
Central Valley Regional Water Quality Control Board

Statement of Rationale

The Executive Officer of the Central Valley Water Board, exercising authority delegated to her by the Board, issued Cleanup and Abatement Order R5-2011-0713 (the "CAO") to TBS Petroleum, LLC ("TBS") to address groundwater contamination at Antler's Shell Station in Lakehead, Shasta County (the "Site"). In issuing the CAO, the Executive Officer chose to exercise her discretion to refrain from naming one of the responsible parties. The Cleanup Team, headed by the Executive Officer, contends that this was an appropriate exercise of discretion and asks the Board to refrain from altering the CAO.

Background

The CAO requires investigation and cleanup of the Site, at which releases from and underground storage tank (UST) impacted groundwater. The main dispute is between TBS, the current property owner, and Mr. Bob Davis, the individual that sold the property to TBS. Mr. Davis has not disputed that spills occurred during his ownership of the Site, but argues that, based on the judicial resolution of liability claims between TBS and himself, the Board should look to TBS alone to complete the cleanup at the Site

Mr. Davis' Liability under a CAO

As documented in the Board's casefile, releases from a UST system occurred under Mr. Davis' ownership of the Site. This gives the Board the authority to issue a Cleanup and Abatement Order to Mr. Davis under the authority of Water Code section 13304, which states that:

Any person ... who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including but not limited to, overseeing cleanup and abatement efforts.

Mr. Davis, as the owner of the property where an unauthorized release occurred, is liable to the Board for the cleanup of the site. However, as explained below, there are valid reasons not to name Mr. Davis in the CAO.

TBS's Liability under a CAO

Under precedential Orders issued by the State Water Board (see *Zoecon Corporation*, Order 86-2 (SWRCB 1986).) and under regulations promulgated to implement Water Code section 13304 (see definition of Responsible Party: Cal. Code Regs., tit. 23, §2720.), TBS is also liable to the Board for the cleanup of wastes at the Site. The State Water Board has opined that, under the principles of nuisance law and under an interpretation of Water Code section 13304 that subsequent property owners are liable for discharges that occurred under prior ownership.

Did the Court Case Discharge Davis' Liability vis-à-vis the Board?

After the Board had initiated actions to require the investigation and cleanup of the Site, TBS sued Mr. Davis in Shasta County Superior Court in order to settle a dispute involving the terms under which TBS took title to the Site. To summarize, Mr. Davis responded to TBS's lawsuit by contending that the "as is" clause in the purchase contract conveyed the responsibility to remediate all known and existing environmental obligations to the TBS (TBS was aware of potential environmental liability at the time it acquired the Site). TBS argued that an indemnification "hold harmless" clause superseded the "as is" clause in the contract, and that the "as is" clause was not sufficient to transfer all environmental obligations to TBS. On 24 July 2009 the Shasta County Superior Court issued a ruling in favor of Mr. Davis, and dismissed the TBS lawsuit with prejudice. On 23 November 2010, the Third Appellate Court District affirmed the Superior Court's ruling, and found:

[t]here are no allegations in the complaint that [TBS was] not aware of the contamination or that [Mr. Davis] failed to disclose or misrepresented any facts regarding the existence of contamination on the property. The 'as is' clause functions to transfer certain liabilities to the new owner. The claims raised in the present complaint are precisely the type of liabilities that were sold along with the property.

Reading this language, it is reasonable to conclude that, in the opinion of the Courts, TBS acquired responsibility for remediating the Site by virtue of the "as is" clause in the purchase contract. However, the Court decision only resolved the liability issues between TBS and Davis. The court decision did not resolve Davis' liability to the Board. This is an important distinction, as there is a decidedly different relationship between co-responsible parties versus the relationship between responsible parties and regulatory agencies. At no point did the Cleanup Team contend that the court decision impacted the Board's ability to name Davis in the CAO. Instead, the Cleanup Team's decision not to name Davis was made for the policy reasons explained below.

Is "Secondary Liability" Appropriate?

Both TBS and Davis have submitted comments asking that they be named "secondarily liable" in any cleanup and abatement order issued by the Board. The term "secondarily liable" finds its origin in State Water Board precedential orders, and is not actually found in the Water Code itself. In practice, a party that is named secondarily liable will only be required to assume obligations in a Cleanup and Abatement Order if the primarily responsible party fails to meet the deadlines. The Board often includes "secondary" deadlines or "cure periods" in the cleanup and abatement orders that find parties secondarily liable, and don't hold the secondarily liable party responsible for meeting the initial deadlines in the Orders.

Though there are many nuances to the assignment of secondarily liability, the State Water Board orders that discuss secondary liability have one thing in common: they require that the Regional Boards, before finding *any* party secondarily liable, make a finding that the cleanup is proceeding well. (*Wenwest, Inc.*, *Susan Rose*, *Wendy's International, Inc.* and *Phillips Petroleum Company*, Order WQ 92-13 (SWRCB 1992).; *Prudential Ins. Co. of Am.*, Order WQ 87-6 (SWRCB 1987).) This requirement effectuates the implied reason why the State Water Board created the secondarily liability in the first place; the State Water Board did not want responsible parties to waste resources duplicating efforts. If one responsible party is undertaking cleanup efforts, then theoretically the other parties would need to duplicate these efforts if they want complete assurances that they would not acquire liability under Water Code section 13350 if the party undertaking the cleanup efforts suddenly halted work, and missed deadlines.

Because the cleanup at the Site is not proceeding well, it is inappropriate for the Board to name either TBS or Davis secondarily liable.

Why Name TBS Alone?

Although both TBS and Davis have liability under Board-issued orders for the cleanup of wastes discharged at the Site, the Cleanup Team contends that there is good reason to simply name TBS in the CAO. For starters, State Water Board Resolution No. 92-49, *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304* ("92-49") implied gives the Board broad discretion in naming parties in Cleanup and Abatement Orders, stating:

The Regional Board shall...

B. Make a reasonable effort to identify the dischargers associated with the discharge. It is not necessary to identify all dischargers for the Regional Water Board to proceed with the requirements for a discharger to investigate and clean up;

C. Require one or more persons identified as a discharger associated with a discharge or threatened discharge subject to Water Code section 13304 to undertake and investigation, based on the findings of [the previous sections].

The Cleanup Team interprets this provision to accommodate the Board's broad prosecution authority, and contends that this authority that should be wielded in such a manner as to actually get the cleanup done in a reasonable amount of time. Given that the Board has the discretion to refrain from naming identified responsible parties, the following are the policy justifications for not naming Mr. Davis in the CAO:

1. TBS is the Responsible Party Best Positioned to Implement the Cleanup

TBS is the current owner of the Site, and there are no known access issues that impede TBS from implementing cleanup options at the Site. As the property owner, TBS will also benefit the most from the increased property value that inheres to a fully-remediated property.

2. The Superior Court Decision, and the Appellate Court's Affirmation, Conclude that TBS is Ultimately Responsible for Paying for the Cleanup

The Board ordinarily does not get involved in contractual disputes between responsible parties. However, in this instance, the Board has been provided with court decisions that ultimately conclude that TBS bears the ultimate responsibility for the environmental obligations that persist at the Site. If the Board looked to Davis to fulfill obligations imposed in a Cleanup and Abatement Order, Davis would need to negotiate an access agreement with TBS, and presumably could seek reimbursement from TBS for the expenditures that were incurred to comply with the CAO. Instead of going through this process, it is reasonable for the Board to look directly to the party that the Courts believe bear the responsibility for the cleanup, which is TBS.

3. It is Unlikely that the UST Fund Will allow TBS to Access Funds

One of the main reasons that TBS wants to include Davis in the CAO is that TBS believes that it will be able to access UST Funds if Davis is named in the Order. However, compliance with Board-issued directives and Orders is generally a prerequisite to the award of a letter of commitment from the UST Fund. Both TBS and Davis have failed to undertake voluntary measures to remediate the contamination that exists at the Site, and have not complied with Board directives relating to the investigation and remediation of the Site.

Though the State Water Board has concluded that it is not improper for a responsible party to assign its grant to another responsible party, this should not form the basis for naming Mr. Davis in the CAO, as that determination is entirely speculative, and, in the opinion of the Cleanup Team, unlikely. In addition, even if Mr. Davis are both named in the CAO, this does not mean that the UST Fund will automatically award funds to Davis. Furthermore, the Cleanup Team believes that nothing in the UST Fund regulations precludes Mr. Davis from transferring a UST Fund commitment (if he is eligible and does receive a commitment from the Fund) to TBS, *even if he is not named in the CAO.*

4. The Board Still Retains the Ability to Name Mr. Davis in Future Orders, Should TBS Fail to Effectuate the Cleanup of the Site

As mentioned above, the court decisions did not resolve Davis' liability to the Board. Should TBS fail to remediate the Site, or should TBS cease to be a viable entity, the Board's recourse could be to pursue Davis in a future Cleanup and Abatement Order. In fact, Mr. Davis' counsel suggested as much, stating that, "If as counsel suggests, Mr. Davis is a responsible party under [Water Code] section 13304, the Board can revisit the issue should TBS cease to exist and have no financial ability to perform the task required under the draft CAO" (Comment Letter Submitted by Mr. Harlow, 11 October 2011.)

The above reasons provide sufficient rationale to overcome TBS's argument that the Cleanup Team's decision not to name Davis is "arbitrary, capricious, and abuse of discretion." (Comment Letter Submitted by Mr. Bloom, 21 November 2011.)

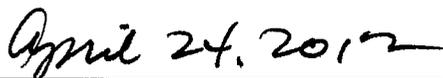
Conclusion: Solely Naming TBS is appropriate

In summary, the Board's Cleanup Team is not looking to intervene in the disputes that have been transpiring between the two identified responsible parties. Instead, the Cleanup Team is merely trying to effectuate a cleanup of the groundwater at the Site. The Executive Officer reasonably concluded that the circumstances surrounding this case allow her to exercise her prosecutorial discretion, and to refrain from naming Davis in the Order.

I hereby affirm that the above statements reflect the considerations that informed my decision to refrain from naming Mr. Bob Davis in Cleanup and Abatement Order R5-2011-0713.



PAMELA C. CREEDON, Executive Officer



24 April 2012