

in existence since at least 1960 and consists of a two-tank gasoline station and a mini-mart. The facility is adjacent to a ground water recharge pond. Approximately 20 homes on individual water supply wells are in close proximity to the market.

A water contamination problem in the area first became apparent in June 1984, when the Tulare County Health Department received complaints from nearby residents of taste and odor problems. In August 1984, the Health Department notified two residents not to use their water for consumption. Two of three wells selected for analysis were found to contain benzene at concentrations of 16 and 18 parts per billion, well above the State Department of Health Services action levels for drinking water of 0.7 parts per billion. Benzene is water soluble and found in gasoline. Groundwater in this area is at approximately 40 feet and the soils are a fine sandy loam. The two private wells sampled appear to be at 100 to 150 feet below the surface. The record discloses no possible sources of the pollution other than the gas station and none of the parties are contesting this issue.

The basic issue presented in these appeals is one of responsibility for the cleanup. Testimony before the Regional Board indicates that C. P. Phelps, a distributor of gasoline product, has been providing gasoline and service to the gasoline station since approximately 1960 when the facility was called Stewart's Market. At that time Phelps was a Norwalk distributor, a brand of Signal Oil and Gas Company. Exxon acquired the Signal properties in 1967. Phelps supplied Exxon product to the Village Market from 1968 to 1983.

The current landowners are John and Mary Lynch. They acquired the property in July 1981 from Norman Larry and Gail Eileen Houston, who had owned it since April 1979. Three weeks after John and Mary Lynch bought the

property, they noticed that the top portion of the underground gasoline tanks were leaking. John Lynch testified that to deal with this problem, he did not keep the tanks full. In November 1983, John and Mary Lynch replaced the tanks. The new tanks have been tested and do not leak.

The Regional Board adopted a cleanup and abatement order on March 22, 1985, pursuant to Water Code Section 13304. The order names as dischargers John and Mary Lynch, Exxon Company U.S.A. and C. P. Phelps, Inc. The order requires the dischargers implement various remedial actions according to a time schedule. These actions include providing an alternate supply of drinking water to users of known polluted wells, assessment of the extent of the toxic contamination and a comprehensive cleanup program of contaminated soils, ground water and leaked fuel.

II. CONTENTIONS AND FINDINGS

The basic issue that Exxon and Phelps are contesting is responsibility and ownership of the old underground tanks which leaked. Both parties feel they should be removed from responsibility because they never owned the tanks.

The two underground tanks in question had been at the Village Market for an undetermined period of time. There is some evidence to suggest that these tanks had been in place since the 1940's. It is very unclear as to who owned these tanks. As discussed above, the gasoline supplier and distributor changed several times from 1960 to 1981. Additionally, a number of different parties owned the property from 1960 to 1981.

Copies of two Grant Deeds in the record from previous parties to the Houstons in 1979 and from the Houstons to John and Mary Lynch in 1981 convey generally the lot in question and are silent concerning anything else. There is no evidence in the record which conclusively shows who does own the tanks.

Order No. 85-066 contains a finding that "[t]here is evidence of ownership of the leaking fuel tanks by Exxon Company, USA and by C. P. Phelps, Inc., the distributor of the fuel." The Regional Board relied on several different bases to conclude that the tanks were the personal property of Exxon and Phelps and to thereby name Exxon and Phelps in the order. These have all been challenged by petitioners. We will address each theory in turn.

1. Contention: Tulare County property tax records do not establish that Exxon owned the tanks.

Finding: From 1968 to 1984 Exxon paid personal property taxes to Tulare County for certain property at the Village Market. The record contains copies of the personal property tax records from 1968 to 1984 as submitted by Exxon. Exxon explained its standard practice for payment of personal property taxes in Tulare County. Exxon submits to the County two copies of a form for service station business and property statements, one of which is returned to Exxon by the County with the assessed values. The first such statement in the record before us is from Humble Oil and Refining, Exxon's predecessor in interest, listing the following property at the site: two used pumps, one used air compressor, office furniture and equipment, a credit card imprinter and miscellaneous tools and equipment. Essentially the same listing was provided on the property statements for 1969, 1970, 1971, 1972, and 1973.

However, in 1974 the word "tanks" is listed as an improvement. Exxon argues that Exxon listed only property other than tanks and that the word "tanks" was included by the assessor on the copy returned to Exxon. In 1975 and 1976 the property statement reads merely "equipment only"; on the 1977 statement the words "pump, compressor, tanks and sign" appear. Exxon again

argues this was because the tax assessor added this to the statement returned to Exxon.¹ This argument was not refuted or challenged.

Exxon does admit that it tendered a property statement in 1978 describing as its property pump, compressor, tanks and sign. Exxon alleges that this was an error, as its clerk had copied the "erroneous" tank listing that the County Assessor had added to the previous years' statement.

Since 1979 the only personal property Exxon has listed for this property is a sign and credit card imprinter. There is some discrepancy with the assessor's statement, which also lists pumps and a compressor. Exxon has further submitted an affidavit from its real estate and engineering manager stating that to the best of his knowledge Exxon has never had an ownership or leasehold interest in the tanks. A computer listing of the Village Market equipment from 1974 submitted to us by Exxon shows only a pole, pump, compressor and miscellaneous equipment being owned by Exxon. (It is not clear whether a tank could be considered miscellaneous equipment, but in any event, there is no support in the record for that proposition.)

The Regional Board also relied upon a letter from the California Service Station Association indicating it is general practice within the industry that when an oil company owns the pumps, signs and credit card imprinter, it also has ownership of the underground tanks. Exxon refuted this letter at the hearing, stating that it has never been Exxon's practice.²

¹ Exxon argues they did not contest the two "erroneous" returns for cost-efficiency reasons. We note the total tax due from Exxon on this property in 1974 was \$19.06, and in 1977, \$22.62.

² We note that a letter of this sort is clearly hearsay under our rules of procedure. While admissible, it is not sufficient in and of itself to support a finding.

The question thus becomes whether it is reasonable to base a finding of ownership of the tanks on the disputed tax records. As Exxon contends, payment of taxes itself does not establish ownership of property, citing Trabue Pittman Corp. v. County of Los Angeles, (1946) 29 Cal.2d 385, 175 P.2d 512. As we discuss infra, absent any additional information, we find that the Regional Board action is inappropriate.

2. Contention: Ownership interest in the tanks runs with the land.

Finding: Exxon argues that the tanks were fixtures, part of the realty, and therefore belonged to the successive owners of the Village Market. The Regional Board argues that the tanks were not "fixtures" and thus should not be considered real property. California Civil Code Section 660, in defining when a thing is deemed to be affixed to the land, uses such terms as "attached", "imbedded" and "permanently resting". Civil Code Section 1013 further provides:

"[W]hen a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as otherwise provided in this chapter, belongs to the owner of the land unless he chooses to require the former to remove it or the former elects to exercise the right of removal provided for in Section 1013.5 of this chapter."

Both of these statutes have been extensively interpreted by case law. According to Witkin, Summary of California Law, "Personal Property", p. 1663, under modern theories, the manner of the annexation is not the sole nor most important test. There are three main factors: (1) physical annexation; (2) adaptation to use with real property; and most significantly, (3) intention to annex to realty.

The Regional Board and Exxon both cite cases to support their respective interpretations. The cases provide various examples of what may or

may not be considered fixtures. Barcroft and Sons v. Cullen (1933) 217 C. 708, 20 P.2d, cited by Exxon, holds that a steel service comfort station with combined plumbing and wiring is a fixture, but does not speak to tanks. Neither the holdings in People v. Church (1943) 57 Cal.App.2d, 136 P.2d 139 nor Standard Oil v. State Board of Equalization (1965) 232 Cal.App.2d. 91, 42 Cal.Rptr. 543, cited by the Regional Board, deal with gasoline tanks. Church indicates that certain types of equipment at a service station are personal property, noting that these items may be removed without destroying anything. Standard Oil also found that gasoline station equipment to be personal property for purposes of taxes.

We also note that Murr v. Cohn (1927) 87 Cal.App. 478, 262 P. 768 found a gasoline tank to be a trade fixture and removable by the tenant who installed it, as the removal would not hurt the property. An important aspect of all of these cases, however, is the intent of the parties to affix the item to realty.

The record before us provides little help in determining whether the tank in question should be regarded as personal or real property. The record does not indicate when or by whom the tank was installed, nor what the arrangement was between the parties, if any. Assuming arguendo that the tank was installed originally by the property owner, the tank would probably remain realty today. On the other hand, if the tank were installed by a tenant of the owner, or by a predecessor in interest to Exxon, the tank could be regarded as remained personal property, or it could have become affixed to the land. Exxon contends that there is no agreement in the record, pursuant to Civil Code

Section 1013 which demonstrates that Exxon had the right to remove the tanks.³ Exxon further argues that it did not have or exercise the right to possess and control the tanks before installation or during use. Exxon pertinently notes that John and Mary Lynch removed the tanks without notifying Exxon or obtaining consent or financial contribution from Exxon.

There is insufficient evidence in the record to determine when, how, by whom and under what circumstances the tanks were installed. Accordingly, we can make no determination as to the personal or real property character of the tanks.

3. Contention: Both Phelps and Exxon disagree with the Regional Board's interpretation of Health and Safety Code §25281(r) that under the law there is no distinction between the pumps and the tanks.

Finding: Chapter 6.7 of the Health and Safety Code, entitled "Underground Storage of Hazardous Substances" became effective January 1, 1984. This chapter requires registration and regulation of underground tanks. Section 25281(r) defines "underground storage tank" as meaning "...any one or combination of tanks, including pipes connected thereto, which is used for the storage of hazardous substances and which is substantially or totally beneath the surface of the ground...."

The Regional Board argues that the law regulating discharges from underground tanks appears to consider pumps and tanks as one, noting that Section 25281(r) includes pipes. Since pumps contain pipes connected to the

³ We do note that the record contains a letter from a party who owned the land in 1960 indicating her belief that she never owned the tank but that the gasoline company did. Once again, we note that this is hearsay and as such, does not provide a basis for a finding.

underground tanks, the Regional Board argues that under the law there is no distinction between the pumps and the tanks. Therefore, since Exxon has acknowledged ownership of the pumps, that it should also be considered owner of the tanks.

We disagree. We feel it is stretching the definition of "tanks" to include "pumps". We note that the Legislature could easily have explicitly included pumps within the definition of tanks, but chose not to do so. Elsewhere in the statute the term "pumps" is used (see, e.g. Section 25292(b)(4)(c)). Furthermore, Chapter 6.7 was adopted after the tank in question was removed. Additionally, the statute does not purport to establish responsibility in cases such as that before us.

There is some material in the record indicating that both C. P. Phelps and Exxon may have had ownership and responsibility for the pumps at various times. However, there is no indication that it was the pumps which leaked and caused the harmful discharge. The record supports only the charge of faulty tanks. Absent any contention that the pumps leaked, we find there is no basis to name the owners of the pumps.

III. REVIEW AND CONCLUSIONS

In reviewing the contentions above, we believe that the record will support only that Exxon declared ownership and paid a small amount of property tax on the tanks in question for at least one year, and possibly two other years. These declarations and payments become the only basis upon which Exxon could properly be named. Exxon has raised a credible defense to these payments being indicative of ownership.

The question thus becomes what standard of review we should apply when reviewing a Regional Board action. Should we uphold a Regional Board action if

there is any possible basis for the action, or should we exercise our independent judgment as to whether the action was reasonable? Generally speaking, the courts use one of two standards in reviewing an action of administrative agency: The substantial evidence test or the independent judgment rule. The former involves an examination of the record to establish the existence or nonexistence of substantial evidence to support the action taken. The latter permits the reviewing court to take a fresh look at the facts to see if the weight of the evidence supports the decision. Under the substantial evidence test, if a court disagrees with the conclusion but finds that there does exist a substantial body of evidence to support the decision, no reversal will take place. With the independent judgment rule, the court would not defer to the agency if the court disagreed with the conclusion.

The State Board is not subject to the exact standards which bind a court. Water Code Section 13320, which provides for State Board review of Regional Board action sets forth a standard of review which is different from ordinary judicial review in two important ways. First, under Section 13320(b) the State Board shall consider both the Regional Board record and "any other relevant evidence" which it wishes in reviewing the order. Second, if the State Board decides the Regional Board action is "inappropriate or improper", the State Board has several options, including remanding or reversing the Regional Board or taking the appropriate action itself. The scope of review thus appears to be closer to that of independent review.

However, any findings made by an administrative agency in support of an action must be based on substantial evidence in the record. (See, e.g. Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d. 506, 113 Cal.Rptr. 836.) Thus, while we can independently review the

Regional Board record, in order to uphold a Regional Board action, we must be able to find that finding of ownership was founded upon substantial evidence.

In our review of the record in the case before us, we find it is not appropriate to name Exxon or Phelps without some additional factual basis. While the disputed payment of taxes for three years provides some evidence of liability, we do not feel it to be sufficient or substantial given the lack of other information in the record and given Exxon's unrefuted explanation that the payments had been erroneously made. For example, the record is devoid of any information as to who paid taxes on the tanks for years other than 1974, 1977, and 1978. Further, there is no information concerning any contracts between any landowners and Exxon, or any predecessors in interest.

We recognize the difficult position in which this places the Regional Board. In this case the Regional Board was searching to find responsible parties who could effectuate the cleanup. Fewer parties named in the order may well mean no one is able to clean up a demonstrated water quality problem. We also recognize that the Regional Board does not have infinite resources available to it to extensively search through various county files in a quest for additional information. We note Exxon itself may have more dispositive information, which may be subpoenaed by the Regional Board. However, in order to name parties such as Exxon and Phelps, we believe there should be more evidence than we have before us currently. Generally speaking it is appropriate and responsible for a Regional Board to name all parties for which there is reasonable evidence of responsibility, even in cases of disputed responsibility. However, 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.

We note that in other cases we have not hesitated to uphold the Regional Board when it has named multiple parties responsible where there is substantial support in the record. (See, e.g. Board Order WQ 84-6, In the Matter of the Petition of Harold and Joyce Logsdon for a Stay and Review of Cleanup and Abatement Order of the California Regional Water Quality Control Board, Central Valley Region.) The record in this case simply does not contain the requisite evidence to support the naming of Exxon and Phelps in the cleanup order.

IV. SUMMARY

1. The Tulare County property tax records are not sufficient by themselves to support naming Exxon as the owner of the tanks.

2. There is insufficient information in the record to make any finding as to whether the tanks in question should be regarded as personal or real property and as to who the true owner is.

3. The Health and Safety Code definition of "underground storage tank" is inapplicable in this case and does not extend liability to the owners or maintainers of pumps.

4. While the State Board's scope of review of Regional Board action is similar to the independent review standard of a court, the findings made by the Regional Board must be supported by substantial evidence in the record.

5. There is not substantial evidence in the record upon which to base a finding that Exxon and Phelps should be named in Cleanup and Abatement Order No. 85-066.

V. ORDER

The Cleanup and Abatement Order No. 85-066 is hereby amended to delete Exxon Company, U.S.A. and C. P. Phelps, Inc.

VI. CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control 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 August 22, 1985.

Aye: Raymond V. Stone
Darlene E. Ruiz
Edwin H. Finster

No: None

Absent: None

Abstain: Eliseo M. Samaniego

for Walt Pettit
Michael A. Campos
Executive Director