

1 A. Recent Regulatory Activity.

2 By letter dated August 8, 2008, the Regional Board informed Mr. Veloz that Carter had
3 not complied with the Regional Board's requests in a May 2000 letter, and that the Order
4 remained operative, stating in pertinent part:

5 On July 10, 2007, Regional Board staff met with representatives
6 for the current owner of the subject property, Seventeenth Street
7 Realty LLC. During that meeting, Regional Board staff indicated
8 that the site was out of compliance with monitoring, reporting and
9 offsite assessment directives issued in our May 2000 letter.
10 Regional Board staff confirmed that the Cleanup and Abatement
11 Order (CAO) for the subject site had not been rescinded or
12 amended, and, therefore, remains in effect. As the named
13 responsible party in the CAO, J.C. Carter Company, Inc. is
14 responsible for compliance with deadlines and time schedules
15 issued for this site.

16 Mr. Veloz contested the letter and renewed earlier requests that the Regional Board
17 reform the Order. At a meeting with staff on November 3, 2008, staff indicated that the Order
18 was outdated, failed to name the appropriate parties, and should be either rescinded or amended.
19 (*See Exhibit BB, Singarella Affidavit, ¶ 4.*) On November 11, 2008, the Assistant Executive
20 Officer said the agency was giving "serious consideration" to rescission. (*See Exhibit BB,*
21 *Singarella Affidavit, ¶ 5.*) On November 24, 2008, at staff's request, Latham & Watkins LLP
22 ("Latham") submitted additional evidence regarding the use and release of chlorinated solvents
23 at the site before Carter, and the absence of such use by Carter. (*See Exhibit R, Latham Letter.*)
24 This submittal also described changes in industrial operations, explaining why Carter would not
25 have used the solvents. (*See id.*) Thereafter, the Assistant Executive Officer indicated that the
26 agency tentatively had decided to rescind the Order. (*See Exhibit BB, Singarella Affidavit, ¶ 8.*)

27 In May 2009, staff apparently met with representatives of Seventeenth Street Realty. On
28 May 15, 2009, the Assistant Executive Officer said that the agency had changed its mind, and no
longer intended to rescind the Order. (*See Exhibit BB, Singarella Affidavit, ¶ 11.*) In the same
conversation, the Assistant Executive Officer said that the agency planned to inquire of
Seventeenth Street Realty as to its claim that it is the successor to Carter, and that the agency was
still deliberating as to the potential rescission. (*See Exhibit BB, Singarella Affidavit, ¶ 11.*)

1 B. ITT Industries Discharged Chlorinated Solvents At The Site During Its Period Of
2 Operations, 1972 to 1983.

3 ITT Industries owned and operated the site from 1972 to 1983, operating there as an
4 unincorporated division called the "J.C. Carter Company." (While ITT also used the Carter
5 name, which was borrowed from the original industrial operator at the site, ITT's Carter was not
6 a stand-alone company, and is different from the Carter company formed years later in 1987,
7 which Carter is named on the Order.) Former ITT employees explained that ITT manufactured
8 oxygen pumps for military use, and documented ITT's use of trichloroethylene ("TCE") and
9 tetra- or per-chloroethylene ("Perc" or "PCE") as important solvents and degreasing agents.
10 These former employees were present at the site for many years, and were percipient witnesses
11 of how these solvents were used, and released at the site. These solvents, and their breakdown
12 products, are the primary contaminants at the site.

13 Affidavits from these former employees dated November 2008 were submitted by
14 Latham to the Regional Board. Carter and/or Mr. Veloz years earlier repeatedly had brought to
15 the Regional Board's attention the well documented use by ITT of TCE and PCE at the site.
16 (See, e.g., Exhibit E, Delta Environmental Consultants, Inc., Chemical Use and Disposal History,
17 December 1, 1990, p. 4.)

18 ITT is a going concern, and recently was sued for historical TCE and PCE releases from
19 pump manufacturing at another site in Costa Mesa. (See Exhibit AA, McCray v. International
20 Telephone and Telegraph Corp., Case No. 00180106, Orange County Superior Court, p. 1.) This
21 new action against ITT was brought to the attention of the Assistant Executive Officer as further
22 evidence that ITT is a viable responsible party. The site at issue in this new case is located less
23 than 3.6 miles away from the subject property. (See *id.*) The complaint alleges that in
24 conducting operations in Costa Mesa, ITT utilized, stored and released a variety of solvents,
25 degreasers and other hazardous substances, including TCE, PCE and TCA. (See *id.*, p. 4.)

26 C. ITT's Successor Brought Trichloroethane, Another Chlorinated Solvent, To The
27 Site.

28 In 1983, ITT sold its Carter division to Armatron International, which incorporated the

1 former ITT division into a wholly-owned newly formed corporate subsidiary, called the "J.C.
2 Carter Company, Inc." (While Armatron also used the Carter trade name, Armatron's Carter is
3 not the same Carter created in 1987, and named on the Order.) Armatron/Carter operated at the
4 site until 1987. It did not manufacture oxygen pumps and may not have used TCE and PCE.
5 But, it did use trichloroethane or TCA, another solvent released at the site. For example,
6 "Twenty gallons of TCA were purchased on January 3, 1986, and delivered on January 8, 1986.
7 TCA was used in the production of an in-line pump." (See Exhibit E, Delta Environmental
8 Consultants, Inc., Chemical Use and Disposal History, December 1, 1990, p. 4.)

9 Armatron still carries on business in Massachusetts through its Flowtron Outdoor
10 Products Division.

11 D. Carter Purchased The Property And Business From Armatron, But Did Not Use
12 TCE, PCE or TCA.

13 In April 1986, petitioner Mr. Robert Veloz was hired to be the President of Armatron/
14 Carter, continuing in that capacity until January 22, 1987. (See Exhibit H, Veloz Affidavit, ¶ 5.)
15 Mr. Veloz was an outsider to Armatron/Carter. His previous background was in the aerospace
16 industry, with an entirely different company. (See Exhibit H, Veloz Affidavit, ¶ 5.) At the time
17 of his hiring, Veloz informed Armatron management that he had been looking to purchase the
18 assets of a business, and that he might want to purchase the assets of Armatron/s. (See Exhibit
19 H, Veloz Affidavit, ¶ 6.)

20 Shortly after his hiring, Veloz entered into discussions with Armatron regarding
21 acquisition of assets of Armatron/Carter, later forming JCC Acquisition Corp. for the asset
22 purchase. (See Exhibit H, Veloz Affidavit, ¶¶ 7, 8.) The letter of intent between Armatron and
23 Veloz (and his colleague Harry Derbyshire) was signed on August 27, 1986. The asset purchase
24 agreement was signed on September 25, 1986, with the transaction consummated on January 22,
25 1987.

26 The transaction among JCC Acquisition Corp., Armatron, and Armatron/Carter was a
27 heavily-negotiated, arms'-length transaction, for an ultimate purchase price of \$18,250,000. (See
28 Exhibit H, Veloz Affidavit, ¶ 9.) JCC Acquisition Corp. observed the requisite corporate

1 formalities, including filing a notice of the Bulk Sale of Assets with the county recorder in
2 Orange County and publishing notice in a newspaper of general circulation.

3 On January 22, 1987, immediately following the acquisition of the Armatron/Carter
4 assets, JCC Acquisition Corp. amended its corporate charter to change its name to "J.C. Carter
5 Company, Inc." (See Exhibit H, Veloz Affidavit, ¶ 8.) On the same date, the directors of
6 Armatron/Carter amended its corporate charter to rename Armatron/Carter "Armatron-JCC,
7 Inc." (See Exhibit H, Veloz Affidavit, ¶ 8.)

8 The ownership, management, and even business associated with the assets of
9 Armatron/Carter changed with the purchase by JCC Acquisition Corp. First, the ownership
10 changed completely. Armatron/Carter had been a wholly-owned subsidiary of Armatron. By
11 contrast, Carter was owned principally by Robert Veloz and Harry Derbyshire, with Charles
12 Housman and Anthony Goodchild, two Armatron officers, owning shares as individuals, not as
13 Armatron. In addition, Housman's ownership was limited in time, per agreement, while
14 Goodchild was a minority shareholder only. Second, the composition of the Board of Directors
15 and officers changed not only in the transition from ITT to Armatron/Carter, but more
16 particularly in the transition from Armatron/Carter to Carter. The three member Board of Carter
17 consisted of Veloz, Derbyshire and Housman (again, for a limited time only). Mr. Veloz himself
18 was a new hire at Armatron/Carter. In addition, he brought in new management, or picked from
19 among non-management at Armatron/Carter for the majority of Carter's officers. Similarly,
20 while a majority of employees stayed with Carter from Armatron/Carter, the number of
21 employees was reduced before, during, and after the transition.

22 Carter did not manufacture oxygen pumps, the business documented as the source of
23 TCE and PCE at the site. Employees present during the Carter years (1987 to 1997) uniformly
24 report that these chemicals, to the best of their knowledge, were not even present on the site
25 during this period. (See Exhibit B, Beard Affidavit; Exhibit C, Petrozzi Affidavit; Exhibit D,
26 Jameson Affidavit.)

27 The CAO makes unsubstantiated claims that Carter discharged at the site. There is not a
28 scintilla of evidence in the record to support such a finding.

1 E. While Undertaking to Investigate And Clean Up The Site, Carter Also Protected
2 Itself Against The Defective Order.

3 Armatron/Carter removed an underground storage tank at the site in March 1986, which
4 resulted in a county referral to the Regional Board. Between 1987 and 1990, Carter voluntarily
5 cooperated with the Regional Board by submitting work plans and installing seven borings and
6 nine monitoring wells to characterize potential contamination at the site. (See Exhibit H, Veloz
7 Affidavit, ¶ 11.)

8 On May 24, 1990, the Regional Board demanded further site assessment and submittal of
9 a remedial action plan. (See Exhibit F, Order, p. 4.) Since Carter believed it had fulfilled its
10 obligations as a good corporate citizen, particularly because it had not contributed to the
11 contamination, Carter declined to submit a remedial action plan. (See Exhibit F, Order, p. 4.)
12 On October 3, 1990, the Regional Board issued the Order, naming Carter as the responsible
13 party. (See Exhibit F, Order, p. 4.)

14 1. Carter's 1990 petition to the State Board was dismissed in 1993 with leave
15 to re-file in the event of future dispute.

16 On November 2, 1990, Carter filed a Petition For Review with the State Board,
17 challenging the Order and requesting that it be held in abeyance. (See Exhibit I, State Water
18 Resources Control Board Letter, November 14, 1990.) On January 14, 1993, the State Board
19 dismissed the Petition with leave to re-file in the event of future dispute, stating in pertinent part:

20 If in the future, an actual dispute arises between you and the
21 Regional Water Quality Control Board over the interpretation or
22 enforcement of the underlying order, you may file a new petition
with the State Water Board within 30 days of the date the new
dispute arises.

23 2. Carter complied with the Order from 1990 to 1997, performing extensive
24 work at the site.

25 Carter performed "significant and extensive" remedial work at the Property. (Exhibit T,
26 Environ International Corp., Summary of No Further Action, October 17, 1997, p. 2.) A total of
27 45 soil gas sampling points, 14 soil borings, and 17 groundwater monitoring wells (13 on-site and
28 4 off-site) were installed between 1986 and 1997. (See *id.*) At least seven rounds of groundwater

1 monitoring were performed as of October 1997. (*See id.*) For over a decade, Carter expended
2 considerable funds—about half a million dollars—to investigate contamination at the Property.
3 (*See Exhibit H, Veloz Affidavit, ¶ 16.*)

4 At a Regional Board meeting on October 17, 1997, Ken Williams, Chief of the Regional
5 Board's Pollution Investigation Section, confirmed that "J. C. Carter complied with the
6 requirements of the order." (*See Exhibit U, Regional Board Minutes of Meeting, October 17,*
7 *1997, p. 5.*) Without modifying the Order, however, the Regional Board asked Carter to
8 continue characterization of the groundwater plume downgradient of the site. (*See id.*) On
9 February 18, 1998, Carter submitted a proposed off-site groundwater investigation, but notified
10 the Regional Board that it would not implement the plan until ITT and/or Armatron were named
11 responsible parties for further actions required at the Property. (*See Exhibit M, Carter's*
12 *February 18, 1998 Letter to Regional Board.*)

13 3. Mr. Veloz cooperated with the Regional Board several years after Carter
14 was acquired by Argo-Tech and no longer owned the property.

15 Mr. Veloz continued cooperating with the Regional Board for three years after Carter was
16 acquired by Argo-Tech Corporation ("Argo-Tech") in 1997 through a Stock Purchase
17 Agreement. (*See Exhibit H, Veloz Affidavit, ¶ 19.*) Between 1997 and 2000, Carter responded
18 to the Regional Board's requests, including submittal of a proposed work plan for off-site
19 investigation. (*See Exhibit M, Carter's February 18, 1998 Letter to Regional Board; see also*
20 *Exhibit H, Veloz Affidavit, ¶ 23.*) In March 1999, Carter even undertook a voluntary air
21 sparging/vapor extraction pilot test to address groundwater contamination at the site. (Exhibit
22 CC, RWQCB's May 11, 2000 Letter to Carter, p. 2.) Twelve extraction wells were installed to
23 facilitate this process. (*See id.*) This voluntary program was initially intended to operate for 30
24 days, but was extended for a full year to provide additional data. (*See id.*) The system was shut
25 down in April 2000 at the request of the Regional Board due to the low influent concentrations
26 and because the test results indicated that it was not likely that a residual source in soil is present
27 in the vicinity of the extraction points. (*See id.; see also Exhibit H, Veloz Affidavit, ¶ 24.*)

28 The Regional Board instead requested Carter to prepare a feasibility evaluation and a

1 remedial action plan for physical testing at the site to examine alternative remedial methods,
2 such as dual phase extraction or other appropriate technologies. (Exhibit CC, RWQCB's May 11,
3 2000 Letter to Carter, p. 1.) The Regional Board further required Carter to submit an addendum
4 to the February 1998 off-site assessment and to submit a workplan for investigation of potential
5 residual sources in soil through an extended vapor extraction system. (*See id.*, p. 2.)

6 In turn, Carter requested the Regional Board in August 2000 to vacate the Order, or in the
7 alternative, to amend the order naming ITT and Armatron and remove Carter as respondent.
8 (*See* Exhibit N, Carter's August 11, 2000 Petition to Regional Board; *see also* Exhibit K, Kirsch
9 Affidavit, ¶ 9.) No written response from the Regional Board was received until eight years later
10 when Mr. Veloz received the Regional Board's August 8, 2008 letter. (*See* Exhibit K, Kirsch
11 Affidavit, ¶ 23.) During this 8-year period, the Regional Board did not enforce the Order against
12 Carter, did not request additional work, and did not allege noncompliance against Carter. (*See*
13 Exhibit H, Veloz Affidavit, ¶ 29.)

14 4. Carter repeatedly requested the dischargers be named as responsible
15 parties.

16 Shortly after the Regional Board issued the Order, Carter requested the Regional Board to
17 name the dischargers ITT and Armatron, as responsible parties, providing factual support for
18 naming them in the Order. (*See* Exhibit E, Delta Environmental Consultants, Inc., Chemical Use
19 and Disposal History of the Property, December 1, 1990, p. 2.) On March 1, 1991, Carter met
20 with the Regional Board, in which the Regional Board indicated a willingness to discuss naming
21 other parties. (*See* Exhibit S, Smith Affidavit, ¶ 3; Exhibit K, Kirsch Affidavit, ¶ 3.) A month
22 later, Regional Board counsel Ted Cobb said he would recommend the Regional Board enforce
23 against ITT and Armatron, naming them primarily responsible for the remedial activities. (*See*
24 *id.*, ¶ 4.)

25 On February 3, 1998, Carter requested the Board to "name ITT and Armatron as
26 responsible parties," since there was substantial evidence demonstrating their liability for the
27 contamination. (*See* Exhibit L, Carter's February 3, 1998 Letter to Regional Board.) Carter
28 and/or Veloz have repeated this request many times. (*See, e.g.*, J.C. Exhibit M, Carter's

1 February 18, 1998 Letter to Regional board; Exhibit N, Carter's August 11, 2000 Petition to
2 Regional Board; Exhibit O, March 27, 2001 Carter's Letter to Regional Board; Exhibit P,
3 September 21, 2001 Letter to Regional Board; Exhibit Q, Carter's November 3, 2008
4 PowerPoint Presentation to Regional Board; and Exhibit R, Carter's November 24, 2008 Letter
5 to Regional Board.)

6 5. Regional Board staff repeatedly acknowledged that the dischargers should
7 be named as responsible parties and agreed to name them.

8 On multiple occasions, Regional Board staff told Carter that the dischargers should be
9 named as responsible parties. (See Exhibit K, Kirsch Affidavit, ¶¶ 2-4, 8, 13-14, 16-19, 24;
10 Exhibit S, Smith Affidavit, ¶¶ 2-5.) On May 9, 2000, the Regional Board acknowledged that the
11 true culpability for the conditions at the Property rested with ITT and Armatron and agreed to
12 name them if provided with the names of specific individuals and addresses. (See Exhibit K,
13 Kirsch Affidavit, ¶ 8.) Carter provided the information, but the Regional Board did not name
14 ITT or Armatron. (See Exhibit K, Kirsch Affidavit, ¶ 8.)

15 A year later, on June 5, 2001, the Regional Board again told Carter that it "would name
16 them [ITT and Armatron] as responsible parties." (See Exhibit K, Kirsch Affidavit, ¶ 19.) The
17 Regional Board, however, did not do so, and in fact, never communicated with Carter again until
18 seven years later. (See Exhibit K, Kirsch Affidavit, ¶¶ 23, 24.) On August 5, 2008, Regional
19 Board staff, Ms. Rose Scott, and Mr. Kirsch discussed the Order, and Ms. Scott recalled that the
20 Regional Board had promised to pursue ITT and Armatron and agreed that Carter had
21 established that ITT and Armatron were responsible for the environmental conditions at the site.
22 (See Exhibit K, Kirsch Affidavit, ¶ 19.) Ms. Scott admitted that "it would have been better if the
23 Board had named the right people initially." (See Exhibit K, Kirsch Affidavit, ¶ 19.)

24 F. Current Owner Seeks Redevelopment of Property and Asserts New Groundwater
25 Contaminants of Unknown Origin.

26 On August 8, 2008, the Regional Board issued a letter to Mr. Veloz outlining cleanup
27 activities associated with the Property's current owner, Seventeenth Street Realty LLC
28 ("Seventeenth Street"), for a redevelopment plan. (See Exhibit A, Regional Board's August 8,

1 2008 Letter, p. 1.)

2 1. Contaminants of unknown origin discovered as part of redevelopment
3 project; Regional Board staff has not identified how the contaminants
4 relate to the Order.

5 The August 8, 2008 letter states that “removal of expected DNAPL [dense non-aqueous
6 phase liquid] is the primary objective of the CAP [corrective action plan] proposed by”
7 Seventeenth Street Realty. (*Id.*, p. 2.) The DNAPL, first discovered in 2007, is located “beneath
8 a portion of the west side of the site,” which is the opposite side of the property that contained
9 the leaking UST removed under Armatron/Carter’s ownership in March 1986. (*Id.*) The
10 Regional Board provides no evidence as to the origin of the DNAPL or how it may be connected,
11 if at all, to the Order.

12 2. Current owner alleges it is the successor to Carter; but no evidence has
13 been provided.

14 Seventeenth Street Realty, in two letters to Mr. Veloz, asserts that it is the successor-in-
15 interest of Argo-Tech, the company that purchased Carter in 1997 through a Stock Purchase
16 Agreement. (*See* Exhibit V, Seventeenth Street’s September 30, 2008 Letter,; Exhibit W,
17 Seventeenth Street’s March 13, 2009 Letter.) Even though the Stock Purchase Agreement
18 indicates the rights and obligations thereunder are generally non-assignable, Seventeenth Street
19 alleges that Mr. Veloz retains liability for cleanup costs related to the Order as a personal
20 indemnitor under the Stock Purchase Agreement. (*See id.*) To date, Seventeenth Street has
21 provided no evidence to the Regional Board or Mr. Veloz supporting these claims in spite of
22 several requests.

23 **III. STANDARD WATER BOARD CAO PRACTICES HAVE NOT BEEN**
24 **FOLLOWED BY THE REGIONAL BOARD IN THIS INSTANCE.**

25 We have found no CAO in which a Regional Board named only an entity that did not
26 discharge at a site, without also naming as primarily liable a discharger. To the extent there may
27 be such a CAO, we would expect based on the law and Water Board practice that unusual
28 circumstances made it very difficult or futile to name the discharger. No such difficulty exists

1 here, where at least one viable discharger is well known to the Regional Board.

2 As discussed, infra, Section IV.A, Carter is not a liable party and should not have been
3 named in the Order, rendering a fatal blow to the Order. The defects in the Order, however, are
4 many—even assuming arguendo that Carter bears secondary liability, which petitioner contests.
5 These defects require the Order to be vacated.

6 A. CAOs Typically Name Actual Dischargers As Primarily Liable, A Practice Not
7 Followed In This Instance.

8 In allocating responsibility for the cleanup amongst named parties, State Board decisions
9 typically hold actual dischargers primarily liable for the contamination caused by their
10 discharges, whenever possible. For example, in *In re Vallco Park*, the Regional Board included
11 the owner of a polluted industrial park in its remediation orders, but allocated primary
12 responsibility for the cleanup to the semiconductor manufacturers who had leased the site, and
13 caused the contamination at issue. The State Board approved, stating that “the Regional Board
14 should continue to look to the [dischargers] regarding cleanup and only involve the landowner if
15 the [dischargers] fail to comply with the orders.” State Water Board Order No. WQ 86-18 (Dec.
16 18, 1986) at 3. *See also*, State Board Order Nos. 87-5 (mine operator and landowner named in
17 waste discharge requirements; operator primarily responsible); 87-6 (landowner and
18 manufacturers of semiconductors named in site cleanup requirements; manufacturers primarily
19 responsible); 89-1 (landowners and operator of crop dusting business named in cleanup and
20 abatement order; operator primarily responsible); 89-8 (lessee included in cleanup and abatement
21 order together with the parties who caused the release of pollutants; lessee considered
22 secondarily liable); 92-13 (landowners held secondarily liable in cleanup and abatement order;
23 operators considered primarily liable).

24 In differentiating between primary and secondary liability, the State Board does not
25 purport to allocate the ultimate liability for cleanup costs; rather, the distinction is intended to
26 specify the roles of each party in implementing the cleanup and abatement order. As indicated in
27 *Vallco*, the party with primary responsibility typically undertakes the cleanup, but the
28 secondarily responsible party “could be liable if cleanup fails” because “if the [discharger] fails

1 to clean up, the Regional Board should, as between landowner and the public, place
2 responsibility on the landowner.” *Id.* Generally, however, the State Board has acknowledged
3 that it is “appropriate to hold the [discharger] primarily responsible [for the cleanup], and the
4 landowner secondarily responsible if the [discharger] fails to perform the work” when the
5 landowner did not actually cause contamination and had no ability to control the property, and
6 the discharger complies with the order. *In re San Diego Unified Port District*, State Board Order
7 No. WQ 89-12 (Aug. 17, 1989) at 10.

8 B. Regional Boards Are Required to Identify and Name Dischargers, Another
9 Practice Not Followed In This Instance.

10 In accordance with the California Code of Regulations, which provides that “Regional
11 Boards shall . . . [n]ame . . . dischargers as allowed by law,” it has been the usual practice of the
12 Board to name all parties for which there is reasonable evidence of responsibility in a CAO, even
13 if such liability is disputed. 23 Cal. Code Regs. § 2907. *See also In the Matter of the Petition of*
14 *Exxon Company*, State Board Order No. WQ 85-7, at 6 (“Generally speaking it is appropriate
15 and responsible for a Regional Board to name all parties for which there is reasonable evidence
16 of responsibility, even in cases of disputed responsibility.”).

17 This common practice has been incorporated into the State Board’s enforcement policy,
18 which directs Regional Boards that “CAOs should name all dischargers for whom there is
19 sufficient evidence of responsibility[.]” (Water Quality Enforcement Policy, State Water
20 Resources Control Board, Resolution No. 2002-0040, at 19.) Thus, typically, the Santa Ana
21 Regional Board has sought to broaden investigations to encompass all potentially responsible
22 parties. Significantly, on at least one occasion, it went so far as to rescind an existing CAO in
23 favor of issuing Water Code Section 13267 letters so that it could “bring to the table more
24 potentially responsible parties,” noting that “it was not reasonable to focus on two parties when
25 there is evidence that many others might bear some responsibility.” (*See Exhibit X, In the*
26 *Matter of Goodrich Corp. and Kwikset Corp.*, Oct. 25, 2002).

1 C. Regional Boards Are Required to Reasonably Investigate Potential Dischargers,
2 Another Practice Not Followed In This Instance.

3 It is common practice for Regional Boards to investigate potential dischargers upon
4 receiving information that one should be named on a CAO. Typically, this requirement is
5 satisfied through the issuance of a Section 13267 letter to the alleged discharger. Pursuant to
6 California Water Code Section 13267, Regional Boards may investigate the quality of waters of
7 the state by requiring “any person who . . . is suspected of having discharged” to submit technical
8 or monitoring reports. [T]he Board[s] often use[] these letters at the start of a cleanup case in
9 order to get sufficient information to prepare appropriate orders” or when potential dischargers
10 are identified in the course of enforcement. *See, e.g.,* San Diego Regional Water Board
11 Investigative Order Nos.: R9-2007-0059 (issued to investigate and monitor the effects of new
12 PCB contamination); R9-2007-0108 (requiring investigation and reporting of information related
13 to unauthorized discharge of 600,000 gallons of untreated sewage); R9-2006-0044 (requiring
14 discharger to initiate site investigation).

15 D. Regional Boards Typically Amend CAOs Following a Change In Ownership,
16 Another Practice Not Followed In This Instance.

17 It is common practice for Regional Boards to amend outstanding CAOs to reflect changes
18 in ownership and operation of a site. *See* Order No. R8-2006-0035 (amending order to reflect
19 changes in ownership); Order No. 99-38 (same); Order No. 98-11 Addendum No. 2 (amending
20 order to reflect name change); Order No. 95-66 Addendum No. 2 (amending order to remove
21 responsible party). A prime example of this practice can be found in the Santa Ana Regional
22 Board’s multiple amendments to a Section 13304 cleanup and abatement order covering the
23 Alumax Fontana Property in San Bernardino County.

24 There, Alumax, Inc. operated, and later purchased, an aluminum recovery facility at the
25 site, which resulted in extensive contamination, and the issuance of a CAO. In 1998, when the
26 Aluminum Company of America (“Alcoa”) acquired the property, the Board replaced the prior
27 order to reflect the change in ownership, and to “require Alcoa to implement appropriate
28 corrective measures and monitoring requirements.” *In re Yellow Roadway Corporation*, Order

1 No. R8-2006-0035 (June 8, 2006) at 3. Subsequently, the property changed hands twice more,
2 and was ultimately purchased by the Yellow Roadway Corporation (“YRC”); thereafter, the
3 Regional Board *again* amended the order. *Id.* at 5. The multiple revisions of the order to reflect
4 changes in ownership and operation demonstrate common practice and policy of the Regional
5 Board. (See Exhibit Z, Digest of Amended Cleanup and Abatement Orders Following a Change
6 in Ownership of the Subject Site.)

7 Departing from its common practice, the Regional Board neither rescinded or amended
8 the Order when Argo-Tech acquired the property in 1997. The Regional Board should have
9 rescinded or amended the Order when this change in ownership occurred 12 years ago, and
10 should have issued a new order naming Argo-Tech as respondent, consistent with the Regional
11 Boards’ pattern and practice. Despite having knowledge of the change in ownership, however,
12 the Regional Board did not rescind or amend the Order to reflect this development. Twelve
13 years later—long after Carter terminated its interest in the Property—the Regional Board
14 continues to refuse to rescind or amend the Order, deviating from its general practice of
15 rescinding orders in similar situations. The Regional Board therefore violated, and continues to
16 violate, the State Board’s policy, which requires Regional Water Boards to take fair, firm and
17 *consistent* enforcement actions.

18 E. Regional Boards Typically Rescind Cleanup and Abatement Orders when the
19 Required Work is Completed.

20 It is common practice and policy of the Regional Boards to rescind orders against
21 responsible parties once the orders are complied with. In a recent example, the Santa Ana
22 Regional Board rescinded an Order issued pursuant to Section 13304 “because the facility [was]
23 in compliance with the enforcement order,” and accordingly, “the enforcement order[] [had]
24 been satisfied” and was no longer necessary. (Order No. R8-2004-0111 (Dec. 20, 2004).)

25 Likewise, the San Diego Regional Board rescinded an Order where the discharger
26 removed leaking Underground Storage Tanks, and conducted a preliminary site assessment and
27 later a vapor extraction pilot study—but did not undertake additional cleanup—on the ground
28 that “the discharger has demonstrated that further remediation is not necessary[.]” *In re 39110*

1 *Contreras Road*, Order No. 98-91 (Sept. 9, 1998) at 1. *See also In re SDG&E*, Order No. 94-117
2 (Aug. 15, 1994) (rescinding order because full compliance was achieved); *In re Brotherton*
3 *Ranch*, Order No. 98-61 (June 10, 1998) (rescinding Order following determination of
4 compliance); *In re City of Solana Beach*, Order No. 2000-126 (July 20, 2000) (rescinding
5 cleanup and abatement order issued pursuant to Section 13304 after discharger completed, and
6 certified, the remedial work required by the order); *In re Bujakowski*, Order No. 2001-279 (Sept.
7 20, 2001) (rescinding cleanup and abatement order after Board staff verified that the discharger
8 had complied with the directives contained therein).

9 Similarly, in another recent order, the San Diego Regional Board rescinded an order
10 against a compliant discharger, and stated that a second order encompassing several responsible
11 parties “will not be rescinded until the other Dischargers named in the Order complete corrective
12 action at their respective properties,” illustrating the common practice of rescinding Section
13 13304 orders once the contemplated work has been completed. *In re Greyhound Lines, Inc.*,
14 Order No. R9-2003-0169 (Apr. 23, 2003) at 1. (*See Exhibit Y, Digest of Cleanup and Abatement*
15 *Orders.*)

16 **IV. ARGUMENT.**

17
18 A. The Order Does Not Impose Liability On Carter, Or Anyone Else, For Cleanup
19 Of DNAPL, In Situ Groundwater Treatment, Gas Control, Or Monitored Natural
20 Attenuation.

21 The Order is very specific with respect to cleanup. It contains contingent cleanup
22 provisions for a very specific kind of cleanup activity. But that contingency never has occurred,
23 and the proposed cleanup plan being pursued by the owner of the site is not the specific kind of
24 cleanup identified in the Order.

25 The August 8, 2008 letter from Ms. Rose Scott to Mr. Veloz describes a corrective action
26 plan, or CAP, prepared by Seventeenth Street Realty which the Regional Board apparently has
27 approved. The letter states that, “the removal of expected DNAPL is the primary objective of the
28 CAP proposed by Tetra Tech.” “DNAPL” refers to Dense Non-Aqueous Phase Liquid, a kind of
contamination that Seventeenth Street Realty believes is present at the site, but the presence of

1 which, if any, was unknown until sometime during or after 2007.

2 The letter also discusses control of possible vapors, stating:

3 "The primary engineered control proposed is a vapor intrusion
4 mitigation system of either a sub-slab passive ventilation system
5 and vapor barrier, or passively or mechanically ventilated parking
6 structures beneath occupied buildings."

6 Finally, the letter addresses monitored natural attenuation, or MNA, stating:

7 "Monitored natural attenuation is proposed as the corrective action
8 intended to address dissolved phase VOCs outside of the core
9 contaminant area."

9 Staff's August 8 letter mistakenly asserts or implies that cleanup of DNAPL and vapors,
10 and MNA, are covered by the Order. Staff simply misreads the Order. Mr. Veloz believes that
11 staff's confusion regarding the scope of the Order is a substantial factor that has led staff to
12 decline to vacate the Order.

13 The Order makes no mention of DNAPL, vapor control, or MNA. These omissions are
14 dispositive here. When the Order addresses cleanup, it does so explicitly, referring both to "a
15 groundwater extraction and treatment system for the shallow aquifer," and "a groundwater
16 extraction and treatment system for the deeper aquifer(s)." Neither of these extract and treat
17 systems are actions to clean up DNAPL or control vapors; nor are they MNA.

18 The Order makes any groundwater extraction and treatment contingent on a future
19 "notification by the Executive Officer." Neither Carter nor Veloz ever received notice from the
20 Executive Officer triggering the provisions of the Order relating to groundwater extraction and
21 treatment.

22 It is an axiom of construction that when an agency order addresses one aspect of an issue
23 with particularity, the omission to address other aspects of the same issue shall be given
24 meaning, and shall be interpreted to be intentional. *See Dyna-Med Inc. v. v. Fair Employment &*
25 *Housing Com* (1987) 43 Cal. 3d 1379, 1391 (finding that the express enumeration of certain
26 remedies impliedly excluded the unexpressed remedy sought by petitioner, which was different
27 in kind, because "the expression of certain things in a statute necessarily involves the exclusion
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1 of other things not expressed.”). Here, the Order addresses a contingent groundwater extract and
2 treat system – one form of cleanup. It does not address the kinds of cleanup activities covered in
3 the CAP, namely, DNAPL removal, vapor control, and MNA. These omissions must be given
4 significance. Neither Carter, nor anyone else (including Seventeenth Street Realty for that
5 matter), is liable under the 1990 Order for any such cleanup.

6 Staff’s interpretation of the Order is arbitrary and capricious, a prejudicial abuse of
7 discretion, and otherwise contrary to law. It is wholly inconsistent with, and ignores, the plain
8 meaning of the Order, and violates canons of construction. Mr. Veloz is entitled to a finding and
9 a conclusion of law that the Order does not render Carter, or anyone else (including Seventeenth
10 Street Realty for that matter), liable for these central elements of the CAP.

11 Nor is Carter or anyone else liable under the Order for any groundwater treatment in the
12 CAP. First, it appears the CAP contemplates *in situ* groundwater treatment. Such in-place
13 groundwater treatment, which does not entail groundwater pumping, is not mentioned in the
14 Order. Second, the required Executive Officer notice in the Order with respect to groundwater
15 treatment never has issued. The Regional Board is estopped from issuing such notice today,
16 after so many years of inactivity, and after circumstances have changed so dramatically.

17 B. Carter Never Should Have Been Named On The Order Because It Never
18 Discharged Waste, Or Caused Or Permitted The Discharge Or Deposit Of Waste,
19 At The Property.

20 Regional Board staff recently acknowledged that Carter never should have been named
21 on the Order in the first place. (See Exhibit K, Kirsch Affidavit, ¶ 24 (“Ms. Scott ... said that ‘it
22 would have been better if the Board had named the right people initially.’”)) Regional Board
23 staff is correct; Carter is not, and never was, a party liable under Section 13304. Carter never
24 should have been named as a responsible party under the Order.

25 Pursuant to Section 13304(a) of the California Water Code, the Regional Board may
26 issue a cleanup order to:

27 “Any person who has discharged or discharges waste into the
28 waters of this state ... or 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

1 waters of the state and creates, or threatens to create a condition of
2 pollution or nuisance ...”

3 Potential liability under Section 13304 may attach to a person that either: (1) discharged
4 waste into waters of the State; or (2) caused or permitted waste to be discharged, or deposited,
5 into waters of the State. As demonstrated below, liability cannot attach to Carter under Section
6 13304.

7 1. Carter never discharged waste at the site.

8 Under the first prong of Section 13304, liability may attach to a person that discharges
9 waste. No matter what the statutory definition, as a matter of fact it cannot be that Carter is a
10 discharger. There is no evidence that Carter released TCE or PCE, or any chlorinated solvent for
11 that matter, at the site. In fact, there is no evidence that Carter even brought such chemicals onto
12 the property during its period of ownership and operation from 1987 to 1997. Since Carter did
13 not contaminate the site with the compounds in question, Carter certainly was not a discharger.

14 Statements in the CAO concluding without record support that Carter was a discharger
15 violate well established California Supreme Court precedent. *See Topanga Assn. For A Scenic*
16 *Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515 (“implicit in section 1094.5 is a
17 requirement that the agency which renders the challenged decision must set forth findings to
18 bridge the analytic gap between the raw evidence and ultimate decision or order”). Because
19 these unsupported findings are only now causing injury to Mr. Veloz, he is within his rights to
20 challenge them today.

21 2. Carter never caused or permitted the discharge of waste.

22 Liability also may attach to a person that causes or permits the discharge of waste. This
23 test was interpreted in *Lake Madrone Water District v. State Water Resources Control Board*,
24 209 Cal. App. 3d 163, 174 (1989) (holding that when defining discharge, “nothing in the Porter-
25 Cologne Act suggest[s] we should deviate from our usual obligation to give effect to statutes
26 according to the ordinary import of the language”). The court found that: “as used in section
27 13304, ‘discharge’ means: to relieve of a charge, load or burden; . . . to give outlet to: pour
28

1 forth: EMIT.” *Id.* In addition, the common definition of “cause” is to “compel by command,
2 authority, or force,” and of “permit” is “to give leave, authorize.” *See* Merriam-Webster Online
3 Dictionary (2009). Thus, for liability to attach under Section 13304, a person must compel,
4 authorize or acquiesce to the act of discharging (i.e., emitting) waste. Carter never used,
5 permitted, authorized, or acquiesced to the use of the contaminants at issue at the Property.

6 *Lake Madrone* involved a water district that released water through a gate valve at the
7 base of a dam which flushed accumulated sediment into a downstream creek, harming aquatic
8 wildlife. 209 Cal. App. 3d at 166. The applicable regional board issued a CAO against the water
9 district to refrain from flushing the sediment and to initiate a cleanup plan. The water district
10 challenged the CAO because, among other reasons, it was not a “discharger” under Section
11 13304. The court upheld the CAO, finding that the district’s active release of water from the
12 gate valve constituted a “discharge.” *Id.* at 174. The Court found that that water district’s dam
13 was not a “mere conduit” of the sediment waste, but rather the dam caused the sediment’s
14 “concentration, chang[ing] the innocuous substance into one that is deadly to aquatic life.” *See*
15 *id.* at 169-171.

16 Unlike the water district in *Lake Madrone*, Carter never took any action (or failed to act
17 in a way) that allowed the discharge of any waste. Further, Carter never took an action (or failed
18 to take an action) that effectively created the waste that led to the discharge.

19 The phrase “cause or permit” was reached in *City of Modesto Redevelopment Agency v.*
20 *Superior Court*, 119 Cal. App. 4th 28 (2004), in the context of a nuisance and products liability
21 claim. In *City of Modesto*, a local redevelopment agency filed numerous claims against the
22 manufacturers of solvents used in dry cleaning facilities. A key issue of the case was whether a
23 manufacturer could be liable under Section 13304 by introducing a waste product into the stream
24 of commerce.

25 The court determined that Section 13304 “must be construed in light of common law
26 principles of public nuisance” because the “Legislature not only did not intend to depart from the
27 law of nuisance, but also explicitly relied on it in the Porter-Cologne Act.” *Id.* at 38. The court
28 found that: “liability for nuisance does not hinge on whether the defendant owns, possesses or

1 controls the property, nor on whether he is in a position to abate the nuisance; the critical
2 question is whether the defendant created or assisted in the creation of the nuisance.” *Id.*
3 (emphasis added).¹

4 *City of Modesto* informs the phrase “cause or permit” under Section 13304. The focus is
5 not on whether a person owns or controls the contaminated property, but whether the person
6 created or assisted in the creation of the waste discharge that contaminated the property. Carter
7 never created or assisted in the creation of a discharge or a nuisance.

8 3. Nor did Carter deposit any waste at the site.

9
10 Liability can attach under the second prong of Section 13304 if a person causes or
11 permits the deposit of waste. The Regional Board has never asserted, and no evidence suggests,
12 that Carter ever “deposited” waste at the Property. Although the Porter-Cologne Act does not
13 define “deposit,” the word’s plain meaning describes purposeful action to permanently pile up or
14 accumulate waste matter. *See Merriam-Webster’s Third New Int’l Dictionary Unabr.* 605 (Philip
15 Babcock Gore, Ph.D., G. & C. Merriam Co. 1976) (deposit is defined as “to place, cache, or
16 entrust especially seriously and carefully; to lay down or let fall or drop by a natural process; to
17 foster the accretion or accumulation of as a natural deposit”). No such action occurred here.

18 4. Nor is Carter liable due to the passive migration.

19 Petitioner acknowledges that the State Board has found in past administrative decisions
20 that a person may be deemed to have caused or permitted a discharge based on a theory of
21 passive migration of contaminants in soil or groundwater, even if the property owner never
22 “discharged, deposited or in any way contributed to the contamination.” *See In re Zoecon*, WQ

23
24 ¹ The court in *City of Modesto* does “disagree with defendants’ contention that only those who
25 are physically engaged in the discharge or have the ability to control waste disposal activities
26 are liable under Section 13304.” 119 Cal. App. 4th at 41. The court did not consider the issue
27 of passive migration of contamination, but whether someone who “specifically instructed a user
28 to dispose of waste” or “manufactured equipment designed to discharge waste” could be found
to have caused or permitted a discharge. *Id.* at 42. Each of these activities requires an action on
the part of the discharger, even though the discharger may not have physically engaged in the
discharge or had the ability to control the waste discharge.

1 86-2, 1986 Cal. ENV. LEXIS 4, *3-4; *see also In re Spitzer*, WQ 89-8, 1989 Cal. ENV. LEXIS
2 11, *10 (“discharge continues as long as the PCE remains in the soil and ground water”). This
3 approach is neither supported by a plain reading of Section 13304 nor *Lake Madrone* or *City of*
4 *Modesto*. The plain meaning of Section 13304 and case law require that, for liability to attach, a
5 person must: (1) actively emit or pour forth (i.e., discharge) waste; or (2) authorize, compel, or
6 acquiesce to (i.e., cause or permit) the discharge of such waste or create or assist in the creation
7 of a discharge. The mere passive migration of waste in the soil or groundwater does not satisfy
8 these requirements. Accordingly, no liability can attach under the second prong of Section
9 13304 from the mere passive migration of contaminants in soil or groundwater.

10 Even if the passive migration theory were valid, Carter did not sit idly by while any
11 contaminant migration allegedly occurred. Carter actively was cooperating with the Regional
12 Board. Regional Board staff acknowledged in October 1997 that Carter had complied with the
13 Order. Given that Carter was actively working with the Regional Board to address the site
14 contamination, it cannot be that Carter passively caused or permitted waste to be discharge
15 during its period of ownership.

16 C. The Order Must Be Vacated Because It Fails To Name the Dischargers, As
17 Required By Law.

18 The Order must be vacated because the Regional Board failed to proceed in a manner
19 clearly required by the California Code of Regulations (C.C.R.) for cleanup and abatement
20 orders issued pursuant to Section 13304. Specifically, Title 23, C.C.R, Section 2907, which is
21 entitled “Policies and Procedures for Investigation and Cleanup and Abatement of Discharges
22 Under Water Code Section 13304,” and which mandates in pertinent part that the:

23 “The Regional Water Boards shall . . . [n]ame other dischargers as
24 permitted by law . . .”

25 The Regional Board thus has a mandatory obligation to name dischargers as responsible
26 parties under a cleanup and abatement order. Substantial evidence in the record unequivocally
27 demonstrates that ITT is a discharger. The record also indicates that on numerous occasions,
28 since 1991 and as recent as 2009, the Regional Board informed Carter that it would name ITT

1 and Armatron as responsible parties. On April 1991, for example, Regional Board counsel
2 informed Carter that it would recommend that the Board issue orders against, or add ITT and
3 Armatron, to the Order, naming them as primarily responsible for the remedial activities. (See
4 Exhibit S, Smith Affidavit, ¶ 4.) About ten years later, Regional Board staff again
5 communicated to Carter that it “would name [ITT and Armatron] as responsible parties.” (See
6 Exhibit K, Kirsch Affidavit, ¶ 4.)

7 Similarly, the Regional Board has ignored the common practice and State Board policy to
8 name all dischargers for whom there is sufficient evidence of responsibility. The Regional
9 Board should have named all dischargers for which there is sufficient evidence of responsibility.
10 The Regional Board has known for almost two decades that ITT and perhaps Armatron are the
11 actual dischargers that contaminated the subject property. The failure to name ITT and possibly
12 Armatron renders the Order inconsistent with 23 C.C.R. § 2907 and common Regional and State
13 Board practice.

14 D. The Order Must Be Vacated Because The Regional Board Failed To Make
15 Reasonable Efforts To Identify The Dischargers.

16 The Order must be vacated because the Regional Board failed to proceed in a manner
17 clearly required by Title 23, C.C.R., Section 2907, which mandates that the:

18 “The Regional Water Boards shall . . . [m]ake reasonable efforts to
19 identify dischargers . . .”

20 Accordingly, the Regional Board has a mandatory obligation to make reasonable efforts
21 to identify dischargers as responsible parties under cleanup and abatement orders.

22 On repeated occasions, Regional Board staff informed Carter that it would attempt to
23 investigate ITT’s and Armatron’s responsibility and try to invite them to a meeting. (See Exhibit
24 K, Kirsch Affidavit.) The Regional Board informed Carter that it was trying to communicate
25 with ITT and Armatron to invite them to a meeting to discuss their involvement at the site and
26 determine their responsibility. (See *id.*) For almost two decades, Carter has requested the
27 Regional Board to involve these two parties in this matter, and the Regional Board has not done
28 so, thereby ignoring its obligation under Section 2907.

1 E. The Order Must Be Vacated Because It Has Not Been Kept Current As
2 Ownership And Operators Have Changed For Twelve Years.

3 Ownership and operation at the site have changed several times since the Order was
4 issued, starting in 1997 when Carter was sold to Argo-Tech Corporation. Regional Board staff
5 met in 2007 with Seventeenth Street Realty, which claims to be the current owner of the site. In
6 May 2009, Regional Board staff met with representatives of Seventeenth Street Realty, who
7 described to staff corporate and real estate transactions since 1997. Merely driving by the site
8 shows that Carter is not operating there, and that other companies are holding themselves out as
9 doing so.

10 In other CAOs, Regional Boards have rescinded outdated orders, and replaced them with
11 CAOs reflecting changes in ownership and operation. The Regional Board has not followed
12 these practices in this instance. Its failure to do so is arbitrary and capricious, a prejudicial abuse
13 of discretion, without rational basis, and otherwise not in accordance with law. The 1990 Order
14 is defective, outdated and incorrect, and must be vacated.

15 F. The Order Is Inconsistent With The State Board's Policy Of Treating Like Cases
16 Alike.

17 The State Board policy calls for consistent enforcement among different matters. In
18 multiple and material respects, this matter is being enforced in a manner that is not consistent
19 with other CAOs. In contrast to other CAOs, the Order does not: (1) name the dischargers;
20 (2) assign primary and secondary liability; (3) reflect changes in ownership and operation; or
21 (4) acknowledge and revise in light of compliance by a named party.

22 The Regional Board's departures from standard CAO practices are without any
23 reasonable explanation or rational basis, creating improper non-conformance with the
24 enforcement policy. These departures and this non-conformance with the Water Boards' own
25 policies are arbitrary and capricious and a prejudicial abuse of discretion, and otherwise not in
26 accordance with law.

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1 G. Enforcement Of The Order In A Manner Inconsistent With Standard Water Board
2 Practice and Policy Violates Equal Protection.

3 The Regional Board's enforcement of the Order violates equal protection of the law. The
4 Equal Protection Clause of the Fourteenth Amendment requires that "all persons similarly
5 situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439
6 (1985). The equal protection guarantee protects not only groups, but persons² who would
7 constitute a "class of one." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). A
8 person can establish a "class of one" equal protection claim by demonstrating it "has been
9 intentionally treated differently from others similarly situated and that there is no rational basis
10 for the difference in treatment." *Id.*

11 1. The Regional Board intentionally treated Carter differently from others
12 similarly situated.

13 A person can demonstrate it was intentionally treated differently from others similarly
14 situated by showing it was singled out for unique regulatory and enforcement treatment. *See*
15 *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004), *overruled in part on*
16 *other grounds by Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). The record in this
17 instance is replete with evidence of such treatment.

18 We have found no instance where a non-discharger has been pursued for nineteen years
19 for cleanup of contamination it did not cause, while the polluters have received a free pass. This
20 is the classic case of no good deed going unpunished. That Carter chose to cooperate with site
21 investigations during the entire period of its ownership (1987-1997) despite its innocence with
22 respect to the contamination was an act of good corporate citizenship. That Carter and/or
23 Mr. Veloz continued to prepare work plans and conduct site activities after the business was sold
24 in 1997 showed their continuing good faith, and desire to bring the site evaluations to a
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26 ² The term "person" as used in the Equal Protection Clause includes corporations. *RK*
27 *Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1057, n. 7 (9th Cir. 2002) (holding that
28 corporations are "persons, who under the Fourteenth Amendment, have constitution right to
the equal protection of the laws").

1 reasonable closure.

2 The Regional Board took advantage of Carter's and Veloz's cooperation, and failed to
3 follow its own regulation, and investigate and name the dischargers. This violation of regulatory
4 mandate also violates Carter's and Mr. Veloz's rights to equal protection of the law. The
5 Regional Board's failure to replace the CAO in light of corporate and real estate transactions
6 over the last twelve years, or grant relief to the named party due to historical compliance and
7 unilateral cleanup also sets this matter apart from other CAOs, violating equal protection.

8 2. The Regional Board had no rational basis for treating Carter differently
9 from others similarly situated; even assuming arguendo it did which we
10 dispute), the Regional Board was motivated by animus.

11 Where similarly situated persons are treated differently, the Equal Protection Clause
12 requires a "rational relation to a legitimate state interest." *Squaw Valley Dev. Co.*, 375 F.3d at
13 944. Where defendant provides a rational basis for the unequal treatment, plaintiff must show
14 that defendant's conduct was motivated by animus. *See id.* at 948.

15 a. The Regional Board has no rational basis for treating Carter
16 differently from other similarly situated parties.

17 Just because a party is cooperating with the Regional Board does not relieve the agency
18 of its mandatory duty to investigate and name the actual dischargers. This is particularly so
19 where the named party's cooperation was given on the agency's implied, if not express, promise
20 to name such dischargers. This is even further so when the named party did the heavy lifting for
21 the agency, developing the case against the dischargers that was the agency's responsibility to
22 develop, and, at the agency's request, even tracking down their addresses.

23 The Regional Board has not provided a rational basis justifying the unequal treatment of
24 Carter simply because there is no such basis. The manifest departures from standard practices
25 and state-wide policy without explanation underscore the absence of one.

26 b. The Regional Board is motivated by animus.

27 The multiple representations by the Regional Board to name the responsible parties in the
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1 Order without any follow-through, together with the admission that Carter never should have
2 been named in the first place, and the fact that the Regional Board repeatedly ignored Carter's
3 requests that the agency follow proper procedure indicate an underlying animus. A repeated
4 representation to perform, followed by repeated failure to do so, can be so grievous as to show
5 animus. In this case, the repeated entreaties by Carter and Veloz, received with the familiar
6 expressed intent to act, but then followed by indifference, creates a pattern that shows animus.

7 Adding to the insult is the fact that agency staff appreciate that Carter never should have
8 been named in the Order in the first instance. In August 2008, staff admitted that "it would have
9 been better if the Board had named the right people initially," acknowledging that the Carter is
10 not the "right" party. The Regional Board, nevertheless, engaged in abusive behavior towards
11 Carter by, for example, inducing this non-discharger to invest hundreds of thousands of dollars
12 for contamination it did not create, refusing to treat it in the same way as other similarly situated
13 entities, and ignoring for many years Carter's multiple requests to rescind the Order and name
14 the responsible parties.

15 H. The Order Is Void For Vagueness And Violates Due Process, As Applied to
16 Mr. Veloz.

17 California courts consistently have held that "due process of law is violated by 'a statute
18 which either forbids or requires the doing of an act in terms so vague that men of common
19 intelligence must necessarily guess at its meaning and differ as to its application.'" *Britt v. City*
20 *of Pomona*, 223 Cal. App. 3d 265, 278 (1990) (quoting *Connally v. General Const. Co.*, U.S.
21 385, 391) (1926); *Franklin v. Leland Stanford Junior Univ.*, 172 Cal. App. 3d 322, 347 (1985)
22 (same). Due process requires the prohibition or regulation to be clearly defined in order to
23 provide fair notice to the public and to avoid arbitrary and discriminatory application of
24 the standard. *Britt*, 223 Cal. App. 3d at 347; *People v. Townsend*, 62 Cal. App. 4th 1390, 1400
25 (1998) ("A statute must be definite enough to provide a standard of conduct for its citizens and
26 guidance for the police to avoid arbitrary and discriminatory enforcement.").

27 Notably, California courts look not only at the face of the regulation, but also consider
28 vagueness challenges to statutes in light of the facts of the case at hand. *Arellanes v. Civil Serv.*

1 *Com'n*, 41 Cal. App. 4th 1208, 1217 (1995) (as-applied vagueness challenge not limited to where
2 First Amendment freedoms at risk). In determining the sufficiency of fair notice, the challenged
3 statute must be examined in light of the conduct with which the person allegedly violated it.
4 *Cranston v. City of Richmond*, 40 Cal. 3d 755, 764 (1985).

5 Under these principles, the Regional Board's Order is unconstitutionally vague as applied
6 to Carter.

7 The Order and site investigation in the 1990s focused on contamination related to the
8 underground storage tank removed in 1986. As of May 11, 2000, Regional Board staff
9 determined that, "It is not likely that a residual source in soil is present in the vicinity of the
10 extraction points." The referred to extraction points targeted the east side of the property, the
11 area of historical contamination studied in the 1990s. Thus, as of 2000, it appeared that the
12 source (*i.e.*, the tank) and the soil effectively had been addressed. As of that time, there was no
13 consideration of any other sources, or any need to control vapors from any other sources, or any
14 need to prepare the site for residential development. These aspects were not considerations
15 under the Order.

16 Now, in 2009, the Order is being asserted with respect to contamination discovered in
17 2007, which was not specified in the Order and was not discovered until 17 years after its
18 issuance. This contamination, apparently discovered by Seventeenth Street Realty, includes an
19 apparent region of DNAPL that may be present on the west side of the property. This DNAPL
20 represents a possible new source, different in location, nature and kind than the source that led to
21 the issuance of the Order in 1990 – the tank removed in 1986. The DNAPL may precipitate
22 consideration of remedial technologies not contemplated to be part of the Order, such as efforts
23 to break it down, and/or control vapors potentially emanating from it.

24 The 1990 Order does not even mention DNAPL, never mind plans or technologies to
25 remediate DNAPL, and is not a reasonable enforcement vehicle to address DNAPL. Further,
26 vapor control is not contemplated by the Order, but apparently is being explored by Seventeenth
27 Street Realty, as part of the proposed conversion of the site from industrial to residential.
28 Neither vapor control nor a change in zoning is part of the Order, and Mr. Veloz could not have

1 reasonably anticipated that the Order would be asserted to make Carter liable for vapor control or
2 residential conversion. We are aware of CAOs that explicitly address DNAPL, vapors, and
3 zoning issues, and request that those CAOs be made part of the record upon review of this
4 petition, to illustrate the notice the Regional Boards typically give where DNAPL, vapors and/or
5 residential conversion are subjects relevant to enforcement. Neither Carter, Mr. Veloz, nor any
6 reasonable person could have anticipated that the Regional Board would attempt to enforce the
7 Order as it now is doing. Accordingly, as sought to be applied in this instance, the Order is void
8 for vagueness, and the agency is estopped from enforcing the Order as proposed.

9 1. The Order does not provide notice as to the cleanup standards that must be
10 satisfied, nor does it provide reasonable guidance as to what needs to be
11 remediated at the Property.

12 The Order does not identify any cleanup standards with respect to DNAPL or vapors, as
13 it does not even mention such things, never mind their cleanup. The Order does not identify that
14 cleanup standards might be based on residential use of the property, or discontinuation of long-
15 established industrial usage. The regulated community must be given clear standards as to how
16 it will be regulated, what is being regulated, and what standards will apply so as to provide fair
17 notice and avoid arbitrary and discriminatory application of the standards. *See Britt*, 223 Cal.
18 App. 3d at 347; *Townsend*, 62 Cal. App. 4th at 1400. The Order is insufficient with regard to
19 notice and standards for DNAPL, vapors, and residential conversion, and violates due process as
20 applied to such matters.

21 Because the Regional Board's October 3, 1990 Order – as enforced against Carter almost
22 two decades after the Order's issuance and 12 years after Veloz sold Carter, and purporting to
23 cover contamination that Carter did not even know it existed – does not give the public notice of
24 the standards by which it will be regulated, the Order is void for vagueness and violates due
25 process. The Regional Board is estopped from enforcing the Order as proposed and also has
26 waived the right to do so.

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I. Enforcement of the Order In A Manner Wholly Inconsistent With Standard Agency Practices and Policy Violates the Administrative Procedures Act.

The Regional Board abused its discretion by failing to proceed in a manner required by law, and acted arbitrarily and capriciously when enforcing the Order, in violation of the California Administrative Procedure Act (APA). *See* Code Civ. Proc. § 1094.5(b), Code Civ Proc. § 1005. The Regional Board’s enforcement of the Order also was not supported by substantial evidence in light of the whole record. *See Lake Madrone, supra*, 209 Cal. App. 3d at 168. The Regional Board violated the APA in a manner prejudicial to Mr. Veloz for the following reasons, without limitation:

- The Regional Board has allowed a third-party developer to manipulate the agency’s administrative process to further private sector plans to try to recoup the costs of a proposal to convert industrial property to residential.
 - This arbitrary and capricious conduct is made clear by the fact that the agency had stopped enforcement of the Order in 2008, and only brought it back to life in 2008 at the urging of Seventeenth Street Realty, the third-party developer.
- The Regional Board apparently has decided to not vacate the Order on the unproven assertion by Seventeenth Street Realty that it is the successor to the Order.
 - This arbitrary and capricious decision was made without competent evidence that Seventeenth Street Realty is a successor to Carter, and in violation of law. As for the latter, it is plain that liability for a CAO does not pass by operation of law to unnamed parties, even those that are successors to named parties.
- The Regional Board failed to proceed in a manner required by law by disregarding its obligation to “[m]ake all reasonable efforts to identify dischargers” as required by 23 C.C.R. § 2907.
- The Regional Board failed to proceed in a manner required by law by refusing to “[n]ame other dischargers as allowed by law,” as required by 23 C.C.R. § 2907.
- The Regional Board acted arbitrarily by naming Carter as the only party despite substantial knowledge of the actual dischargers.
- The Regional Board Staff acted capriciously by repeatedly assuring Carter that it would name ITT and Armatron as responsible parties while consistently failing to act.
- The Regional Board did not base its decision to name responsible parties on substantial evidence.
- The Regional Board did not base its determination that Carter caused or permitted a discharge on substantial evidence.

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J. The Order Should Be Rescinded Because It Was Complied With.

1. Order fully complied with during Carter era.

Consistent with standard practice to rescind CAOs when a respondent fully discharges its reasonable obligations, the Regional Board should have rescinded the Order against Carter in 1997 – the year Veloz sold Carter to Agro-Tech. During its period of Veloz ownership, Carter complied fully with the Order, as attested by Regional Board Staff. (See Exhibit U, regional Board Minutes of Meeting, October 17, 1997, p. 5 (“J.C. Carter [had] complied with the requirements of the Order”).)

2. Regional Board is estopped from asserting that Carter must take any further actions as the basis of the Order.

Veloz requested the Regional Board to vacate the Order in August 2000. This request was made three years after staff acknowledged compliance by Carter with the Order, and after a decade of remedial investigation and activity at the site funded by Carter.

The Regional Board never responded. Years passed and the Regional Board did not require any additional work under the Order or issue any notice of violation (or any other type of notice or communication). *Eight years later*, the Regional Board sent Mr. Veloz a letter concerning a third-party’s proposed redevelopment plans. Mr. Veloz reasonably relied on the Regional Board’s silence as an implied acceptance of the request to vacate the Order. The Regional Board is estopped from holding Carter liable for any further obligations under the Order. (See *Phelps v. State Water Resources Control Bd.*, 157 Cal. App. 4th 89, 114 (2007).)

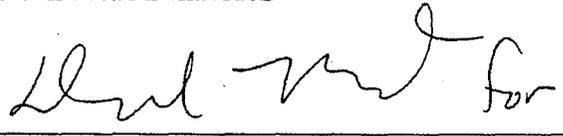
1 **V. CONCLUSION.**

2 For all the reasons stated hereinabove and in the Petition, Mr. Veloz respectfully requests
3 that the State Board grant his Second Petition For Review.
4

5
6 DATED: August 6, 2009

Respectfully Submitted,

7 LATHAM & WATKINS LLP
8 Paul N. Singarella
9 Daniel P. Brunton
10 Mayte Santacruz Benavidez

11 By 

12 Paul N. Singarella
13 Attorneys for Petitioner
14 ROBERT M. VELOZ
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7 Attorneys for Petitioner
ROBERT L. VELOZ

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BEFORE THE
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of:

California Regional Water Quality Control Board,
Santa Ana Region's Cleanup and Abatement Order,
No. 90-126

PROOF OF SERVICE



1 **PROOF OF SERVICE**

2 I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a
3 party to this action. My business address is: 600 W. Broadway, Suite 1800, San-Diego, California
92101.

4 On August 6, 2009, I served the following document(s) described as:

5 **SECOND PETITION FOR REVIEW AND REQUEST FOR HEARING**

6 **REQUEST TO VACATE ORDER NO. 90-126 AND STOP ENFORCEMENT AGAINST J.C.
CARTER COMPANY, INC.**

7 **STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF SECOND PETITION FOR
REVIEW AND REQUEST FOR HEARING**

8 **EXHIBITS IN SUPPORT OF PETITION FOR REVIEW AND REQUEST FOR HEARING**

9 by serving a true copy of the above-referenced document(s) in the following manner:



BY OVERNIGHT MAIL DELIVERY - I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by FedEx. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by FedEx; such documents are delivered for overnight mail delivery by FedEx on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described documents and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by FedEx:

16 **State Water Resources Control Board**
17 **Office of Chief Counsel**
18 **Jeannette L. Bashaw, Legal Analyst**
1001 "I" Street, 22nd Floor
Sacramento, CA 95814



BY U.S. MAIL - I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described documents and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

24 **(SEE ATTACHED SERVICE LIST)**

25 I declare that I am employed in the office of a member of the Bar of, or permitted to
26 practice before, this Court at whose direction the service was made.

27 Executed on August 6, 2009, at San Diego, California.

28 

Michelle Wright

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6 *mayte.santacruz.benavidez@lw.com*

7 Attorneys for Petitioner
ROBERT L. VELOZ

8
9 **BEFORE THE**
10 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

11
12 In the Matter of:

13 California Regional Water Quality Control Board,
14 Santa Ana Region's Cleanup and Abatement Order,
No. 90-126

**EXHIBITS IN SUPPORT OF
PETITION FOR REVIEW AND
REQUEST FOR HEARING**

(Cal. Water Code § 13320; 23 Cal.
Code Regs. §§ 2050, 2053)

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Exhibit List

Exhibit	Date	Description
A.	8/8/08	Letter from Rose Scott, California Regional Water Quality Control Board, Santa Ana Region to Robert L. Veloz re Characterization Reports and Corrective Action Plan, J.C. Carter Facility, 671 West 17 th Street, Costa Mesa, California. Cleanup and Abatement Order No. 90-126, Case No. 083000202T
B.	11/24/08	Affidavit of David S. Beard
C.	11/21/08	Affidavit of Michael T. Petrozzi
D.	11/21/08	Affidavit of Monroe F. Jameson
E.	12/1/90	Chemical Use History, J.C. Carter Company, Inc., 671 West 17 th Street, Costa Mesa, California. Delta Environmental Consultants, Inc.
F.	10/3/90	Cleanup and Abatement Order No. 90-126 for J.C. Carter Company, Inc.
G.	6/26/08	Corrective Action Plan - Former J.C. Carter Company Facility. Tetra Tech.
H.	6/15/09	Affidavit of Robert L. Veloz
I.	11/14/90	Letter from Craig M. Wilson, State Water Resources Control Board to Diane Smith, Snell & Wilmer re In the Matter of the Petition of J.C. Carter Company, Inc. for Review of Cleanup and Abatement Order No. 90-126 of the California Regional Water Quality Control Board, Santa Ana Region. Our File No. A-709.
J.	1/14/93	Letter from Craig M. Wilson, State Water Resources Control Board to Diane Smith, Snell & Wilmer re In the Matter of the Petition of J.C. Carter Company, Inc. for Review of Cleanup and Abatement Order No. 90-126 of the California Regional Water Quality Control Board, Santa Ana Region. Our File No. A-709.
K.	6/12/09	Affidavit of Laurence S. Kirsch.
L.	2/03/98	Letter from Diane Smith, Snell & Wilmer to Ken Williams and Leslie Alford, California Regional Water Quality Control Board, Santa Ana Region re: 671 W. 17 th Street, Costa Mesa, CA 92627.
M.	2/18/98	Letter from Diane Smith, Snell & Wilmer to Ken Williams and Leslie Alford, California Regional Water Quality Control Board, Santa Ana Region re: 671 W. 17 th Street, Costa Mesa, CA 92627.
N.	8/11/00	Petition to Stay and Vacate and/or Amend Cleanup and Abatement Order No. 90-126, J.C. Carter Company, Inc. – Case No. 083000202T, submitted by Laurence Kirsch of Cadwalader, Wickersham & Taft. (With Exhibits)
O.	3/27/01	Letter from Laurence Kirsch, Cadwalader, Wickersham & Taft to Rose Scott, RWQCB re Cleanup and Abatement Order No. 90-126 for J.C. Carter Company, Inc. Case No. 083000202T.
P.	9/21/01	Letter from Laurence Kirsch, Cadwalader, Wickersham & Taft to Jorge Leon, SWRCB Office of Chief Counsel re Cleanup and Abatement Order No. 90-126 for J.C. Carter Company, Inc. Case No. 083000202T.
Q.	11/03/08	Latham & Watkins PowerPoint Presentation – “Meeting November 3, 2008”

Exhibit	Date	Description
R.	11/24/08	Letter from Charity Gilbreth, Latham & Watkins to California Regional Water Quality Control Board, Santa Ana Region re Cleanup and Abatement Order No. 90-126 Issued in 1990 for the Property Located at 671 West 17 th Street in Costa Mesa.
S.	6/15/09	Affidavit of Diane R. Smith
T.	10/09/97	Summary of No Further Action Request - J.C. Carter Company, Inc., 671 West Seventeenth Street, Costa Mesa, California.
U.	10/17/97	Minutes of the October 17, 1997 Santa Ana Regional Water Quality Control Board Meeting.
V.	9/30/08	Letter from Richard Grabowski, Jones Day to Robert Veloz, Marlene Veloz, Michael Veloz, Katherine Canfield, Harry Derbyshire, Edith Derbyshire and Maureen Partch re Seventeenth Street Realty, LLC Demand for Indemnity.
W.	3/13/09	Letter from Richard Grabowski, Jones Day to Paul Singarella, Latham & Watkins re Seventeenth Street Realty LLC's Indemnity Demand.
X.	11/19/92	Letter from Gerard Thiebault, Santa Ana Regional Water Quality Control Board to All Interested Parties re Decision of the Board in the Matter of Petitions Filed by Goodrich Corporation and Kwikset Corporation for Review of Cleanup and Abatement Order No. R8-2002-0051, enclosing October 25, 1992 written decision.
Y.	n/a	Digest of Cleanup and Abatement Orders Rescinded When Required Work is Completed.
Z.	n/a	Digest of Amended Cleanup and Abatement Orders Following a Change in Ownership of the Subject Site.
AA.	3/23/09	Complaint for Damages and Equitable Relief in <u>McCray Dale Way Partnership, L.P. v. International Telephone and Telegraph Corporation, et al.</u> , Case No. 00180106, Orange County Superior Court
BB.	6/15/09	Affidavit of Paul N. Singarella
CC.	5/11/00	Letter from Rose Scott, RWQCB, to Robert Veloz regarding Off-Site Characterization and Remediation Status.
DD.	6/15/09	Affidavit of Robert L. Dickson, Jr.

SECRET



California Regional Water Quality Control Board

Santa Ana Region



Linda S. Adams
Secretary for
Environmental Protection

3737 Main Street, Suite 500, Riverside, California 92501-3348
Phone (951) 782-4130 • FAX (951) 781-6288 • TDD (951) 782-3221
www.waterboards.ca.gov/santaana

Arnold Schwarzenegger
Governor

August 8, 2008

Mr. Robert L. Veloz
757 Riven Rock Road
Santa Barbara California 93108

**SUBJECT: CHARACTERIZATION REPORTS AND CORRECTIVE ACTION PLAN
J. C. CARTER FACILITY
671 WEST 17TH STREET
COSTA MESA, CALIFORNIA
CLEANUP AND ABATEMENT ORDER NO. 90-126
CASE NO. 083000202T**

Dear Mr. Veloz:

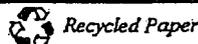
On July 10, 2007, Regional Board staff met with representatives for the current owner of the subject property, Seventeenth Street Realty LLC. During that meeting, Regional Board staff indicated that the site was out of compliance with monitoring, reporting and offsite assessment directives issued in our May 2000 letter. Regional Board staff confirmed that the Cleanup and Abatement Order (CAO) for the subject site had not been rescinded or amended, and, therefore, remains in effect. As the named responsible party in the CAO, J.C. Carter Company, Inc. is responsible for compliance with deadlines and time schedules issued for this site. Based on our goal of addressing the CAO, the data discussed during the July 2007 meeting and the property owner's desire to redevelop the site, we requested a formal report summarizing the findings and a corrective action plan (CAP). Furthermore, we indicated that continued groundwater monitoring and off-site assessment were required for compliance with previous directives.

In order meet the objectives of the CAO and to allow for redevelopment to proceed at this site, the volatile organic compounds (VOCs) present in soil vapor and groundwater beneath the site, as well as any soil contamination, must be mitigated. While we recognize J.C. Carter Company, Inc. as the named responsible party for cleanup at this site, we have agreed to review and comment on reports provided by the current property owner. If you have concurrent plans for mitigating the contamination present beneath this site or object to the implementation of the work proposed on behalf of the current property owner, please contact this office immediately. It is not our intention to thwart any plans you may have regarding the site cleanup; however, without other alternatives to evaluate, we will continue to direct the current property owner to proceed with characterization and cleanup activities.

We have reviewed the following reports prepared on behalf of Seventeenth Street Realty LLC by Tetra Tech, Inc, the consultants for the property owner:

Corrective Action Plan dated June 26, 2008
Soil Gas and Groundwater Investigation Report dated May 2, 2008

California Environmental Protection Agency



<i>Off-Site Groundwater Investigation Report</i>	dated May 2, 2008
<i>Site Characterization Summary Report</i>	dated May 27, 2008
<i>Groundwater Monitoring Data Report</i>	dated August 16, 2007
<i>Groundwater Monitoring Data Report</i>	dated June 28, 2007
<i>Groundwater Monitoring Data Report</i>	dated March 30, 2007

The primary chemical contaminant at the site is TCE; however, other compounds were detected at concentrations of concern, including: cis-1,2-dichloroethylene (DCE), 1,1-DCE, vinyl chloride, tetrachloroethylene (PCE), 1,2-dichloroethane (DCA), methyl tertiary butyl ether (MtBE) and benzene. Tetra Tech presented new groundwater data at our July 2007 meeting indicating that a region of dense non-aqueous phase liquid (DNAPL) may be present at the base of the shallow water-bearing zone beneath a portion of the west side of the site. The reports listed above supported this conclusion, based on the large vertical concentration gradient and the maximum concentration of trichloroethylene (TCE) of 71,000 micrograms per liter ($\mu\text{g/l}$) at CPT10. The lateral extent of the expected DNAPL was estimated in the reports based on the VOC concentrations greater than 10,000 $\mu\text{g/l}$ in groundwater samples from the lower portion of the shallow water-bearing zone that lies above the fine-grained Monterrey Formation.

The removal of expected DNAPL is the primary objective of the CAP proposed by Tetra Tech. DNAPL expected to be present at the base of the shallow water-bearing zone is likely to continue to contribute VOCs to the dissolved phase plume. Tetra Tech proposed to periodically add an oxidant solution in batches to the DNAPL source area using a network of 2-inch diameter injection wells screened at the base of the shallow water-bearing zone immediately above the fine-grained unit. The oxidant solution will be selected based on the results of a bench scale test of two potential oxidants. The purpose of the bench scale test is to determine the soil oxidant demand and estimate the dosage rate. The bench scale test is currently underway in the laboratory. After receiving the results of the laboratory test and submitting a work plan to this office for approval, a field test will be performed. The work plan will outline the testing and monitoring procedures to be implemented during the field test and the precautions taken to ensure that storm drains are not intercepted by the oxidant solution. Following the field application test, a work plan for full-scale implementation of *in situ* chemical oxidation (ISCO) of the DNAPL will be submitted, provided the feasibility of this approach is demonstrated during the field test. The work plan will include the proposed location of the full-scale application well network and the locations of additional wells necessary for comprehensive monitoring.

The existing monitoring well network currently fails to provide an accurate representation of the concentration of TCE at the base of the shallow water-bearing zone. The plan for treating and monitoring the success of ISCO application must include monitoring points with screens targeting the base of the shallow water-bearing zone. These wells must be used for monitoring during the post remedial monitoring program.

The CAP projects that by remediating the DNAPL and the core of the dissolved phase TCE plume, the contributing source of VOCs in the dissolved phase will be mitigated and the mass of the remaining dissolved phase VOCs will be allowed to attenuate naturally. Monitored natural attenuation is proposed as the corrective action intended to address dissolved phase VOCs outside of the core contaminant area. The CAP suggested a monitoring program for 2 years following the completion of ISCO application. Unless a dramatic decline in the dissolved phase

concentrations of VOCs occurs shortly following the ISCO applications, a longer period of groundwater monitoring will probably be required to determine whether the dissolved phase plume is stable and concentrations are decreasing. Evidence of a significant reduction in the dissolved phase concentrations is required for monitored natural attenuation to be acceptable for closure and removal of the CAO. Dissolved phase VOCs present in groundwater at the levels currently observed at the site would not be sufficient for closure. However, long-term monitoring may be concurrent and ongoing while construction and occupancy occur, provided human health risks have been mitigated.

Soil contamination present in the waste cutting oil tank area will be removed by excavation during redevelopment. Regional Board staff must be notified prior to collecting soil verification samples and waste disposal certificates must be submitted with the soil verification sample laboratory results. Composite samples are not acceptable for *in situ* verification samples. It is expected that areas of previously undetected soil contamination may be encountered as structures are removed and the site is graded. Upon encountering such areas, Regional Board staff must be notified and soil sampling must be conducted in accordance with the contaminated soil management plan presented to contractors and environmental management personnel prior to development.

The primary engineered control proposed is a vapor intrusion mitigation system of either a sub-slab passive ventilation system and vapor barrier, or passively or mechanically ventilated parking structures beneath occupied buildings. The proposed land use restrictions will be recorded at the Orange County Recorder's office prior to occupancy and will include notifications to future owners/occupants, restrictions on single family residential land use, notification requirements for soil excavation below 3 feet, restrictions on activities that may affect the vapor intrusion mitigation system, and restrictions on groundwater use.

Based on our review of the documents listed above, we concur with the recommendation to implement groundwater remediation and use engineered and institutional controls to manage exposure risk to building occupants. We are directing Seventeenth Street Realty LLC to submit the work plan to conduct the field test for ISCO to this office by September 26, 2008. The plan should include the installation of wells necessary for implementing the field test and monitoring program. We require notification three business days prior to conducting any field work at this site. If you have any questions, please call me at (951) 320-6375.

Sincerely,

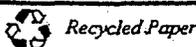


Rose Scott
Engineering Geologist
UST Section

Addressee: Robert Veloz, bob@bobveloz.com

cc: Paul Keen, Seventeenth Street Realty, keen@greenstarmanagement.com
Lawrence Kirsch, Shea & Gardner, lkirsch@sheagardner.com
Jon Lovegreen, Tetra Tech, Inc., Jon.Lovegreen@tetrattech.com

California Environmental Protection Agency



AFFIDAVIT OF DAVID S. BEARD

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

I, DAVID S. BEARD, hereby state as follows:

1. My name is David S. Beard. I worked at the property located at 671 West Seventeenth Street in Costa Mesa, California (the "Property"), from 1973-1980, and 1987-2004. I am over the age of 18 and am competent to make this affidavit. I am of sound mind and am executing this affidavit based on my personal knowledge.

2. When I was first hired at the Property, it was owned by Mr. Carter, but shortly thereafter he sold the plant to ITT Corporation ("ITT"). The plant was then operated as the J.C. Carter Company Division of ITT.

3. I was first hired at the Carter Plant to work on the machine shop drill press line. I later worked in the tool crib, then as a test technician in both the aerospace and industrial marine ("IM") divisions, and later as the Engineering Laboratory Manager.

4. My father also worked at the Property before me, from approximately 1965 through 1981, and I used to visit him at work before I worked there.

5. The Property is currently almost entirely paved. That was not always the case. When I first began to work at the Property, only the front (north) portion of the plant was paved. The back (south) portion of the property was an open field. Once the current aerospace test facility was constructed in the 1973-1974 time period, that facility was an isolated paved area connected to the rest of the Carter Plant by a single road. In fact, before I worked at the Property, when I was in high school, I used to ride my road bike on the unpaved portions of the Property, as did other people.

ITT Carter Used TCE and PCE To Clean Parts

6. During the time ITT owned the Property, trichloroethylene ("TCE"), which was commonly referred to as "trike," and perchloroethylene ("PCE"), also known as perc, were used on the Property.

7. ITT Carter designed and manufactured cryogenic pumps for liquid natural gas.

8. From the 1950s to the 1970s there was also a demand for oxygen pumps for the aerospace industry, the steel industry, and other companies that needed to move liquid oxygen. Several space programs, including the Titan I Intercontinental Ballistic Missile Project, required oxygen pumps for their rocket engines. As a result, during the days of ITT Carter there was a high demand for oxygen pumps. In addition to other cryogenic pumps, ITT Carter therefore also designed and manufactured oxygen pumps.

9. The oxygen pumps made by ITT Carter were distinct from the other pumps made at the Property because the oxygen pumps had residual hydrocarbons that needed to be cleaned before exposure to oxygen.

10. The cleaning process for the oxygen pumps was extremely labor intensive and time consuming. Such process was, however, critical because if the oxygen pumps were not cleaned properly there was a risk of explosion when exposed to contaminants such as grease.

11. TCE and PCE were very efficient cleaning agents. The primary use of TCE and PCE at the Property was therefore to clean the oxygen pumps.

12. After the oxygen pumps were cleaned the TCE and PCE was placed in the steel container tank located in a concrete walled underground sump behind Building 9, in what is now the covered inspection staging area. The sump had a large manhole-size opening in the steel tank into which the TCE, PCE, used oil, and any other liquids that needed to be disposed of were stored.

13. Since TCE and PCE were available, and were effective cleaners, ITT Carter also used TCE and PCE to clean other parts.

14. ITT Carter used TCE and PCE at several degreasers on the Property. One was a "vapor degreaser," which was first located in the southeast corner of Property Plant attached as Exhibit 1 to this affidavit, which reflects the buildings on the property as of the late 1970's. This area of the plant was a "clean room" used to clean aerospace parts very thoroughly. The vapor degreaser was later moved to the building I have drawn onto the Property to the southwest of Building 12. The building was at one time the location of the structure currently designated as Building 8. I have indicated with an "x" the location of the degreaser in that building. ITT also used TCE in another degreaser in the location of the current Building 12, which was then not a building but an outdoor concrete slab. I have indicated with an "x" the location of the degreaser on that slab. This area was also referred to as a "clean room," although it was not an enclosed room at the time.

15. TCE and PCE were not handled with great care during the period of ITT ownership and were spilled at various locations on the Property.

Use Of TCE And PCE At The Property Ended By 1980

16. The demand for oxygen pumps decreased in the late 1970's as the air force and NASA space programs changed course. Specifically, Titan I came to an end and was replaced by Titan II and III, which did not use oxygen as a propellant. As a result, there was a diminished demand for oxygen pumps and the business therefore shifted its focus to other shaft seal pumps which used argon, nitrogen, and hydrazine. TCE and PCE were not used to clean these other fuel pumps.

17. The industry began to discourage the use of TCE and PCE as people learned more about these chemicals. In the late 1970s these chemicals were phased out because they were known to be dangerous and toxic to use.

18. With the decrease in sales of the oxygen pumps, we determined that it was no longer profitable to clean the pumps on site because of the labor intensive cleaning process. The cleaning room was also high maintenance.

19. ITT Carter also learned and appreciated the safety risks involved if the oxygen pumps were not cleaned properly.

20. As a result, we started sending all of the oxygen pumps to Wyle Company to be cleaned sometime between 1978 and 1979.

21. By 1980, the cleaning room where TCE and PCE had been used on the oxygen pumps was shut down and converted into an office building.

22. Since TCE and PCE were primarily used at the Property to clean the oxygen pumps, when ITT Carter stopped cleaning the oxygen pumps on site it also stopped using TCE and PCE to clean other parts.

23. Once the underground storage tank behind Building 9 was removed, all chemicals were disposed of in steel drums, sealed and collected by an outside vendor, and taken off site.

Veloz Carter Did Not Use TCE Or PCE At The Property

24. ITT Carter stopped using TCE and PCE around 1978. I do not remember TCE or PCE being used at the Property at all by 1980.

25. TCE and PCE were not used, spilled, or disposed of at the Property during the Veloz Carter era, from 1987-1997, and in fact TCE and PCE were not even present on the Property during that time period.