



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>

Arnold Schwarzenegger
Governor

July 2, 2009

CERTIFIED MAIL & EMAIL

Mr. Ken Berry
California Citizens for
Environmental Justice
10567 Mariposa Avenue
Jackson, CA 95642
berry-k@sbcglobal.net

Dear Mr. Berry:

PETITION OF KEN BERRY AND CALIFORNIA CITIZENS FOR ENVIRONMENTAL JUSTICE (CLEANUP AND ABATEMENT ORDER NO. R2-2008-0093 FOR PETE'S STOP, MR. CUONG CHON HUYNH, DUNG V HA AND KIEU TUYET HUYNH (AS TRUSTEES FOR THE DUNG V HA AND KIEU TUYET HUYNH AB LIVING TRUST), AND MR. PETER SIALARIS, FOR 290 KEYES STREET, SAN JOSE, SANTA CLARA COUNTY), SAN FRANCISCO BAY WATER BOARD: BOARD WORKSHOP NOTIFICATION
SWRCB/OCC FILE A-1973

Enclosed is a copy of the proposed order in the above-entitled matter. The State Water Resources Control Board (State Water Board) will hold a workshop on this proposed order on *Tuesday, September 1, 2009*, commencing at *9:00 a.m.* in the Coastal Hearing Room, Second Floor of the Cal/EPA Building, 1001 I Street, Sacramento, California. You will separately receive an agenda for this meeting.

The purpose of this workshop is to solicit comments from stakeholders and the public regarding the proposed order. The State Water Board will take no formal action on the proposed order at this workshop. After consideration of comments received prior to or at this workshop, the State Water Board may schedule the matter for formal action at a subsequent State Water Board meeting.

At the workshop, interested persons will be allowed to comment orally on the proposed order, subject to the following time limits. The petitioners Mr. Ken Berry and California Citizens for Environmental Quality, dischargers, Mssrs. Cuong Chon Huynh, Dung V. Ha, Kieu Tuyet Huynh, and Peter Sialaris and the San Francisco Bay Regional Water Quality Control Board will each be allowed five minutes for oral comment, with additional time for questions by the State Water Board members. Other interested persons will be allotted a lesser amount of time to address the State Water Board.

All comments shall be based solely upon evidence contained in the record or upon legal argument. Supplemental evidence will not be permitted except under the limited circumstances described in California Code of Regulations, title 23, section 2050.6. Written comments on the

California Environmental Protection Agency

Mr. Ken Berry

- 2 -

July 2, 2009

draft order and any other materials to be presented at the workshop, including power point and other visual displays, must be received by **12:00 noon, August 3, 2009**. Please indicate in the subject line, comments to A-1973—September 1, 2009 Board Workshop. Those comments must be addressed to:

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
(tel) 916-341-5600
(fax) 916-341-5620
(email) commentletters@waterboards.ca.gov

If there are any questions or comments, please contact James Herink, Staff Counsel, in the Office of Chief Counsel, at (916) 341-5150 or email jherink@waterboards.ca.gov.

Sincerely,



Michael A.M. Lauffer
Chief Counsel

Enclosure

cc: See next page

cc: Mr. Cuong Chon Huynh **[via certified mail only]**
Pete's Stop
290 Keyes Street
San Jose, CA 95112

Mr. Dung Ha and Ms. Kieu Huynh
[via certified mail only]
2130 Hillstone Drive
San Jose, CA 95138

Mr. Bruce Wolfe **[via email only]**
Executive Officer
San Francisco Bay Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
bwolfe@waterboards.ca.gov

Ms. Dyan Whyte **[via email only]**
Assistant Executive Officer
San Francisco Bay Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
dwhyte@waterboards.ca.gov

Dorothy Dickey, Esq. **[via email only]**
Office of Chief Counsel, State Water Board
c/o San Francisco Bay, Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
ddickey@waterboards.ca.gov

Mr. Thomas Mumley **[via email only]**
Assistant Executive Officer
San Francisco Bay Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
tmumley@waterboards.ca.gov

Mr. Nathan King **[via email only]**
San Francisco Bay Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
nking@waterboards.ca.gov

Yuri Won, Esq. **[via email only]**
Office of Chief Counsel, State Water Board
c/o San Francisco Bay, Regional Water Quality
Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
ywon@waterboards.ca.gov

Mr. Ken Greenberg, Chief **[via email only]**
Clean Water Act Compliance (NPDES)
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105
greenberg.ken@epa.gov

Elizabeth Miller Jennings, Esq.
[via email only]
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
bjennings@waterboards.ca.gov

Interested Persons

DRAFT

July 2, 2009

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WQ 2009-

In the Matter of the Petition of

KEN BERRY AND CALIFORNIA CITIZENS FOR ENVIRONMENTAL JUSTICE

For Review of Cleanup and Abatement Order No. R2-2008-0093 for Pete's Stop, Mr. Cuong Chon Huynh, Dung V. Ha, and Kieu Tuyet Huynh (as Trustees for the Dung V. Ha and Kieu Tuyet Huynh AB Living Trust), and Mr. Peter Sialaris, for 290 Keyes Street, San Jose, Santa Clara County

Issued by the
California Regional Water Quality Control Board,
San Francisco Bay Region

SWRCB/OCC FILE A-1973

BY THE BOARD:

On November 12, 2008, the San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) issued Cleanup and Abatement Order (CAO) No. R2-2008-0093 to Messrs. Cuong Chon Huynh, Dung V Ha, and Kieu Tuyet Huynh (as trustees) and Mr. Peter Sialaris concerning Pete's Stop (Site). The Site has been an active gasoline station since the mid-1990s. Mr. Ken Berry and California Citizens for Environmental Justice (Petitioners) filed a timely petition requesting review by the State Water Resources Control Board (State Water Board). In this Order, the State Water Board grants the petition and remands the matter to the San Francisco Bay Water Board.

I. BACKGROUND

The Site comprises approximately 0.22 acres in the City of San Jose. The aboveground facility consists of an approximately 2,000 square foot building used as a gasoline station and mini-mart. The Site has been in operation since at least the mid-1990s. The Site is about thirteen miles southeast of San Francisco Bay at an approximate elevation of 103 feet above mean sea level. Two groundwater bearing zones were encountered beneath the Site to the total depth explored of forty feet below ground surface. Soil and groundwater beneath the Site have been contaminated by petroleum hydrocarbons from leaking underground storage

tanks (USTs). Because of historical releases of hazardous materials at the Site, the Site appears on the Cortese List maintained by the California Environmental Protection Agency.¹

To date, one 12,000-gallon and two 10,000-gallon gasoline USTs, a 2,000-gallon and two 10,000-gallon diesel USTs, and associated piping and dispensers have been removed and replaced at the Site. Twenty groundwater monitoring wells have been installed at the Site and quarterly groundwater monitoring has been performed since 1999. A groundwater extraction and treatment system has operated sporadically since December 2002. The system consists of four shallow extraction wells using granular activated carbon treatment.

The San Francisco Bay Water Board adopted the CAO at its meeting on November 12, 2008. The CAO requires the submission of a revised corrective action plan, proposed curtailment, and implementation of the aforementioned after acceptance by the Executive Officer of the San Francisco Bay Water Board. The CAO also prohibits the discharge or further significant migration of wastes or hazardous substances in a manner that will degrade water quality; it also prohibits activities associated with the subsurface investigation and cleanup that will cause significant adverse migration of wastes or hazardous substances.

II. ISSUE AND FINDING

The Petitioners' sole contention is that the San Francisco Bay Water Board failed to comply with the requirements of the California Environmental Quality Act² (CEQA). The Board found that the adoption of the CAO "categorically exempt" from the requirements of CEQA.³ Government Code section 65962.5 requires the State Water Board to compile a list of, among other things, certain "underground storage tanks for which an unauthorized release report is filed pursuant to Section 25295 of the Health and Safety Code."⁴ This list is commonly referred to as "the Cortese List."⁵ The Petitioners claim that the use of a categorical exemption is unlawful because CEQA prohibits the use of categorical exemptions for projects that take place on sites included on the Cortese List.

¹ Cortese List Data Resources <<http://www.calepa.ca.gov/SiteCleanup/CorteseList/>> [as of Jul. 2, 2009] and <https://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T0608501906> [as of Jul. 2, 2009].

² Pub. Resources Code, § 21000 et seq.

³ The Petitioners' contention is identical to the contention raised in SWRCB/OCC File A-1972. However, due to factual differences, the two petitions have not been consolidated.

⁴ Gov. Code, § 65962.5, subd. (c)(1).

CEQA was enacted in 1970 with the intent that all state agencies that regulate activities found to affect the quality of the environment, do so giving major consideration to preventing environmental damage.⁶ As such, CEQA is to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.⁷ However, courts have noted that, like all laws, CEQA's provisions should be given a reasonable and practical construction.⁸

CEQA's statutory framework sets forth a series of analytical steps intended to promote the goals and purposes of environmental review: information; participation; mitigation; and accountability. CEQA's implementing guidelines establish a three-tiered process to ensure that these goals are carried out.⁹ The first tier is jurisdictional, requiring an agency to conduct a preliminary review to determine whether an activity is subject to CEQA. An activity that is not a discretionary "project" is not subject to CEQA.

A "project" is defined as "the whole of an action, which has a potential for resulting in a direct physical change in the environment, or a reasonably foreseeable, indirect physical change in the environment. . . ."¹⁰ Keeping in mind the purposes of CEQA, the issue of when to start the environmental review process is crucial. Environmental review must occur late enough in the development process to contain meaningful information, but early enough so that whatever information is obtained can practically serve as input into the decision-making process.¹¹ Environmental review that occurs too early cannot identify specific physical changes – direct or indirect – and would result in sheer speculation. If a specific agency action does not fit within the definition of "project," CEQA is not applicable and no further environmental review is required.

⁵ The author of the original legislation was Assemblyman Cortese.

⁶ Pub. Resources Code, § 21000, subd. (g).

⁷ *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259.

⁸ *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 593.

⁹ *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 379-380 (quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74).

¹⁰ Cal. Code Regs., tit. 14, § 15378, subd. (a).

¹¹ See *Id.*, § 15004, subd. (b); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 129-130 (quoting *No Oil, Inc. v. City of Los Angeles*, *supra*, 13 Cal.3d 68, 77).

The second tier of the CEQA review process concerns exemptions.¹² If a project fits within an appropriate exemption, no further CEQA review is necessary. There are two types of exemptions – statutory and categorical. Because CEQA is statutory rather than constitutional in origin, the Legislature may create exemptions from CEQA's requirements, regardless of their potential for adverse environmental consequences.¹³ These legislatively created exemptions are statutory exemptions.

Categorical exemptions represent those classes of activities that the Secretary of the Natural Resources Agency has determined do not have a significant effect on the environment.¹⁴ The Legislature has identified certain projects that may not use categorical exemptions to avoid CEQA review. The relevant exception is the "Cortese List" exception. Under CEQA, any project located on a site found on the Cortese List is not eligible for a categorical exemption.¹⁵

The San Francisco Bay Water Board's adoption of the CAO was a discretionary action that constitutes a project under CEQA. It found that this action was categorically exempt from CEQA's requirements. One of the CAO's findings stated that "this action is categorically exempt from the provisions of [CEQA] pursuant to Section 15321 of the Resources Agency Guidelines."¹⁶ Because the Site is currently found on the Cortese List, the use of a categorical exemption is not proper and violates CEQA.

While the Site's placement on the Cortese List precludes the use of categorical exemptions, it does not preclude the use of statutory exemptions or the preparation of environmental documents¹⁷ in order to comply with CEQA. Upon remand, the San Francisco

¹² The third tier applies only if the agency determines substantial evidence exists that the project may cause a significant effect on the environment. This third tier is not relevant to this petition and will not be discussed.

¹³ *Napa Valley Wine Train, Inc. v. P. U. C.* (1990) 50 Cal.3d 370, 376.

¹⁴ Pub. Resources Code, § 21084, subd. (a).

¹⁵ *Id.*, subd. (c).

¹⁶ San Francisco Bay Water Board Order No. R2-2008-0093, Finding No. 15. Section 15321 of the CEQA Guidelines exempts projects that are "actions by regulatory agencies to enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency."

¹⁷ "Environmental documents" is a defined term under CEQA and refers to Initial Studies, Negative Declarations, draft and final Environmental Impact Reports. (Cal. Code Regs., tit. 14, § 15361.)

DRAFT

July 2, 2009

Bay Water Board may determine that the CAO's adoption is eligible for a statutory exemption or may prepare an environmental document.¹⁸

ORDER

IT IS HEREBY ORDERED that the CAO is vacated and remanded to the San Francisco Bay Water Board. Upon remand, the San Francisco Bay Water Board shall make a CEQA determination consistent with this Order.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 15, 2009.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

Jeanine Townsend
Clerk to the Board

¹⁸ In its response to this petition, the San Francisco Bay Water Board asserts that "even if the categorical exemption does not or cannot apply, the CAO falls within the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment." (Response to Petition SWRCB/OCC File A-1973, p. 3.) While this assertion may or may not be correct, the State Water Board is not in a position to make that determination. Because of the narrow legal grounds upon which the petition was filed, the administrative record was not requested by the State Water Board. No party objected to this procedure.