as hazardous waste manifests or permits, to indicate PCE was used at the former dry cleaner; it most likely was used in dry cleaning activities, but again we have no specific documentation." (These letters are attached to the 7/31/14 Robinson Comment Letter as Exhibit 4.) The only support for the Regional Board claim that PCE was "most likely" used at the dry cleaner appears to be that found at page 5 of the July 2, 2014 Cleanup Team Staff Report accompanying the Tentative Order. There, staff note that (1) "telephone directories further provide evidence that One Hour Martinizing Cleaners operated at the Site in August 1961 and continued until at least late 1966"; and (2) "It is common knowledge that One Hour Martinizing revolutionized the use of PCE in their dry cleaning machinery."

- As to the waste oil tank at the automotive fueling facility, the Regional Board has set forth no evidence to demonstrate that a release occurred during the time period 1965-1986, as opposed to before or after that time period.

II. THE REGIONAL BOARD'S FINDING THAT MS. LEHRMAN IS A DISCHARGER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Liability May Be Imposed on Dischargers Under Water Code Section 13267 and Water Code Section 13304 Only Where Substantial Evidence Exists

The Tentative Order states that it is being issued by the Regional Board pursuant to its authority under both Water Code section 13267 and Water Code section 13304.

Water Code section 13267 states, in relevant part:

> In conducting an investigation specified in subdivision (a), the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging, or who proposes to discharge waste within its region . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires. The burden, including costs, of these reports shall bear a

> reasonable relationship to the need for the report and the benefits to be obtained from the reports. [section 13267(b)(1) (emphasis added)]

When acting under the authority of Section 13267, the Regional Board must "identify the evidence that supports requiring that person to provide the reports." Water Code § 13267(b)(1). Such evidence must be more than uncorroborated assertions or speculation: evidence supporting issuance of requirements under Section 13267 is "relevant evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Id. at § 13267(e).

Water Code section 13304 states, in relevant part:

> Any person . . . who 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 or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts. [section 13304(a) (emphasis added)]

The State Water Resources Control Board ("State Board") has confirmed that the Regional Board must rely on "substantial evidence" to name a party as a discharger under these statutory provisions:

> There must be a reasonable basis on which to name each party. There must be substantial evidence to support a finding of responsibility for each party named. This means credible and reasonable evidence which indicates the named party has responsibility.

In the Matter of the Petition of Exxon Company, USA, State Board Order WQ 85-7. *See also In the Matter of the Petition of Stinnes-Western Chemical Corporation*, State Board Order WQ 86-19 ("[I]n order to uphold a Regional Board action, we must be able to find that the action was based on substantial evidence."). *Cf.* State Board Resolution No. 92-49, Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code Section 13304, at I.A (requiring "substantial" and "sufficient" evidence to support a Board determination as to the source of a discharge).

The State Board has applied this standard to overturn Regional Board decisions that are not based on substantial evidence. *See, e.g., Exxon, supra* (finding no substantial evidence in the record upon which to base a finding that petitioners should be named in Cleanup and Abatement Order issued under section 13304); *In the Matter of the Petition of Larry and Pamela Canchola*, State Board Order No. WQO 2003-00020 (Regional Board did not have substantial evidence under section 13267 where uncontroverted evidence showed that former owners did not use or store pollutant at issue – MTBE – during their ownership of the site); *In the Matter of the*

Petition of Chevron Products Company, State Board Order No. WQO 2004-0005 (Regional Board did not have substantial evidence to issue requirements to Chevron under section 13267 where the evidence provided by Chevron showing another party's responsibility for the discharges outweighed the evidence relied upon by the Regional Board to name Chevron as a discharger).

B. There Is No Substantial Evidence Allowing the Regional Board to Name Ms. Lehrman as a Discharger in the Tentative Order

Here, the Board has not produced substantial evidence to support naming Ms. Lehrman as a discharger in the Tentative Order pursuant to Water Code section 13267. In light of Ms. Lehrman's declaration and the absence of any contrary evidence, it is clear that no "credible and reasonable evidence" exists to support a conclusion that Ms. Lehrman discharged contaminants at the Property. Although the term "discharge" as used in section 13267 is not defined, it has been defined in the context of Water Code Section 13304 to mean "to relieve of a charge, load, or burden," "to give outlet to," "pour forth," or "emit." *Lake Madrone Water District v. State Water Resources Control Board*, 209 Cal.App.3d 163, 174 (1989). There is no evidence of any such activity by Ms. Lehrman, no evidence that Ms. Lehrman owned, managed, or operated the dry cleaner or the service station at the Property, and no evidence that PCE or other contaminants were used by Ms. Lehrman at the Property. In fact, Ms. Lehrman's declaration provides substantial evidence negating each of these points, and the Regional Board offers no evidence to the contrary.

The Board has also not produced substantial evidence to support naming Ms. Lehrman as a discharger in the Tentative Order pursuant to Water Code section 13304, as someone who has "caused or permitted" a discharge. Courts interpreting the "caused or permitted" language have held that Section 13304 requires "active, affirmative or knowing conduct" with regard to the contamination. *Redevelopment Agency of City of Stockton v. BNSF Railway Co.*, 643 F.3d 668, 678 (9th Cir. 2011) (finding that where the alleged discharger engaged in no active, affirmative or knowing conduct with regard to the contamination, it could not be liable for causing or permitting a discharge under Section 13304); *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 44 (2004) (Section 13304's "causes and permits" language was not intended "to encompass those whose involvement with a spill was remote or passive"). To the extent that State Board decisions reach different conclusions regarding the scope of liability under the Water Code, those decisions have been superseded by these decisions by the state and federal courts.

The totality of the evidence now before the Regional Board demonstrates that Ms. Lehrman's actions related to the Property were "remote and passive" and did not constitute "active, affirmative, or knowing conduct" with respect to the contamination at issue. Ms. Lehrman's declaration is substantial evidence of her role as the spouse of a landowner who did not include her in any decision-making related to the Property. See **Exhibit 1**. The fact that her husband had the Property recorded in both their names, and asked Ms. Lehrman to execute leases and deeds of trust for the Property as an owner of record, is entirely consistent with this role. No

evidence in the record raises any inference that Ms. Lehrman was actively involved in operating or managing the dry cleaner or the automotive fueling facility at the Property, or had any knowledge of whether or how any potential contaminants were used, stored, handled, or disposed of at those businesses. As such, she did not "cause or permit" a discharge triggering liability under Water Code section 13304.

Not only is there a lack of substantial evidence that Ms. Lehrman had a sufficient relationship to any contamination to name her as a discharger, there is also a lack of substantial evidence that contaminants were, in fact, released during the period of her passive ownership interest in the Property. The Board has twice admitted that it has found no specific evidence that PCE was even used at the dry cleaner at the Property, but instead relies on "common knowledge" that One Hour Martinizing used PCE, and the fact that a One Hour Martinizing appears to have operated at the Property from August 1961 until "at least late 1966." See Part I.E, above. This is not the type of "credible and reasonable evidence" that the State Board has found sufficient to hold a party responsible as a discharger. Moreover, even if this were to constitute substantial evidence of PCE use by the dry cleaner until late 1966, the time period at issue only overlaps Ms. Lehrman's ownership period (June 25, 1965 to December 26, 1986) by, at most, approximately eighteen months. And there is absolutely no evidence, let alone substantial evidence, of a PCE release at the dry cleaner between June 25, 1965 and late 1966. More broadly, as set forth at Part I.E, above, the Regional Board has produced no evidence that discharges occurred at either the dry cleaner or the automotive fueling facility during the 1965-1986 period, when Ms. Lehrman had an ownership interest in the Property, as opposed to before or after that time period.

In sum, there is no substantial evidence that a discharge of contaminants occurred during the period when Ms. Lehrman had an interest in the Property, that Ms. Lehrman herself discharged contamination at the Property, or that she engaged in any active, affirmative, or knowing conduct with regard to a discharge of PCE or other contaminants at the Property. As the spouse of a landowner who merely held an ownership interest and signed documents in that capacity, Ms. Lehrman cannot be named as a discharger responsible for the requirements in the Tentative Order, under either Water Code section 13267 or Water Code section 13304.

C. The Burdens of the Tentative Order on Ms. Lehrman Do Not Bear a Reasonable Relationship to the Benefits of the Order

As noted above, Water Code section 13267(b)(1) requires that the financial and other burdens imposed by the Regional Board's requirements "shall bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports." The Tentative Order does not meet this standard with respect to Ms. Lehrman.

The Board is essentially asking Ms. Lehrman – who is 82 years old, blind, suffering from dementia, and living in a long-term care facility, and who has found no insurance policy that could pay either her legal fees or the costs of complying with the Tentative Order – to undertake a multi-year site investigation that will likely cost several hundred thousand dollars, if not millions of dollars. The Tentative Order also names as a discharger another party that can fully

fund and complete the investigation: Chevron, a sophisticated corporation with over $250 billion in assets and annual net income of over $21 billion,[2] and extensive experience in environmental investigations. Requiring Ms. Lehrman to also participate in and fund the work required by the Tentative Order would be financially and practically unreasonable, does not satisfy any legitimate need, and will not provide any additional benefits. Burdening an 82-year old with significant disabilities with an expensive and long-term environmental investigation cannot be in the best interests of the People of the State of California, and it cannot be what the Legislature intended in giving the Regional Board significant power under Water Code section 13267. As such, independent of the other deficiencies discussed in this letter, the Regional Board is not authorized to name Ms. Lehrman as a discharger under section 13267.

D. Certain Factual Assertions in the Tentative Order Are Unsupported by Substantial Evidence and Must Be Corrected Or Deleted

In addition to improperly identifying Ms. Lehrman as a discharger, the Tentative Order contains certain factual assertions that are either contradicted by undisputed evidence or are not supported by substantial evidence. These erroneous factual assertions are all specified in the July 31, 2014 Robinson Comment Letter (at Part II.D) and in the September 9, 2014 Robinson Comment Letter. They must be corrected or deleted, if the Tentative Order is to reflect only the substantial evidence before the Board.

III. Conclusion

For the reasons discussed above, (1) the Regional Board is not authorized to name Ms. Lehrman as a discharger in the Tentative Order pursuant to either Water Code section 13267 or Water Code section 13304, and (2) factual assertions in the Tentative Order that are not supported by substantial evidence must be corrected or deleted. Ms. Lehrman objects to the Tentative Order on those grounds, and respectfully requests that she be removed from the Tentative Order before it is approved by the Regional Board.

Sincerely,

Donald E. Sobelman

Attachment:
Exhibit 1: Declaration of Jane A. Lehrman

cc: Stephen Hill (via e-mail only: shill@waterboards.ca.gov)
Bruce H. Wolfe (via e-mail only: bwolfe@waterboards.ca.gov)

[2] http://en.wikipedia.org/wiki/Chevron_Corporation (statistics cited for 2013).

EXHIBIT 1

DECLARATION OF JANE A. LEHRMAN

I, Jane A. Lehrman, declare:

1. I have personal knowledge of the facts stated in this declaration. I would competently testify to those facts if called as a witness, under oath, in an administrative hearing or other sworn proceeding.

2. I am 82 years old. I live in Gardnerville, Nevada in a long-term care facility.

3. I was married to Philip M. Lehrman from 1954 until 2000, when we were divorced.

4. Philip died in January 2014. I did not inherit any portion of his estate.

5. I have been informed that the California Regional Water Quality Control Board is in the process of issuing a cleanup order regarding environmental contamination at 1705 Contra Costa Boulevard in Pleasant Hill, California ("the Property"). I have also been informed that Philip and I, in conjunction with Ned and Marjorie Robinson, owned some or all of the Property from 1965 until 1986, and that a dry cleaner and a gas station operated on the Property during that time. I do not have any independent information or recollection regarding the Property or those operations.

6. Philip was a real estate investor, and I was a teacher. I did not participate in making decisions related to Philip's investments – that was his business, not mine. I had no role in purchasing, leasing, or selling the Property. I did not have any contact with the dry cleaner or gas station tenants at the Property.

7. I do not know what role Philip may have played in managing the Property – he did not share information about his investments with me. Often he would ask me to sign documents, but would not explain anything to me about those documents or the investments that they related to.

8. I do not recollect ever visiting the Property. Even if I did visit, I never would have brought any chemicals to the Property, used chemicals at the Property, or disposed of chemicals at the Property.

9. I possess no historical documents or records related to the Property or the businesses that operated there, and I have no information as to where any such documents or records would be located.

10. I do not know of any insurance policy that may cover costs related to this matter. For this reason, all money that I must spend in responding to the cleanup order– including legal fees – is being paid out of my own retirement savings and income.

11. In January 2014, I became blind. This declaration has been prepared at my direction and has been read to me orally. I understand that a notary will verify that I have sworn under penalty of perjury under the laws of the States of California and Nevada that the foregoing is true and correct and that I executed this declaration on September 9, 2014, in Gardnerville, Nevada.

JANE A. LEHRMAN

STATE OF NEVADA)
: ss.
CARSON CITY)

On this 9th day of September, 2014, personally appeared before me, a Notary Public in and for said county and state, JANE A. LEHRMAN, personally known (or proved) to me to be the person whose name is subscribed to the above instrument who acknowledged to me that she executed the above instrument.

Notary Public

(Seal)

SANDRA F. MENDEZ
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 10-19-15
Certificate No: 99-12514-3