

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
U.S. CELLULOSE AND LOUIS J. AND) ORDER NO. WQ 92-04
SHIRLEY D. SMITH)
For Review of Site Cleanup Require-)
ments Contained in Orders Nos. 90-036)
and 90-162 of the California Regional)
Water Quality Control Board,)
San Francisco Bay Region.)
Our File No. A-723 and 723(a))

BY THE BOARD:

On February 21, 1990, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) issued Order No. 90-036 containing requirements for the cleanup of chemicals (primarily organic solvents) which leaked into the soil and ground water from underground storage tanks located at 1547 Almaden Road in San Jose. That Order named the current landowners (Louis J. and Shirley D. Smith), the tenant who occupied the premises when the tanks were removed (Pacific States Chemical), and a prior tenant who occupied the premises and used the storage tanks to store lacquer thinner and acetone (U.S. Cellulose) as dischargers. Haz/Control, a firm which had stored methyl ethyl ketone (MEK) in the underground storage tanks for a brief period of time was not named.

Pacific States Chemical (Pacific) appealed to the Regional Board to be removed from the Order, and, following a hearing on December 12, 1990, the Regional Board amended Order No. 90-036 by removing Pacific as a discharger.

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Pacific States Chemical (Pacific) appealed to the Regional Board to be removed from the Order, and, following a hearing on December 12, 1990, the Regional Board amended Order No. 90-036 by removing Pacific as a discharger.

The Smiths and U.S. Cellulose appealed to the State Water Resources Control Board (State Water Board) requesting that Pacific and Haz/Control be included in the Regional Board's Order as dischargers to share the burden of the cleanup.

I. BACKGROUND

The following facts are undisputed:

The property at 1545-1547 Almaden Road in San Jose, California included two underground storage tanks, a 6000 gallon tank and a 2000 gallon tank. The tanks were installed in 1963 by then-tenant Almaden Paint Company. They were removed in August 1985, at which time evidence of leakage was observed in the excavation. Both tanks were corroded. Soil and ground water samples were taken in 1985 from the area beneath and around the excavation.

Hazardous substances, including MEK and other organic solvents (acetone, isopropanol, toluene, xylene, ethyl benzene, methylene chloride, trichloroethene, trichloroethane, dichloroethene, dichloroethane, tetrachloroethane and trichlorotrifluoroethane) were present in the samples. MEK was present in the highest concentration by an order of magnitude: 57,000 parts per million (ppm), followed by acetone and isopropanol at 2,800 ppm.

Petitioners Louis J. and Shirley D. Smith (Smiths) purchased the property from Samuel H. and Beulah Tyler and Robert R. and June T. Rogers in 1968 and have owned the property ever since.

Petitioner U.S. Cellulose purchased the assets of Richard Castner (who was doing business at the site as a sole proprietor under the name U.S. Cellulose) and continued to lease the property from the Smiths. U.S. Cellulose stored "lacquer thinner" (consisting of toluene, acetone, and isopropanol, among other things) in the 6000 gallon tank and acetone in the 2000 gallon tank until it vacated the premises in 1980.

Respondent Pacific leased and occupied the property after U.S. Cellulose moved out in 1980, but did not use the tanks.

Respondent Haz/Control stored at least 1500 gallons of MEK in one of the tanks for a short time in October 1982.

CONTENTIONS

Petitioners contend that Pacific and Haz/Control should be added to the Regional Board order as dischargers because of their control and use of the underground tanks from which the discharge occurred.

DISCUSSION

Water Code Section 13304 authorizes Regional Water Quality Control Boards to issue Orders requiring cleanup activities to any person "who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance." In a series of prior Orders, we have established certain principles regarding liability for groundwater cleanups. Cleanup liability is broad and may extend, depending on the facts of the case to old

landowners, present landowners, old tenants, and present tenants. In cases involving several potentially responsible parties, it is appropriate to name in cleanup orders all parties for which there is reasonable evidence of responsibility. There must be substantial evidence to support a finding of responsibility for each party named. In reviewing an action of a Regional Board, we look at the record to determine whether, in light of the record as a whole, there is a reasonable and credible basis to name a party.

With these principles in mind, we turn to the case at hand.

A. Pacific

Petitioners contend that Pacific should be named as a discharger because it was the tenant in possession of the premises when Haz/Control stored MEK in the tanks on the property. Petitioners also contend that Pacific controlled access to the tanks and induced the Smiths to allow Haz/Control to use the tanks. Pacific argues that it referred Haz/Control's request for temporary use of the tanks to the Smiths, and that Haz/Control negotiated access to the tanks, and insurance coverage, directly with the landowners.

While we have found that landowners and tenants may be characterized as dischargers despite the lack of any direct action causing a discharge, we decline to find that Pacific was a discharger under the circumstances of this case. Pacific did not use the underground storage tanks located on the premises it leased from the Smiths and did not authorize Haz/Control to do so.

We do not accept Petitioners' argument that Pacific's referral of Haz/Control to the Smiths for authorization to use the underground storage tanks located on the premises leased by Pacific was sufficient involvement to support the conclusion that Pacific should be named as a discharger. Although a lessee has exclusive control of the leased premises, in this case Pacific carefully refrained from exercising any control over the tanks and deferred control of the tanks to the Smiths as the property owners.

B. Haz/Control

Petitioners contend that respondent Haz/Control should be identified as a discharger because it is the only known source for the MEK found at the site. Petitioners contend that the conclusions reached by the Regional Board are not supported by the evidence presented by the parties, the samples taken at the site, and the inventory reconciliation information presented by Haz/Control. In particular petitioners dispute the Regional Board's findings that: (1) all of the pollution at the site was the result of leakage from the larger of the two tanks; (2) Haz/Control used the smaller of the two tanks to store MEK; (3) the smaller tank did not leak; and (4) Haz/Control accounted for substantially all of the MEK that it had stored at the site.

Based upon our independent review of the record developed by the Regional Board, as supplemented by the parties during the course of this review, we find that there is substantial direct and circumstantial evidence that Haz/Control caused or permitted MEK to be discharged to the soil and ground

water at the site by storing MEK in a corroded tank.

At the time of removal both tanks were characterized as corroded. The contractor who removed the tanks located a distinct hole in the 6000 gallon tank, stated that the 2000 gallon tank appeared to be in a similar state of decay, and believed that both tanks had leaked. Despite the absence of direct evidence of holes in the 2000 gallon tank, the record does not justify a conclusion that only the larger tank leaked. On the contrary, it suggests the conclusion that, if one tank leaked, it would be more likely than not that the other leaked as well.

The soil and ground water samples taken from the site do not provide enough information to determine which of the tanks leaked, or that one of them did not leak. However, the sampling data are consistent with a conclusion that both tanks leaked.

The record is not sufficient to account for the full amount of MEK that Haz/Control put into the tanks. Depending on the assumptions made in attempting to reconcile the inventory and sales information presented by Haz/Control, the volume of "missing" MEK ranges from about 10 gallons to as much as a barrel. We note in passing that our experience with developing regulations governing underground storage of hazardous substances convinced us that inventory reconciliation is a notoriously inaccurate method of monitoring the amount of liquid that might be in a tank.

More significantly, MEK was the most concentrated pollutant in samples from the site and Haz/Control is the only person known to have stored pure MEK in the underground storage

tanks at the site since Pacific occupied the premises. MEK was not identified as a major constituent of any of the chemical mixtures that were stored in the tanks before 1980. We conclude that some of the MEK stored in the tanks by Haz/Control in 1982 leaked out. This accounts for the high concentration of MEK in the samples taken from the excavation following the removal of the tanks.

CONCLUSION

We concur with the Regional Board's determination to delete Pacific from the Order prescribing cleanup and abatement requirements for the site at 1545-1547 Almaden Road in San Jose.

We conclude that Haz/Control should be added to the order because it is a known source of the MEK that was such a dominant constituent of the pollution at the site.

ORDER

IT IS ORDERED that Order No. 90-036, as amended by Order No. 90-162, is amended to include Haz/Control as a discharger responsible for cleanup and abatement actions in compliance with those orders.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 19, 1992.

AYE: W. Don Maughan
Eliseo M. Samaniego
John Caffrey
Marc Del Piero
James M. Stubchaer

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché

Maureen Marché
Administrative Assistant to the Board