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CITY OF SAN JOSE
 Planning, Building and Code Enforcement
 200 East Santa Clara Street
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 Website: www.sanjoseca.gov/planning

NOTICE OF ENVIRONMENTAL APPEAL

TO BE COMPLETED BY PLANNING STAFF	
FILE NUMBER <i>CP11-049 (Appeal)</i>	RECEIPT # <i>640434</i>
TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX) <i>EIR</i>	AMOUNT <i>\$100.00</i>
	DATE <i>11/4/11</i>
	BY <i>Mecra</i>

TO BE COMPLETED BY PERSON FILING APPEAL
PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.
THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION: <i>280 N 33rd / 1604 MCKEE ROAD</i>
REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.): <i>PLEASE SEE ATTACHED</i>

PERSON FILING APPEAL	
NAME <i>ANDY SABERI</i>	DAYTIME TELEPHONE <i>(650) 588-3088</i>
ADDRESS <i>1045 AIRPORT BLVD</i>	CITY <i>SO. SAN FRANCISCO</i>
SIGNATURE <i>[Signature]</i>	STATE <i>CA</i>
	ZIP CODE <i>94080</i>
	DATE <i>11/04/2011</i>

CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)		
NAME <i>JAMES DOMBROSKI</i>		
ADDRESS <i>P.O. BOX 751027</i>		CITY <i>PETALUMA</i>
DAYTIME TELEPHONE <i>(707) 762-7807</i>		STATE <i>CA</i>
FAX NUMBER <i>(707) 769-0419</i>	ZIP CODE <i>94975</i>	
E-MAIL ADDRESS <i>Jdombroski@aol.com</i>		

PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.

Law Offices of
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October 17, 2011

Via Email (john.davidson@sanjose.ca.gov)
and Fax (408-292-6055)

Mr. John Davidson
Senior Planner
Department of Planning, Building
and Code Enforcement
200 E. Santa Clara Street, 3rd Floor
San Jose, California 95113

Re: City File No. CP11-049 (formerly CP09-115)
Draft EIR for Moe's Stop Gas & Service Station

Dear Mr. Davidson:

This office represents Andy Saberi, property owner and business owner, and Andy's BP, Inc., dba Gas & Shop (hereinafter "Andy's BP"), located at the southwest corner of McGee Road on N. 33rd Street, across the street from Moe's Gas, applicant in the above-referenced proceeding. This office also represents the same parties in the case against the City of San Jose, as Respondent; and Mr. Amir Shirazi, et al., real parties in interest, in the Superior Court of the State of California for the City and County of Santa Clara, Case No. 110 CV 176412.

Andy's BP objects to the "Draft" EIR based upon the following:

1. The EIR erroneously omits review of the applicant's leaking underground fuel tanks;
2. The EIR erroneously relies on false data re traffic analysis;
3. The EIR erroneously fails to address the applicant's failure to comply with state and local laws.

A. The EIR is Flawed: No Analysis of the Leaky Underground Tanks.

1. **The Applicant's Leaky Underground Fuel Tanks Was Addressed in Andy's BP Petition for Writ of Mandate.**

Petitioner's reply brief in support of the Verified Petition for Writ of Mandate, stated, in part, as follows:

On August 13, 2009, the County of Santa Clara sent a letter to Shirazi regarding a fuel leak investigation at Moe's Stop. (SJ 87) The letter refers to the fact that Moe's Station was a site where fuel leaks had occurred, i.e., a "fuel leak site." (SJ 87; emphasis added)

The site of the Project was on the "LUST" (Leading Underground Storage Tanks) list, i.e., a site with issues regarding soil contamination involving leakage of underground gasoline storage tanks. (SJ 107) At a meeting, Respondent's staff member stated, "...I did some further investigation into it and it appears that there still are kind of issues going on with that, so, basically, as an active-active leaking underground storage tank site, while development on the property can still proceed, it is true that we cannot find this to be exempt from CEQA, so that we—the staff—the applicant would need to do some kind of environmental clearance, either a— you know, a negative declaration or, you know, if required, an EIR." (SJ 107; emphasis added..) Respondent's staff speaker further stated, "...I found, you know, a trail of—I guess he discussed correspondence from the Santa Clara County. I did, I believe, find the same correspondence he did. That was dated from June of this year, so, clearly there's still activity on the site with regard to the — to the leaking underground storage tank. So again, you know, it's not an issue that, you know, this development can't happen, it's just that the exemption will not cover it." (SJ 108-109; emphasis added.)

On March 29, 2010, Respondent, through its representative Avril Baty, executed an initial study indicating that the Project would result in 41 net new average daily trips. (SJ 45) It further indicated that:

"The Municipal Environmental Compliance Officer and the Santa Clara County Department of Environmental Health have reviewed the soils report, and have determined that the groundwater at the site has been impacted by an historic release of gasoline,..." (SJ 41; emphasis added.)¹

On April 14, 2010, a supplemental memorandum was prepared regarding the Project, in relation to information received regarding an issue regarding a leaking underground fuel tank not originally identified by the Fire Department. (SJ 58)

¹ The opposition brief submitted by Respondent Shirazi fail to address the issue of Respondent's admission that "the site has been impacted by an historic release of gasoline." This admission alone is good grounds to require an EIR.

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The letter from Petitioners' counsel states that substantial evidence supported the conclusion that significant impacts may occur, and as a consequence, an EIR was mandated. (SJ 65) [*The substantial evidence clearly shows: (1) geology and soils may be impacted based upon applicant's leaking gasoline tanks; (b) hazards and hazardous materials may be impacted based upon applicant's leaking gasoline tanks; and (c) transportation/traffic may be impacted based upon the 'Generation Study' by Traffic Data Service. [p] 'If the Planning Commission simply believes an impact may occur, an EIR must be required. Applicable treatises and laws clearly mandate an EIR if an impact may occur. Here, applicant's history of 'out of compliance' with its underground tanks, coupled with the possible leaking, is sufficient to require an EIR. An impact may occur is sufficient to require an EIR. In addition, there can be no doubt based upon the TDS Study that traffic may be impacted. This is sufficient to require an EIR."* (SJ 65)].)

On April 21, 2010, a planning commission meeting was held. (SJ 119 et seq.) Based on the report of TDS, Mr. Dombroski argued that the Project would double traffic because Moe's Stop is a origin/destination in and of itself because it has the lowest gasoline prices in the area. (SJ 123) He noted that customers were observed waiting up to 15 minutes in line to use the station, negating the inference that customers arose from driving by the facility alone. (SJ 124) Thomas Saberi further stated at the meeting that Geotracker, a public website, failed to reflect that the site was in compliance with respect to underground gasoline leakage and contamination. (SJ 125) Mr. Saberi requested the commission order an EIR based on issues relating to traffic and contamination from leakage of gasoline. (SJ 125) At the conclusion of the meeting the application for conditional use permit was approved in light of the negative declaration and a finding it was in compliance with CEQA. (SJ 127-128)

2. The Expert Retained by Andy's BP Confirms Contamination Caused By Applicant.

The expert retained by Andy's BP is Bob Clark-Riddell. His resume is attached as Exhibit A (8 pages). Mr. Clark-Riddell's expert report is attached as Exhibit B (20 pages).

This is substantial evidence that significant impacts may occur and as a consequence, an EIR is mandated. For these reasons, the EIR is patently flawed.

B. The EIR Relies on False Data Regarding the Traffic Analysis.

At page 13 of the EIR, it states that "gas prices" at Andy's BP Gas & Shop are "comparable to Moe's Stop" and that "prices don't typically vary by one cent per gallon on a daily basis." These predicate facts in the EIR are false. In fact, studies by Andy's BP

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show that at least 2/3 of the time, Moe's Gas is cheaper and the prices vary by more than one cent per gallon.

At page 14 of the EIR, it refers to "pass-by trip reduction" for the proposition that traffic is not generated by the gas station. Application of this principle is wrong because the area has the distinction for "cheap gas", the cheapest in the San Jose metropolitan area. In fact, Moe's Stop advertises on a website that applicant's posts daily with his prices to obtain overflow traffic.

All of these facts were ignored in the EIR. Additionally, the EIR acknowledges at page 13 to 14 that it relies on these false assumptions. Accordingly, the EIR is patently flawed.

C. The EIR Fails to Address the Applicant's Failure to Comply With State and Local Laws.

An acknowledged condition for obtaining the conditional use permit, the applicant must be in compliance with all state and local laws. Here, applicant has violated state and local laws by failing to comply with the Court's Order and Judgment Granting Peremptory Writ of Mandate filed March 29, 2011. These violations are documented in the attached email to counsel for the City of San Jose and applicant's counsel, dated October 14, 2011, attached as Exhibit C.

It is clear that based upon the above, the City of San Jose, in concert with the applicant, have violated the fundamental constitutional due process rights of Andy's BP, entitling Andy's BP to pursue appropriate Court intervention in a federal civil rights complaint.

For these reasons, it is requested that the EIR be revised to address and evaluate the substantial impacts which may occur.

Very truly yours,

JAMES M. DOMBROSKI

JMD:sd



Bob Clark-Riddell, P.E.
President/Principal Engineer

EXPERIENCE AND SKILLS

Mr. Clark-Riddell has significant experience in the environmental and civil engineering field, featuring:

- Over 25 years of experience,
- Registration as a Civil Engineer in California,
- Emphasis in client interaction, project management and staff supervision,
- Coordination of a wide range of services for multiple clients,
- Extensive regulatory negotiation, cost recovery, and liability minimization experience, and
- Focus on soil and groundwater assessment/remediation/compliance sampling, fixed price remediation (with cleanup cost cap policies), Phase I & II environmental site assessments and due diligence, cleanup fund work, regulatory compliance, and litigation support/expert witness reporting.

Mr. Bob Clark-Riddell founded Pangea Environmental Services, Inc. to provide his clients with top quality, reliable and cost-effective environmental and engineering services. Mr. Clark-Riddell has over 25 years of experience, which includes his role as a co-founder of Cambria Environmental Technology, Inc., which he helped grow to more than \$11M in annual revenues, as well as tenures at Weiss Associates, ICP/Kaiser Engineers, the U.S. Postal Service, and the Superior Electric Company. As Pangea's Owner/Principal Engineer, Mr. Clark-Riddell is responsible for all business development, technical work, and administration. Mr. Clark-Riddell works intimately with clients, staff, subcontractors and regulators. He trains and manages engineering staff, applies innovative remedial technologies, designs remediation programs, oversees engineering projects, and provides technical quality control. He has designed and supervised remediation projects at over 200 sites in California and has conducted numerous feasibility studies, corrective actions and cost evaluations. Most recently, Mr. Clark-Riddell has coordinated many property transaction and redevelopment projects, requiring extensive due diligence and regulatory interaction to negotiate risk-based cleanup standards, considering engineering/administrative controls, and pursuing case closure. He has also assisted with litigation support on several matters. He has experience with geotechnical evaluations, construction management, asbestos-related services, hazardous material management, industrial water/wastewater, stormwater compliance, and wetlands restoration.

EDUCATION

B.S., Mechanical Engineering, University of Pennsylvania, Philadelphia PA, 1985

Additional Studies:

Litigating Groundwater Cases-Plaintiff and Defendant Perspectives, Bar Assoc. of SF, CA, 2003

Management Action Program Workshop, Anaheim, CA, 2003

Environmental Forensics Workshop, Groundwater Resources Association, Emeryville, CA, 2002

Brownfields Forum, Fanner Insurance, San Ramon, CA, 2002

Litigation Support and Expert Witness Workshop, Oakland, CA, 2000

Civil Engineering Fundamentals, Bechtel Corporation, San Francisco, CA, 1991

Legal Aspects of Construction, University of California Extension, Berkeley, CA, 1990

Ground Water Remediation, University of California, Berkeley Extension, Berkeley, CA, 1990

Environmental Law and National Environmental Policy Act, U.S.D. Agriculture, Wash., DC, 1989

REGISTRATION AND AFFILIATIONS

Registered Civil Engineer (PE), State of California, No. C49629

National Society of Professional Engineers (NSPE)

Professional Environmental Marketing Association (PEMA)

Groundwater Resources Association (GRA)

Rotary Club of Oakland (#3)

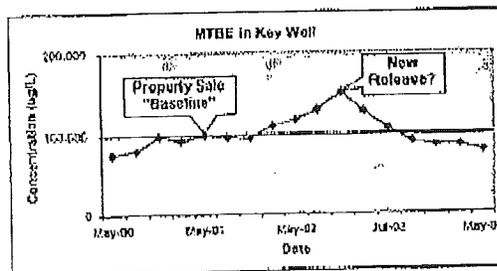
PROFESSIONAL HISTORY

- 2004 - Present **President/Owner/Principal Engineer, Pangea Environmental Services, Inc., Oakland, California;** Founder and principal engineer.
- 1994 - 2004 **Principal Engineer, Cambria Environmental Technology, Inc., Oakland, California;** Co-founder and principal engineer. As leader of the Investigation-Remediation Group and profit center for over five years, Mr. Clark-Riddell was responsible for managing a technical group of up to 16 staff to provide a wide range of services to numerous clients. Mr. Clark-Riddell was responsible for business development and technical work product and quality. The IR Group/profit center had annual revenues of approximately \$2M and 15% profitability. The primary services were Phase I & II environmental site assessments for due diligence/property transaction, assessment/remediation for UST cleanup fund projects, regulatory compliance, litigation support/expert witness reporting, and storm water monitoring. Contaminants were primarily petroleum hydrocarbons and chlorinated solvents, but also included interaction with U.S. EPA and California DTSC for metals contamination, Voluntary Cleanup Agreements, and Preliminary Endangerment Assessments.
- 1989 - 1994 **Project Engineer, Weiss Associates, Emeryville, California;** As lead engineer for a major oil company client, coordinated remediation projects for over 20 sites in Northern California. Supervised engineers, staff scientists and field technicians. Also worked on RI/FS and related reports for RCRA/CERCLA and U.S. DOE sites. Provided technical assistance for litigation support projects.
- 1986 - 1989 **Project Engineer, ICF Kaiser Engineers, Fairfax, Virginia;** Performed project management duties for environmental assessments, a feasibility study, and a site design guidelines study to comply with NEPA requirements. Also prepared procurement specifications, and inspected computerized industrial plant equipment for the Navy. Duties required coordination of nationwide vendors, vendor database, and personal inspection of equipment across the U.S. to confirm compliance with military procurement specifications.

REPRESENTATIVE PROJECTS AND EXPERIENCE

Environmental Litigation Support

Expert Testimony for Group of Service Station Owners: For a group of plaintiffs Mr. Clark-Riddell provided two long days of expert testimony to help preserve environmental indemnification and minimize environmental liability from alleged 'new' contamination. At issue was whether or not the new owners/operators had unauthorized releases that added to the known contamination at their sites. Observed concentration increases in site monitoring wells (primarily MTBE) are the focus of the litigation. Mr. Clark-Riddell reviewed site records and tank tightness testing to help document that the source of the increased concentrations was not the responsibility of the new owner. In some cases increased concentrations were explained by remediation system operation, or by fate and transport of known contamination. Constituent ratios, modeling, and forensic analyses are other tools used in dating site contamination. In addition to technical tasks, Mr. Clark-Riddell has been involved in regulatory interaction and discussion of strategic issues affecting the sites and the litigation. The case settled before trial. Settlement terms are confidential.



Expert Opinion Report and Deposition Testimony for former Boat Painting and Steel Coating Facility: Alameda, California -- Prepared an expert report and provided expert testimony/deposition on behalf of a third-party defendant. Expert report presented five opinions supported by site data, project information, and industry literature. Reviewed numerous expert witness reports and depositions. At issue was soil and groundwater contaminated with PAHs, VOCs, and metals. The defendant had operated a wood treating facility from 1924 to 1968. The dispute involved three properties, two of which were owned by the plaintiff. The plaintiff alleged that chemical releases from the wood treating facility impacted his properties. The defendant filed counter claims and cross claims. Our client, a tenant on one of the properties, used coal tar pitch and coal tar epoxy resin, which contains PAHs. Our tenant also conducted steel sand blasting and painting, using paints and paint thinners and generated blast materials with metals. The expert report cost approximately 1/5th of the plaintiff's report cost, found unsubstantiated claims, and discovered several data points mistakenly located on incorrect property. Defendant obtained summary judgement on plaintiff's claim.

Expert Deposition Testimony regarding Inadequate Remediation of a Former Service Station Site: Oakland, California -- Provided expert testimony/deposition on behalf of a plaintiff. Expert opinion provided on appropriateness of past, present and planned remedial efforts. Settlement allowed plaintiff to resume control (as lead administrator) of cleanup and obtain reimbursement from the State UST Cleanup Fund. With cleanup control, plaintiff has successfully accelerated cleanup efforts.

Mediation Assistance regarding Alleged Clean Water Act Violations from a Release at a Service Station Site: Richmond, California -- On behalf of defendant, expedited site assessment to quickly fully delineate the contaminant extent in the site subsurface and help demonstrate that released compounds did not pose a significant risk to human health or the environment. Attended court-ordered mediation and presented documents related to site conditions and compliance actions conducted by defendant, which resulted in lowest settlement amount from the plaintiff (River Watch) as witnessed by the mediator.

Tidal Influence and Preferential Pathway Impact on Hydrocarbon Litigation: Oakland, California -- For a large semi-public entity, Mr. Clark-Riddell coordinated a thorough subsurface evaluation of tidal impact on petroleum hydrocarbons. The goal of the work was to determine if storm drains were acting as conduits for contamination to the San Francisco Bay, and if bay water was affecting the fate and transport of known contamination. The results of this work are confidential.

Consultant Negligence Evaluation for Insurance Firm: South Lake Tahoe, California -- On behalf of a leading environmental insurance company, Mr. Clark-Riddell evaluated the performance of an environmental consultant on an MTBE project near Lake Tahoe. Detailed review of public and private records was required to determine if the consultant performed within the 'standard of care' for the industry at the time.

Redevelopment and Imminent Domain (Taking): San Jose, California -- When the San Jose Redevelopment Agency was 'taking' a property, Mr. Clark-Riddell was retained to quantify environmental liability related to residual contamination. The property owner and legal counsel desired to reduce the large discount on the property price attributed to the known contamination.

Litigation Support for Large Soil Excavation: Los Angeles, California -- Prepared comments on cost appropriateness of \$6 million project for excavation of metal and hydrocarbon contamination at a former refining facility. Included a detailed evaluation of soil treatment and disposal options such as soil washing, metals neutralization, stabilization, pH control, capping, thermal treatment and insitu vitrification.

Litigation Support for Cost Apportionment: Homer Spit, Alaska -- Performed technical review of case activities to determine cost apportionment for contractual cost sharing agreement. Involved assessment of the scope and cost of all project activities and regulatory directives.

Impacted Drinking Water and Property Value: Anderson Valley, California - Assisted downgradient property owner in recovering for damages to property from soil and ground water impact due to upgradient leaking UST. Involved file review, meeting with regulatory agency, site inspection, corrective action review, wellhead protection review, and written technical assessment.

Tidal Influence on Free Product and Hydrocarbon Plumes: Napa, California - Evaluated tidal influence on free product occurrence in site wells at a bulk transfer facility adjacent the Napa River. Reviewed site data and recommended alternative remedial approach for the site. Homer, Alaska - Reviewed a hydrogeologic study that evaluated the tidal influence on petroleum hydrocarbon fate and transport beneath the Homer Spit. The ground water flow direction varied 360 degrees, with a preferential flow perpendicular to the closest shoreline.

Property Transaction and Land Development

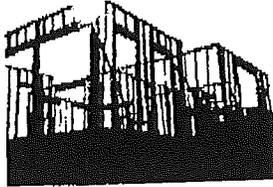
Experience Overview: During preparation of Phase I and II environmental site assessments (ESA's) for property/business sale or purchase, Mr. Clark-Riddell has provided extensive interaction with client's representatives and others, including attorneys, real estate brokers, lending institutions, tenants, other consultants, and contractors. Mr. Clark-Riddell had worked closely with client to conduct appropriate work scope to achieve client objectives for cost control and liability minimization. He has helped establish baseline conditions, especially important for active service stations with USTs. ESA are typically performed to in compliance with ASTM standards. The ESA's are used to identify potential environmental concerns on the subject property or on adjacent properties. When appropriate, Mr. Clark-Riddell recommends and manages Phase II ESA (subsurface sampling), prepares remediation cost estimates, and oversees Phase III remediation work.

Phase II ESA, Regulatory Interaction, and Liability Assessment for an Industrial Facility in Richmond: For this former industrial facility in Contra Costa County, California, Mr. Clark-Riddell was retained further characterize subsurface chlorinated compounds to help facilitate property sale and liability assumption for residual contamination. The goal of the activity is to further define chlorinated compounds and hopefully demonstrate that detected compounds do not pose a significant risk to human health or the environment. These efforts are designed to quickly outline a plan for monitored natural attenuation, and to minimize the uncertainty pertaining to future compliance costs and potential liability. Pangea was hired through the client's legal counsel to review the new information and estimate lifecycle costs for environmental compliance. Pangea calibrated its cost estimates by contacting key regulatory personnel and discussing site data without site disclosure. Consistent with Pangea's expectations, the regulatory agency indicated that the site would require additional assessment and long-term monitoring at a minimum. Site remediation would only be required if contamination represented a significant threat to human health and/or the environment, to be evaluated by soil gas sampling and a sensitive receptor survey.

Given the project uncertainty, Pangea prepared cost estimates for various assessment and remediation scenarios, and offered a probability analysis of the different scenarios. This approach effectively illustrated the range and likelihood of potential costs. Pangea assisted the client and legal counsel with an evaluation of transaction alternatives for negotiation of final transaction terms with the prospective purchaser. Pangea is currently completing sampling of soil gas, soil and groundwater to assess site conditions, and will update remediation and compliance cost scenarios.

Client quote: "Bob Clark-Riddell went the extra mile for us, and carefully documented possible scenarios and likely costs related to our situation. He also summarized transaction alternatives for managing environmental risk and cost. From a corporate perspective, Mr. Clark-Riddell's reports enabled appropriate action to be discussed at all levels in the organization with no ambiguity. A refreshing approach to a delicate issue."

Remediation for Residential Development and Property Transfer: Mr. Clark-Riddell was the lead manager for remediation and closure of a high-profile former industrial site on approximately 2 acres in Emeryville, CA. The site subsurface was prepared for approximately high-density housing in conjunction with the remediation. Petroleum hydrocarbons impacted the site from two USTs and four ASTs, with free product present. With the escrow deadline approaching, Mr. Clark-Riddell prepared and successfully implemented site remediation to negotiated cleanup standards within nine months. Mr. Clark-Riddell's cost control kept the project on track despite the excavation volume exceeding the prior consultant's estimate by four times. Approximately 17,000 tons of contaminated soil and perched groundwater was removed. Shallow soil gas sampling and risk assessment services helped demonstrate no significant risk to the future site residents. Deed restrictions and vapor barriers were required to facilitate closure. Meetings were held with the RWQCB's risk manager, Alameda County Health Care Services Agency, City of Emeryville, attorneys, developers, property owners, and nearby community members. Resulted in closure without ongoing groundwater monitoring of residual contamination, completed before the final escrow deadline.

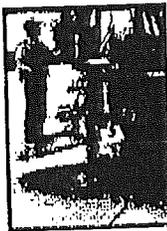


Residential Redevelopment using Oakland's Urban Land Redevelopment (ULR) Program: Mr. Clark-Riddell managed site remediation and cleanup level negotiation to facilitate residential redevelopment in Oakland, California. To establish site-specific target levels (SSTs), Mr. Clark-Riddell used the City of Oakland's *Oakland Risk-Based Corrective Action: Technical Background Document* from the ULR Program. Remediation involved soil excavation, and installation of oxygen releasing compound within a 10-ft deep trench to stimulate degradation of residual hydrocarbons. To influence hydrocarbons offsite, hydrogen peroxide was injected in two wells over a six-week period. A sensitive receptor survey identified and safeguarded known receptors.

Liability Assessment and Mitigation: San Francisco, California - Prepared reports estimating potential cost liability associated with known USTs or discovered lead or hydrocarbon impact. Oakland, San Francisco and San Mateo, California - Helped secure "comfort letters" from regulatory agencies on property owner's behalf, which indicate that a third party is responsible for the known contamination. Has assisted with securing indemnification during property transaction process.

Site Assessment and Remediation of Petroleum Hydrocarbons

Soil and Groundwater Assessment and Remediation of Petroleum Hydrocarbons: Lead engineer for scoping site assessment of petroleum hydrocarbons and conducting risk evaluation. In many cases, assessment activities define the lateral and vertical extent of contamination in a rapid, dynamic manner to control cost and expedite closure. When site cleanup is necessary, Mr. Clark-Riddell evaluates traditional and innovative remedial options and coordinates feasibility and pilot testing. He has designed, permitted and implemented remediation for gasoline service stations for a major oil companies, small oil companies, and independent station owners/dealers. He has coordinated remediation at over 200 service station using dual phase extraction, air sparging, soil vapor extraction, ground water pump and treat, free-product recovery and biosparging. Setup operation and maintenance programs and achieved regulatory case closure.



Free Product Recovery for UST/Hydrant System: Mr. Clark-Riddell was the lead engineer and manager to remediate two-acre vehicle maintenance and fueling facility in San Francisco. Tasks included removal of 4 USTs and 850 linear feet of fiberglass piping from the pressurized hydrant system; installation of a soil and groundwater remediation and treatment system; remediation of stockpiled soil impacted with hydrocarbons and lead to avoid expensive soil disposal as hazardous waste; intensive regulatory negotiations; and ongoing compliance. The insitu remediation system consisted of Soil Vapor Extraction (SVE) and Total Fluid Extraction (TFE) with submersible pneumatic pumps. The TFE system extracted floating hydrocarbons (LNAPL) and groundwater. Aboveground soil bioremediation of 1,000 cubic yards of soil

involved vapor extraction, nutrient addition, and proprietary hydrocarbon degraders. The soil was reused onsite with regulatory approval.

Remediation System Selection and Standardization: Standardized remediation approach and developed equipment for soil vapor extraction and treatment. Compared capabilities, features and cost of blowers, carbon adsorption systems, diffuser stacks, and advanced oxidation equipment such as internal combustion engines and thermal and catalytic oxidizers. Assisted with standardization of remediation work plans and systems for ground water extraction and treatment. Incorporated standardized systems and work plans into remediation projects. Made presentations to major oil companies.

UST Cleanup Fund Assistance: Managed all aspects of UST Cleanup Fund projects, including claim application preparation, pre-approval requests, reimbursement requests. Experience with approximately 25 claimants, projects, including sites in Burlingame, Fremont, Hayward, Milpitas, Mountain View, Oakland, Palo Alto, Sacramento, San Jose, San Francisco, San Mateo, South San Francisco, and Weed. Successful in scoping projects to facilitate full reimbursement from the Fund and to achieve regulatory case closure.



Chlorinated Hydrocarbon Assessment & Remediation

Guaranteed Remediation of PCB and Solvent Plume and Insurance Program: To end the legal stalemate between two manufacturing firms, Mr. Clark-Riddell offered an incentive-based performance guarantee featuring a blend of proven and innovative low-cost remedial solutions combined with sophisticated insurance instruments. The contaminants of concern were PCB and chlorinated solvents (primarily dichlorobenzenes (DCBs) and trichlorobenzenes (TCBs)) in soil and groundwater straddling the property boundary. During negotiations with the RWQCB and the development of site remediation goals, proposed and got approval for, depth-specific cleanup levels to control cost. Approximately 1,200 tons of contaminated soil was removed from the site and VOC concentrations in groundwater have decreased by two orders of magnitude.

PCE and Stoddard Solvent at Former Dry Cleaners: Emeryville, California – Performed lateral and vertical assessment of PCE and Stoddard solvent in multiple shallow water bearing zones. Installed wells in different depths. Effort related to property transaction and litigation. Used dynamic techniques to adequately assess contamination quickly and cost effectively.

Dry Cleaner Sites: Berkeley, California – Performed extensive site assessment, indoor air testing, and mitigation testing in a fast and dynamic manner to evaluate conditions and respond to discovered subsurface PCE and related degradation compounds at an operating dry cleaning facility. Helped determine PCE extent in soil gas, soil and groundwater. Used membrane interface probe equipment to provide real-time data on contaminant concentrations and soil conductivity to better assess conditions and select confirmation soil and groundwater sampling locations. Conducted indoor air sampling within operating cleaner and adjacent buildings to assess potential impact to indoor air. Completed testing of subsurface vapor extraction for site interim remediation and vapor collection. Worked with client and legal counsel. Oakland, California – Helped design and implement a remedial approach for a former dry cleaner site, which resulted in case closure from the Water Board. Abandoned facility had been idle for over six years and under litigation. Emeryville, California – Performed lateral and vertical assessment of PCE and Stoddard solvent in multiple shallow water bearing zones. Installed wells in different depths. Effort related to property transaction and litigation. Used dynamic techniques to adequately assess contamination quickly and cost effectively.

Soil Vapor Extraction of TCE: Mountain View, California - After evaluating different remedial alternatives and feasibility testing, designed and installed vapor extraction system to remove TCE and other chlorinated compounds from soil and ground water.

TCE and PCE Remediation: Palo Alto, California - Represented property owner's interest in evaluating and improving remediation efforts using dual-phase extraction and ground water extraction at a former plating facility.

TCE and Vinyl Chloride Remediation: Livermore, California - Negotiated for shutdown of pump and treat system after achieving asymptotic removal rates. Used field testing to demonstrate other remedial technologies were not cost effective or applicable.

Feasibility Studies: Prepared remedial feasibility studies for several sites in the San Francisco Bay Area with either hydrocarbons or halogenated volatile organic compounds. Evaluated numerous equipment suppliers and system effectiveness of remedial technologies, including ultraviolet/hydrogen peroxide treatment of ground water for halogenated and non-halogenated compounds.

Remediation Engineering for DOE: U.S. EPA Superfund Sites, Livermore, California - Prepared economic and performance evaluation of in-situ air sparging compared to conventional vapor and ground water extraction for remediation of TCE based on field tests at DOE in Savannah River. Prepared cost estimates for remediation alternatives. Evaluated soil vapor treatment system included automated carbon adsorption and thermal oxidation with vapor phase scrubbing for sites in the Mocho and Spring Subbasins and the Altamont Hills.

Metals Containment & Remediation

Lead Containment: Oakland, California - Evaluated remedial strategies for lead-bearing soil at a former scrap yard. Researched naturally-occurring lead concentrations in Oakland. Selected remedial strategy consisting of lime treatment of shallow soil and capping to control pH in site soil for preventing lead mobilization.

Arsenic and Hydrocarbon Remediation: Hayward, California - Designed a ground water extraction and treatment system to remediate gasoline-range hydrocarbons and arsenic. Activated alumina cartridges were used to treat the arsenic, which apparently originated from pesticide use in old orchards. Complex interbedded clay and sandy units complicated the remedial efforts.

Zinc in Soil and Groundwater: Oakland, California - For this property transaction at an industrial facility, Bob Clark-Riddell interfaced with the California EPA (DTSC), the Regional Water Quality Control Board, seller and their legal counsel to assess and remediate metals (zinc and other compounds) and low pH at the site.

Barium Excavation During UST Removal: Berkeley, California - Coordinated removal of a 1,000-gallon waste oil tank and 250 cubic yards of Class 1 hazardous soil due to elevated barium concentrations. Used mobile laboratory to expedite project and control costs. Excavated to fullest extent practical without undermining a street and building. Received regulatory closure.

Regulatory Compliance/Hazardous Materials



Regulatory Compliance for Large Private Firm: San Francisco, California - For this large client Mr. Clark-Riddell has been providing regulatory compliance services for up to 10 years, assisting with a wide range of compliance needs at their many facilities. Services have HMBPs, SPCCs & compliance audits, air permit updates, waste discharge sampling and reporting, DTSC Voluntary Cleanup Agreement, and site remediation and monitoring.

Stormwater: Northern California - For several school districts and industrial/commercial facilities Mr. Clark-Riddell has been managing preparation of stormwater pollution prevention plans (SWPPPs) and annual stormwater monitoring.

Bob Clark-Riddell, P.E.

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Waste Disposal: For the City of Oakland Mr. Clark-Riddell has coordinated disposal of hazardous materials. Includes profiling assistance and working with disposal contractors and disposal facilities. Provided waste disposal services for numerous assessment and remediation projects.

Land Development Feasibility Studies under NEPA: Arlington, Virginia - Managed a feasibility study and site design guidelines study per NEPA requirements for a development of 4.4 millions square feet of occupiable office space in a congested urban setting. Involved site review and geotechnical and subsurface investigations which indicated the presence of freon, PCBs, and petroleum hydrocarbons. Also involved assessing the impact to waterfowl and other wildlife habitats, water quality, wetlands, and the transportation and other socioeconomic infrastructure. Managed a second study to develop a six-story 1.0 million square feet building in a wooded suburban setting along a creek, requiring habitat delineation, urban planning and community relations.

Wetlands Delineation and Restoration

Wetlands Delineation and Restoration: San Mateo, California - Under oversight by the U.S. Army Corps of Engineers, Mr. Clark-Riddell coordinated a wetlands delineation study and subsequent restoration for this small airport parcel. Mr. Clark-Riddell worked closely with a Certified Wetlands Scientist to survey the parcel and implement restoration.

Construction Management

Office Building Construction: Silver Spring, Maryland - Was onsite engineer responsible for inspecting electrical and mechanical construction with respect to construction drawings for a 12-story office building for the U.S. General Services Agency.

USPS Facility Upgrade: San Francisco, California - Project manager for oversight of \$5 million upgrade of main mail processing facility for U.S. Postal Service.

Remediation System Installation: Oversight of remediation systems throughout California, including inspection of civil, mechanical, and electrical disciplines.

Technical Proposal Services

Proposal Preparation Services: Los Angeles, California - Hired as technical writer for preparation of large government proposals including Emergency Response Services for EPA Region 4 of the Southeastern U.S., and assessment and remediation services for the TERC for the Army Corps of Engineers. Invaluable experience with large teams of technical staff/writers, graphic illustrators, and senior management under tight time frames and high stakes.

Andy's BP Inc v. Amir Shirazi et al
1590 and 1604 McKee Road, San Jose, CA

Opinion #1: Gasoline-related contamination from 1604 McKee (1) has likely impacted 1590 McKee property in the past and may still currently impact 1590 McKee, and (2) has likely impacted property nearby 1590 McKee where the regulatory agencies have required additional contamination delineation by the 1590 McKee responsible party.

This opinion is based on the following information:

1. **A significant release of gasoline-related compounds occurred at 1604 McKee (Moe's Arco), as evidenced by soil and groundwater contamination at the site [Groundwater Investigation Report by WellTest, September 25, 2009].**
2. **"The stability of the dissolved-phase groundwater plume has not been determined" for the 1604 McKee release [Groundwater Investigation Report by WellTest, September 25, 2009]. Additional evaluation of plume stability is required [Well Installation Report by WellTest, January 7, 2010]**
3. **The groundwater direction from 1604 McKee is partially toward 1590 McKee, with 1590 McKee in the cross/downgradient direction from 1604 McKee [Figure 1]. Dissolved contamination tends to move in a downgradient direction, and to diffuse laterally (including crossgradient) due to the contaminant concentration gradient.**
4. **MTBE is highly soluble in water and tends to migrate in groundwater significantly faster than other gasoline-related compounds due to its high solubility and low rates of adsorption to soil.**
5. **Subsurface utility conduits are present under McKee Road and slope downward past 1604 McKee toward 1590 McKee.** The invert (flow line) of the storm drain sewer is approximately 6 ft deep, with the storm drain backfill material extending to approximately 7 ft deep. The water depth in Arco well MW-2 has ranged from approximately 5 to 8 ft depth. Therefore, when the groundwater is shallower than the storm drain trench bottom the storm drain is a potential conduit for contaminant migration toward the 1590 McKee site. Sanitary sewers also run past both sites on both sides of McKee Road, but the depth is not shown on the reviewed maps. These sanitary sewers may also be conduits for contaminant migration from 1604 McKee toward 1590 McKee. [Storm drain and sanitary sewer maps].
6. **MTBE detected in Arco well MW-5 located downgradient of 1604 McKee on the Anne Darling School property suggests that MTBE has migrated at least 150 ft from the 1604 McKee site (and that MTBE is present across McKee Road from the 1590 McKee site) [Well Installation Report by WellTest, January 7, 2010]. For comparison, contamination from nearby former Chevron site apparently migrated approximately 250 ft downgradient according to well locations [Figure 1], while contamination from a petroleum hydrocarbon release at 1590 McKee (Gas & Shop)(first discovered during a 1988 fuel piping repair) apparently migrated approximately 220 ft downgradient assuming MTBE detected in offsite Gas & Shop well MW-12 is not from another source such as 1604 McKee [Gas & Shop Monitoring Reports].**

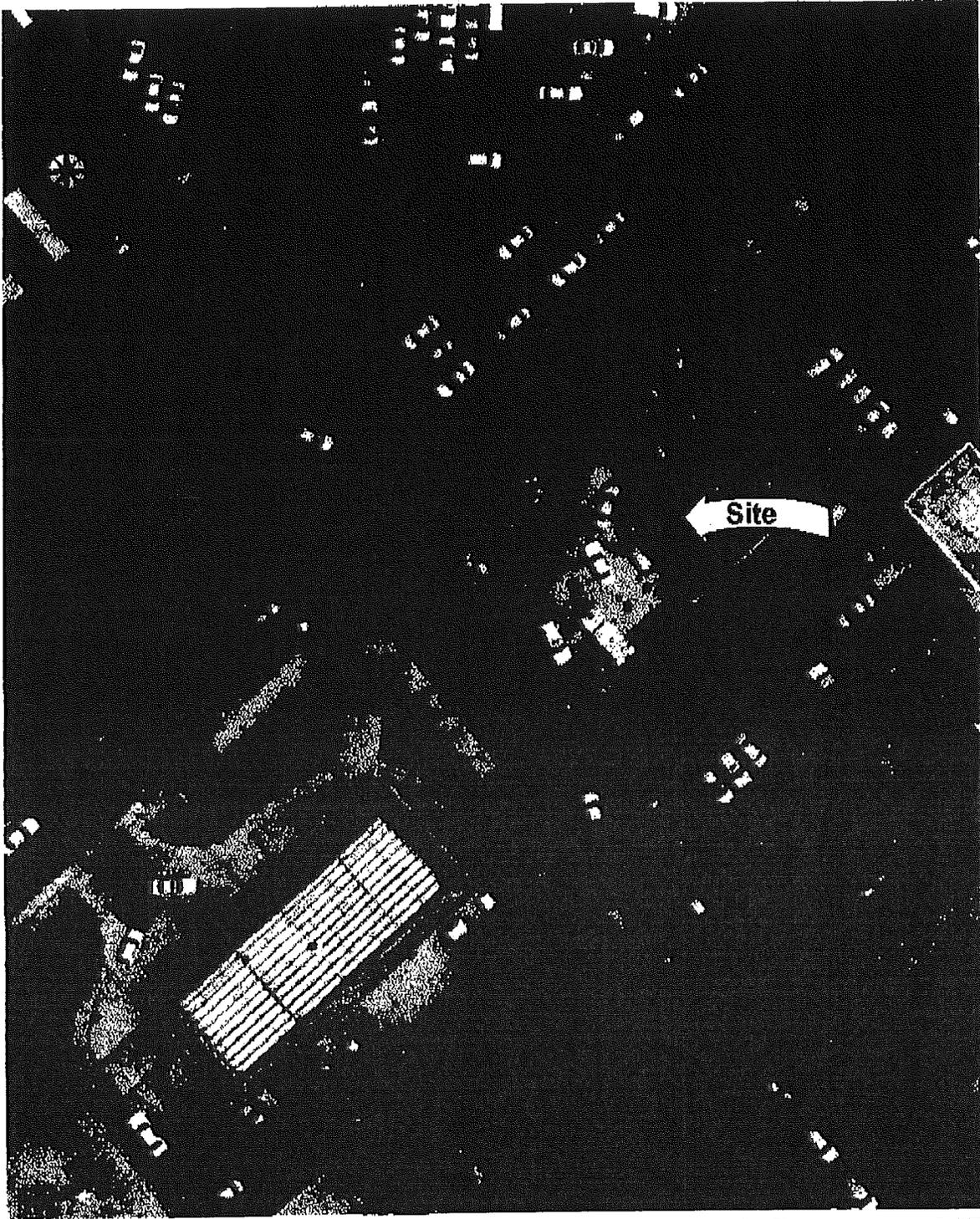
7. **The highest MTBE concentrations in groundwater have been observed at 1604 McKee: 4,900 ug/L in well MW-2 on 10/21/01 versus 4,040 ug/L at 1590 McKee in MW-9 on 9/24/04 [Groundwater Monitoring Reports]**
8. **MTBE concentrations in groundwater could be higher than observed** because the well screen (13'-18' depth) for Arco well MW-2 has been consistently submerged [Well Installation Report by WellTest, January 7, 2010], and shallower gasoline-related contamination was detected shallower (10' depth) in site soil 1604 McKee, including the only MTBE detected in soil. [Table 2, Groundwater Investigation Report by WellTest, September 25, 2009]. Similarly, the well screen for MW-5 is also submerged so dissolved constituent concentrations may not be representative and could be higher than reported [Well Installation Report by WellTest, January 7, 2010].
9. When MTBE was first discovered in Arco well MW-2, the closest well at the 1590 McKee site was Gas & Shop well MW-2 [Figure 1]. **MTBE concentrations in Gas & Shop well MW-2 are significantly lower than in upgradient Arco well MW-2 and exhibit a similar concentration trend** [Figure 2]. During the first monitoring of Arco well MW-2 on January 13, 2000, an elevated MTBE concentration of 3,000 ug/L was detected. Approximately nine months later the MTBE concentration in Gas & Shop well MW-2 increased from 13 ug/L to 320 ug/L [Monitoring Reports].

Opinion #2: Contamination emanating from 1604 McKee has caused the 1590 McKee owner/responsible party (RP) to incur estimated damages ranging from \$8,600 to \$43,000.

This opinion is based on the following information:

1. **1590 McKee owner/RP was required to install and monitor well MW-8 in 33rd Street between 1590 and 1604 McKee sites.**
2. 1590 McKee owner/RP was required to install and monitor wells MW-10 and MW-11 in McKee Road, which are located in the cross/downgradient direction from both 1590 and 1604 McKee sites.
3. **Wells MW-10 and MW-11 are located nearby underground storm drain and sanitary sewer utilities that could have acted as preferential pathways for contaminant migration from the 1604 McKee site to the McKee Road impact monitored by these wells.**
4. Well installation costs include workplan preparation, interaction with agency oversight staff, permitting, other pre-field planning activities, drilling by a licensed contractor, soil sampling, well materials, well development, laboratory analyses, soil and water disposal, traffic control, wellhead surveying, and reporting. These well installation and related costs are estimated to cost approximately \$15,000.

5. **Twenty eight monitoring events have been performed on well MW-8, MW-10 and MW-11, for a total of 84 well monitoring/samplings** over an eight year period (2003 to 2011). Each monitoring event includes cost for well gauging, well sampling, laboratory analyses, field supplies, permitting, traffic control (including hiring of off-duty San Jose Police officers), water disposal, and reporting. Assuming a cost of approximately \$800/well for monitoring, the monitoring costs for the 84 well monitoring episodes is approximately \$67,000.
6. Project management costs for well installation and monitoring of these wells are estimated to be approximately \$4,000, assuming approximately \$500/year for eight years.
7. **Combining the above 'corrective action' costs yields a total cost of approximately \$86,000** incurred by 1590 McKee RP.
8. Parties with commingled contaminant plumes often apportion cost responsibility to each contributor based on the estimated relative contaminant contribution from each hydrocarbon release. For cost estimation purposes, I estimate that the **contribution from 1604 McKee** release to the area near and downgradient of the 1590 McKee site (between MW-8 and MW-11) **could range from 10% to 50%**. Correspondingly, the corrective action costs or damages incurred by 1590 McKee RP range from \$8,600 to \$43,000.
9. This cost range does not include costs incurred for the following offsite assessment performed nearby 1590 McKee in locations where contamination could have migrated from 1604 McKee: soil and groundwater investigation within McKee Road in 2005 (Borings HP-1 through HP-8); offsite well installation in 2006 (MW-12, MW-13 and MW-14); monitoring of offsite wells MW-12, MW-13 and MW-14; and groundwater investigation in 2010 (Borings HP-11 through HP-17).



Aerial Photograph Source: Google Earth 2008

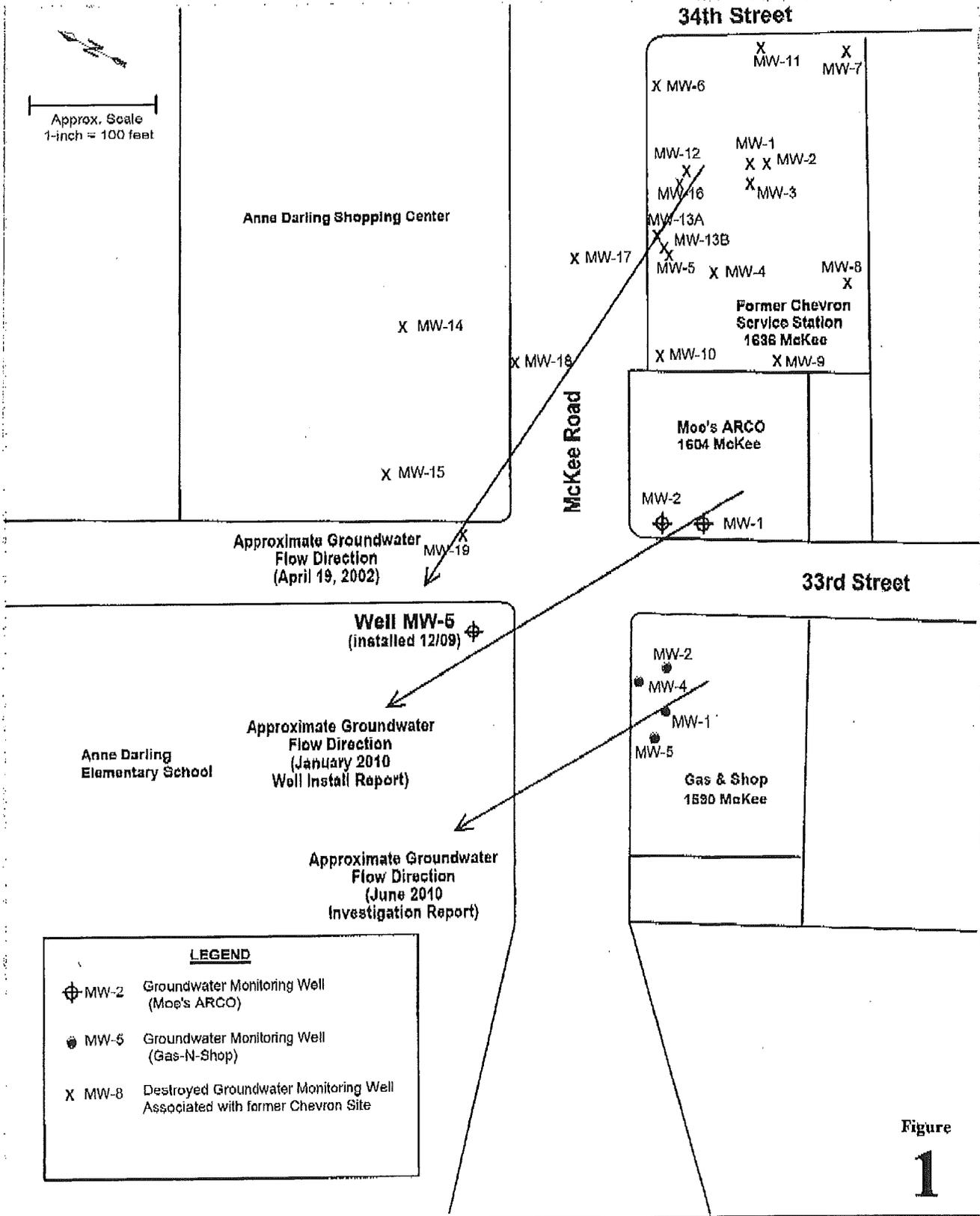
WellTest, Inc.
P.O. Box 8548
San Jose, CA 95155

Aerial Photograph of Site Area
Roy's Mobil
197 East Jackson Street
San Jose, CA

FIGURE

2

JOB NO. 2072



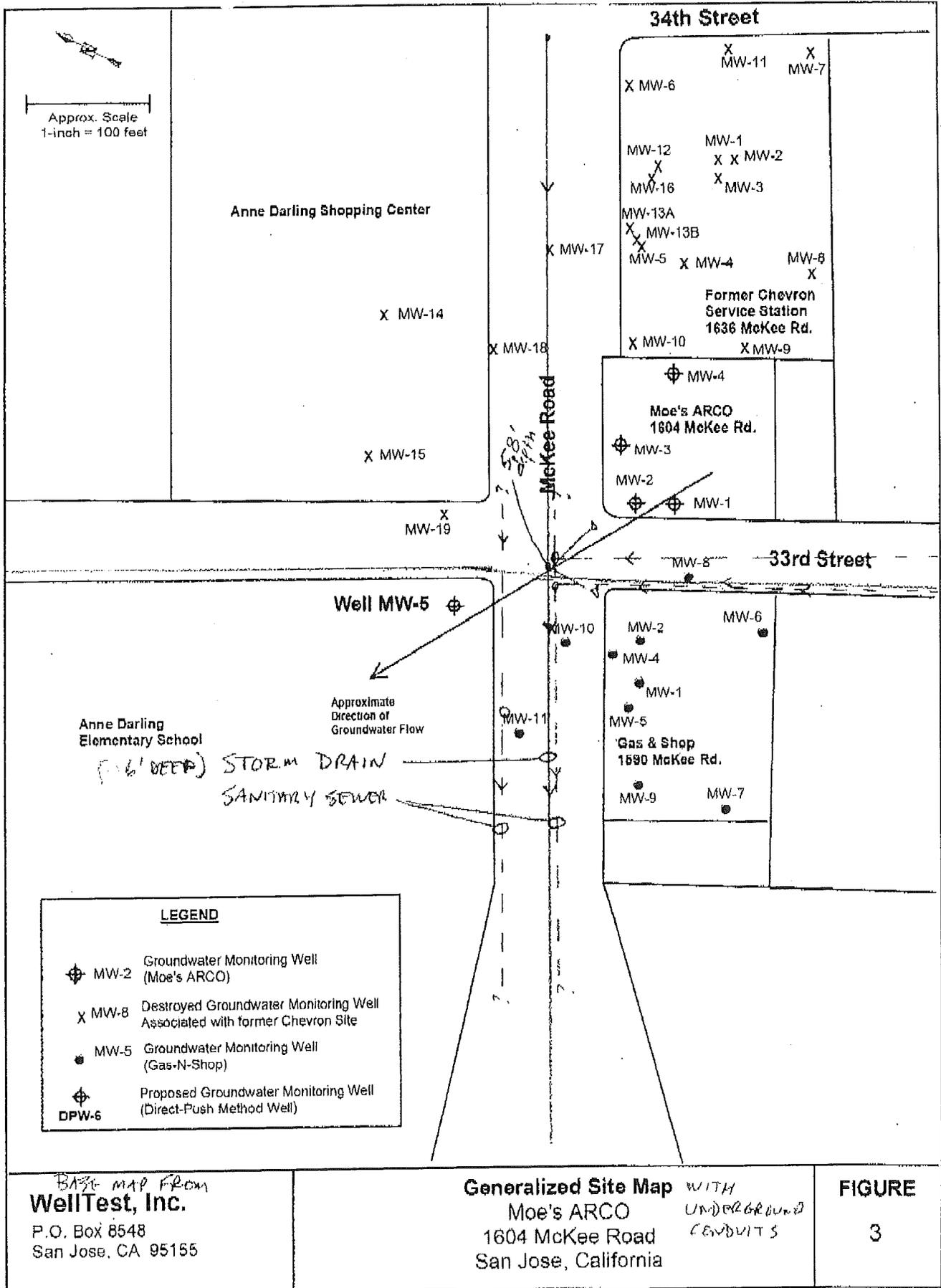
Figure

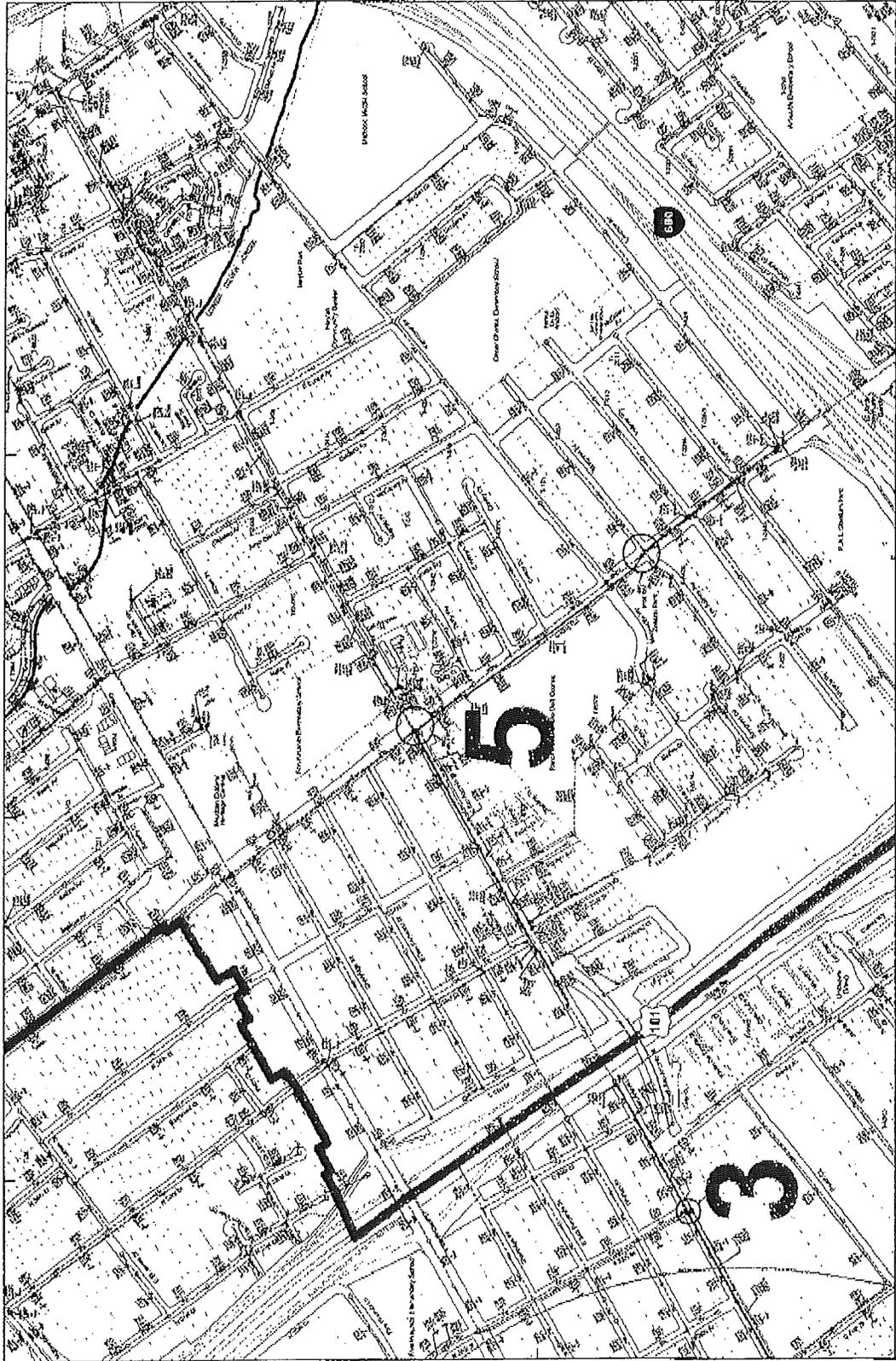
1

Gas & Shop and Moe's ARCO
1590 & 1604 McKee Road
San Jose, California



Historic Well Locations (2002)
and Groundwater Flow Direction





DATE	BY	CHKD	APP'D
6/27/07	...	...	...

SANITARY SEWER SYSTEM

1" = 100'

1982 and 7-1-87

PERMANENT



City of San Jose
 Department of Public Works
 Ray Alban, Director
 OFFICE OF PUBLIC UTILITIES

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TABLE 1
 Well Construction Details
 Moe's ARCO
 1604 McKee Road
 San Jose, CA

Well ID	Well Type	SCWD Permit #	DWR #	Installation Date	Casing Diameter (Inches)	Borehole Depth (ft bgs)	Screened Interval (ft bgs)	TOC Elevation (ft. MSL)	DTW (btoc) (03/10 /10)	Well Screen Flooded?
MW-1	Monitoring	99W00787	714577	12/22/99	2	18	13 to 18	84.76	5.10	Yes
MW-2	Monitoring	99W00788	714578	12/22/99	2	20	13 to 20	84.64	5.63	Yes
MW-3	Monitoring	09W00320	e0091120	07/15/09	¾	18	13 to 18	Not Surveyed	5.44	Yes
MW-4	Monitoring	09W00319	e0091119	07/15/09	¾	18	13 to 18	Not Surveyed	5.97	Yes
MW-5	Monitoring	09W00760	e0099572	12/21/09	¾	20	15 to 20	Not Surveyed	7.23	Yes

TABLE 2
Groundwater Monitoring Data
Moe's ARCO
1604 McKee Road
San Jose, CA

Well Number	Date	TPH _g	B	T	E	X	MTBE	MTBE	DIPE	ETBE	TAME	TBA	EDB	1,2-DCA	Meth.	Elit.	Depth to GW	TOC Elev.	GW Elev.	Screen Submerged ?
MM-1 (Screened 13 - 18')	01/13/00	100	1	<0.5	2.1	2.9	590	640	<25	<25	<25	170	<0.5	<0.5	na	na	4.71	84.76	80.05	Yes
	04/20/00	<50	<0.5	<0.5	<0.5	<0.5	610	na	na	na	na	na	na	na	na	na	4.71	84.76	80.05	Yes
	07/26/00	<50	<0.5	<0.5	<0.5	<0.5	590	na	na	na	na	na	na	na	na	na	5.63	84.76	78.13	Yes
	01/12/01	120	4.6	0.51	<0.5	0.62	1,000	na	na	na	na	na	na	na	na	na	6.19	84.76	78.57	Yes
	07/13/01	<50	<0.5	<0.5	<0.5	0.87	300	220	<5.0	<5.0	<24	na	na	na	na	na	6.48	84.76	78.28	Yes
	10/12/01	<50	<0.5	<0.5	<0.5	<0.5	260	250	<5.0	<5.0	<5.0	<25	na	na	na	na	6.81	84.76	77.95	Yes
	01/11/02	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	5.79	84.76	78.97	Yes
	02/25/02	<50	<0.5	<0.5	<0.5	<0.5	<5.0	5	<5.0	<5.0	<25	na	na	na	na	na	5.82	84.76	78.94	Yes
	04/19/02	<50	<0.5	<0.5	<0.5	<0.5	<5	1.0	<0.5	<0.5	<0.5	<5	na	na	na	na	5.91	84.76	78.85	Yes
	09/30/02	<50	<0.5	2.0	<0.5	9.3	76	98	<2.5	<2.5	<2.5	<2.5	na	na	<2,500	<250	6.13	84.76	78.63	Yes
	12/26/02	<50	<0.5	<0.5	<0.5	<0.5	<5.0	1.0	<0.5	<0.5	<0.5	<5.0	na	na	na	na	4.98	84.76	79.78	Yes
	02/03/03	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	5.39	84.76	79.37	Yes
	04/23/03	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	5.91	84.76	78.85	Yes
	07/07/03	<50	<0.5	<0.5	<0.5	<0.5	170	na	na	na	na	na	na	na	na	na	5.01	84.76	78.75	Yes
	10/09/03	<50	<0.5	<0.5	<0.5	<0.5	7.8	na	na	na	na	na	na	na	na	na	6.45	84.76	78.31	Yes
	02/05/04	76	<0.5	<0.5	<0.5	2.6	110	na	na	na	na	na	na	na	na	na	5.49	84.76	79.27	Yes
	06/22/04	<50	<0.5	<0.5	<0.5	<0.5	25	na	na	na	na	na	na	na	na	na	6.24	84.76	78.52	Yes
	09/20/04	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	5.72	84.76	78.04	Yes
	12/29/04	<50	<0.5	<0.5	<0.5	<0.5	110	na	na	na	na	na	na	na	na	na	5.90	84.76	78.86	Yes
	03/18/05	<50	<0.5	<0.5	<0.5	<0.5	100	na	na	na	na	na	na	na	na	na	4.68	84.76	80.08	Yes
06/15/05	<50	<0.5	<0.5	<0.5	<0.5	72	na	na	na	na	na	na	na	na	na	5.60	84.76	79.16	Yes	
09/29/05	<50	<0.5	<0.5	<0.5	<0.5	78	na	na	na	na	na	na	na	na	na	6.80	84.76	77.96	Yes	
03/30/06	<50	<0.5	<0.5	<0.5	<0.5	32	30	<0.5	<0.5	<0.5	<0.5	<5.0	<0.5	<500	<50	4.55	84.76	80.21	Yes	
06/27/06	<50	<0.5	<0.5	<0.5	<0.5	33	32	<0.5	<0.5	<0.5	<0.5	<5.0	<0.5	na	na	6.03	84.76	78.73	Yes	
09/25/06	82	3.9	3.8	1.6	11	41	59	<1.2	<1.2	<1.2	<1.2	<1.2	<1.2	na	na	7.32	84.76	77.44	Yes	
12/06/06	150	2.8	1.2	5.3	12	25	21	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	na	na	7.13	84.76	77.63	Yes	
02/28/07	140	9.7	15	4.0	26	23	22	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	na	na	6.26	84.76	78.50	Yes	
05/25/07	<50	<0.5	<0.5	<0.5	<0.5	32	28	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	na	na	6.56	84.76	78.20	Yes	
09/24/07	<50	<0.5	<0.5	<0.5	0.40	27	35	<0.5	<0.5	<0.5	<0.5	<0.5	<0.5	<500	<50	7.52	84.76	77.24	Yes	
12/05/07	<50	<0.5	0.82	0.55	2.5	22	na	na	na	na	na	na	na	na	na	7.19	84.76	77.57	Yes	
03/26/08	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	5.72	84.76	78.04	Yes	
06/05/08	<50	<0.5	<0.5	<0.5	<0.5	7	na	na	na	na	na	na	na	na	na	6.74	84.76	78.02	Yes	
08/01/08	<50	<0.5	<0.5	<0.5	<0.5	16	na	na	na	na	na	na	na	na	na	7.55	84.76	77.21	Yes	
10/31/08	<50	<0.5	<0.5	<0.5	<0.5	21	na	na	na	na	na	na	na	na	na	8.09	84.76	76.67	Yes	
03/29/09	<50	<0.5	<0.5	<0.5	<0.5	11	na	na	na	na	na	na	na	na	na	5.71	84.76	79.05	Yes	
07/20/09	<50	<0.5	<0.5	<0.5	<0.5	15	na	na	na	na	na	na	na	na	na	7.26	84.76	77.50	Yes	
03/09/09	<50	<0.5	<0.5	<0.5	<0.5	na	7.2	<0.5	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	5.10	84.76	79.66	Yes

TABLE 2
Groundwater Monitoring Data
Moe's ARCO
1604 McKee Road
San Jose, CA

Well Number	Date	TPHg	B	T	E	X	MTBE	MTBE	MTBE	DIPE	ETBE	TAME	TBA	EDB	1,2-DCA	Meth.	Elm.	Depth to GW	TOC Elev.	GW Elev.	Screen Submerged?
MW-2 (Screened 13 - 20')	01/13/00	2,000	53	4.1	34	1.1	2,400	3,000	<50	<50	<50	<50	<50	<250	<0.5	<0.5	<0.5	7.41	84.64	77.23	Yes
	04/20/00	440	8.1	<0.5	1.9	0.96	3,100	na	na	na	na	na	na	na	na	na	na	5.33	84.64	79.31	Yes
	07/26/00	770	29	2.3	7.0	3.1	4,100	na	na	na	na	na	na	na	na	na	na	6.77	84.64	77.87	Yes
	01/12/01	320	30	2.0	0.85	3.4	3,900	na	na	na	na	na	na	na	na	na	na	6.41	84.64	78.23	Yes
	07/13/01	590	22	<1.0	0.93	4.700	4,500	4,500	<50	<50	<50	1400	na	na	na	na	na	6.71	84.64	77.93	Yes
	10/12/01	290	20	<0.5	<0.5	4.900	4,500	4,500	<100	<100	<100	<500	na	na	na	na	na	7.55	84.64	77.09	Yes
	01/11/02	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	6.19	84.64	78.45	Yes
	02/25/02	<250	0.5	<0.5	<0.5	3.400	3,600	3,600	<100	<100	<100	<500	na	na	na	na	na	7.55	84.64	77.09	Yes
	04/19/02	130	<1	<1	<1	2,900	3,500	3,500	<50	<50	<50	570	na	na	na	na	na	6.12	84.64	78.52	Yes
	09/30/02	130	1.2	0.83	<0.5	3.2	1,600	2,200	<50	<50	<50	<500	na	na	<5,000	<5,000	<5,000	6.14	84.64	78.50	Yes
	12/26/02	<100	<1	<1	<1	2,200	2,200	2,200	<50	<50	<50	<500	na	na	na	na	na	5.55	84.64	79.09	Yes
	02/03/03	<150	<1.5	<1.5	<1.5	2,300	na	na	na	na	na	na	na	na	na	na	na	5.82	84.64	78.82	Yes
	04/23/03	<150	<1.5	<1.5	<1.5	2,500	na	na	na	na	na	na	na	na	na	na	na	5.41	84.64	79.23	Yes
	07/07/03	120	<0.5	<0.5	<0.5	1,800	na	na	na	na	na	na	na	na	na	na	na	6.33	84.64	78.31	Yes
	10/09/03	190	0.78	<0.5	<0.5	1,900	na	na	na	na	na	na	na	na	na	na	na	6.76	84.64	77.88	Yes
	02/06/04	170	<0.5	<0.5	<0.5	2.0	1,600	na	na	na	na	na	na	na	na	na	na	6.02	84.64	78.62	Yes
	06/22/04	160	0.72	<0.5	<0.5	1,300	na	na	na	na	na	na	na	na	na	na	na	5.60	84.64	78.04	Yes
	09/20/04	410	25	1.7	4.0	2.0	810	na	na	na	na	na	na	na	na	na	na	7.06	84.64	77.58	Yes
	12/29/04	170	2.3	<0.5	0.52	1.8	930	na	na	na	na	na	na	na	na	na	na	6.30	84.64	76.34	Yes
	03/18/05	220	2.4	<0.5	<0.5	0.75	850	na	na	na	na	na	na	na	na	na	na	5.25	84.64	79.39	Yes
	06/15/05	220	5.3	<0.5	1.7	0.64	750	na	na	na	na	na	na	na	na	na	na	6.05	84.64	76.59	Yes
	09/29/05	110	3.3	<0.5	1.1	1.1	710	na	na	na	na	na	na	na	na	na	na	7.15	84.64	77.49	Yes
	03/30/06	150	2.5	<0.5	0.67	0.9	430	340	340	<5.0	<5.0	160	na	na	<5,000	<5,000	<5,000	5.22	84.64	79.42	Yes
	06/27/06	280	3.3	1.2	1.3	2.2	410	410	410	<10	<10	130	na	na	na	na	na	6.53	84.64	78.11	Yes
	08/28/06	120	1.0	0.72	0.53	2.6	470	560	560	<17	<17	<170	na	na	na	na	na	7.56	84.64	77.08	Yes
	12/08/06	180	0.87	<0.5	<0.5	1.1	280	280	280	<10	<10	<100	na	na	<10	<10	<10	7.42	84.64	77.22	Yes
02/20/07	180	1.90	0.67	0.52	1.9	280	280	280	<5.0	<5.0	<50	na	na	<5.0	<5.0	<5.0	6.70	84.64	77.94	Yes	
05/25/07	90	1.30	<0.5	<0.5	0.75	280	280	280	<5.0	<5.0	<50	na	na	<5.0	<5.0	<5.0	6.87	84.64	77.77	Yes	
09/24/07	280	3.0	0.29	0.30	0.76	120	170	170	<5.0	<5.0	180	na	na	<5.0	<5.0	<5.0	7.65	84.64	76.99	Yes	
12/06/07	180	0.58	<0.5	<0.5	<0.5	84	na	na	na	na	na	na	na	na	na	na	7.52	84.64	77.12	Yes	
03/26/08	230	1.8	<0.5	0.78	2.6	<100	na	na	na	na	na	na	na	na	na	na	6.10	84.64	78.54	Yes	
06/05/08	220	0.81	<0.5	<0.5	<0.5	59	na	na	na	na	na	na	na	na	na	na	7.02	84.64	77.62	Yes	
08/01/08	170	2.1	<0.5	<0.5	<0.5	48	na	na	na	na	na	na	na	na	na	na	7.68	84.64	76.96	Yes	
10/31/08	150	1.4	<0.5	<0.5	<0.5	32	na	na	na	na	na	na	na	na	na	na	8.15	84.64	76.49	Yes	
03/29/09	91	<0.5	<0.5	<0.5	<0.5	32	na	na	na	na	na	na	na	na	na	na	6.08	84.64	78.56	Yes	
07/20/09	87	<0.5	<0.5	<0.5	<0.5	53	na	na	na	na	na	na	na	na	na	na	7.43	84.64	77.21	Yes	
03/09/09	100	<1.0	<1.0	<1.0	<1.0	43	na	na	<1.0	<1.0	<1.0	120	na	<1.0	<1.0	<1.0	5.53	84.64	79.01	Yes	

TABLE 2
Groundwater Monitoring Data
Moe's ARCO
1604 McKee Road
San Jose, CA

Well Number	Date	TPHg	B	T	E	X	MTBE	MTSE*	DPE	ETBE	TAME	TBA	EDB	1,2-DCA	Meth.	Eth.	Depth to GW	TOC Elev.	GW Elev.	Screen Submerged ?
MW-3 (Screened 13 - 18')	07/20/09	75	<0.5	1.8	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	7.41	NS	NC	Yes
	03/08/10	<50	<0.5	<0.5	<0.5	<0.5	na	<0.5	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	5.44	NS	NC	Yes
MW-4 (Screened 13 - 18')	07/20/09	<50	<0.5	<0.5	<0.5	<0.5	<5.0	na	na	na	na	na	na	na	na	na	12.60	NS	NC	Yes
	03/10/10	<50	<0.5	<0.5	<0.5	<0.5	na	<0.5	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	5.97	NS	NC	Yes
MW-5 (Screened 15 - 20')	07/05/10	<50	<0.5	<0.5	<0.5	1.9	na	1.4	na	na	na	na	na	na	na	na	9.40	NS	NC	Yes
	03/10/10	<50	<0.5	<0.5	<0.5	<0.5	na	1.4	<0.5	<0.5	<0.5	<2.0	<0.5	<0.5	na	na	7.23	NS	NC	Yes
DP-1	10/05/09	<50	<0.5	<0.5	<0.5	1.9	na	1.4	na	na	na	na	na	na	na	na	9.40	NS	NC	Yes

TABLE 3
Soil Sampling Data
Moe's ARCO
1604 McKee Road
San Jose, CA

Boring Name	Sample ID	Sample Depth (ft bgs)	Date	TPHg mg/Kg	B mg/Kg	T mg/Kg	E mg/Kg	X mg/Kg	MTBE mg/Kg
MW-1	S-MW1-5	5	12/22/99	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	S-MW1-10	10	12/22/99	<1.0	<0.005	<0.005	<0.005	<0.005	0.23
	S-MW1-15	15	12/22/99	39	0.014	0.019	0.097	0.19	<0.05
MW-2	S-MW2-5	5	12/22/99	1.2	0.015	0.008	<0.005	0.016	<0.05
	S-MW2-10	10	12/22/99	140	314	0.33	5.8	0.31	<0.5
	S-MW2-15	15	12/22/99	930	4.3	1.0	5.7	1.9	<2
MW-3	MW-3d5.0	5	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	MW-3d10.0	10	07/15/09	1.3	<0.005	0.012	<0.005	<0.005	<0.05
	MW-3d15.0	15	07/15/09	7.5	<0.005	0.16	0.015	<0.005	<0.05
MW-4	MW-4d5.0	5	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	MW-4d10.0	10	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
	MW-4d15.0	15	07/15/09	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05
None	S-P1-3	3	01/22/99	<1.0	<0.005	0.012	<0.005	0.032	<0.05
None	S-P2-3	3	01/22/99	<1.0	<0.005	0.007	<0.005	0.019	<0.05
None	S-P3-3.5	3.5	01/22/99	<1.0	<0.005	0.010	<0.005	0.025	<0.05
None	S-P4-3.5	3.5	01/22/99	2.0	<0.005	0.058	<0.005	0.19	<0.05
None	S-PLA-2.5	2.5	01/22/99	<1.0	0.005	0.007	0.022	0.015	<0.05
None	S-P1-3	3	01/22/99	<1.0	<0.005	<0.005	<0.005	<0.005	<0.05

Notes:

TPHg = total petroleum hydrocarbons as gasoline

B = benzene

T = toluene

MTBE = Methyl tert-Butyl Ether

Parts per million = ppm = mg/Kg

NA = not analyzed

nm = not measured

E = Ethylbenzene

X = Total Xylenes

* = Data unavailable

Samples LF-1, LF-2, and LF-3 collected by Levine-Fricke

Samples WT-1, WT-2, WT-3, and WT-4 collected by WellTest, Inc.

See Attachment F for a map showing the locations of the 01/22/99 soil samples

WellTest, Inc. (Project #2187) Moe's ARCO 1604 McKee Road, San Jose, California	Log of Well MW-5 Sheet 1 of 1
--	---

Date(s) Drilled: December 21, 2009	Logged By: Bill Dugan, PG	Checked By: Bill Dugan, PG
Drilling Method: Direct-Push	Drill Bit Size/Type: 2.125" ESP Probe Rod with 2.375" Expendable Steel Tip	Total Depth of Borehole: 20 feet bgs
Drill Rig Type: GeoProbe 540-UP	Drilling Contractor: WellTest, Inc. (C57-B43074)	Approximate Surface Elevation: 75 feet MSL
Groundwater Level and Date Measured: 9.4 feet measured on 01/05/10	Sampling Method(s): 4" ESP Geo MC Sample Tube with PVC Liner	Hammer Data: G42
Borehole Backfill: Well Completion	Well elevation not surveyed	

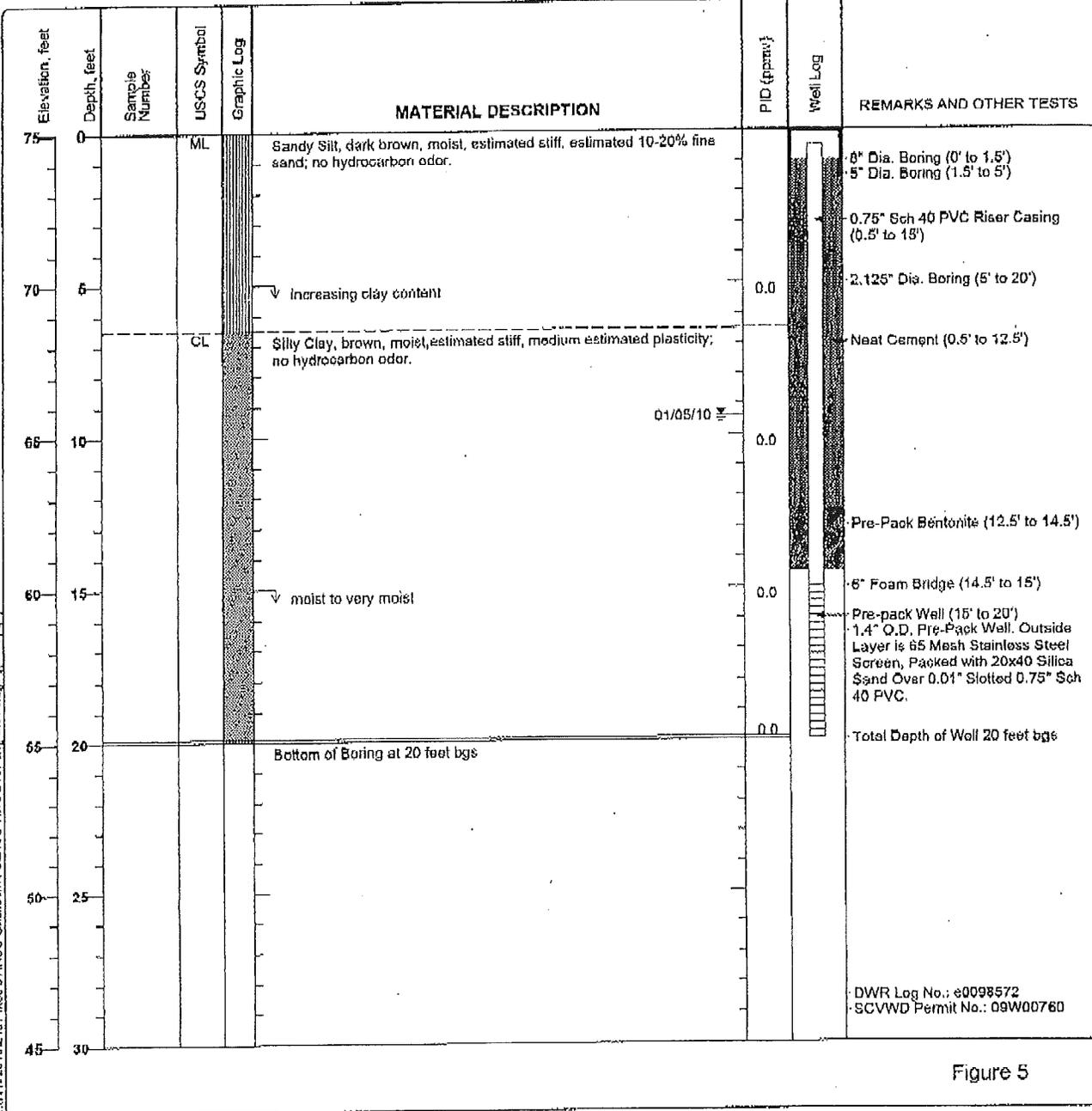
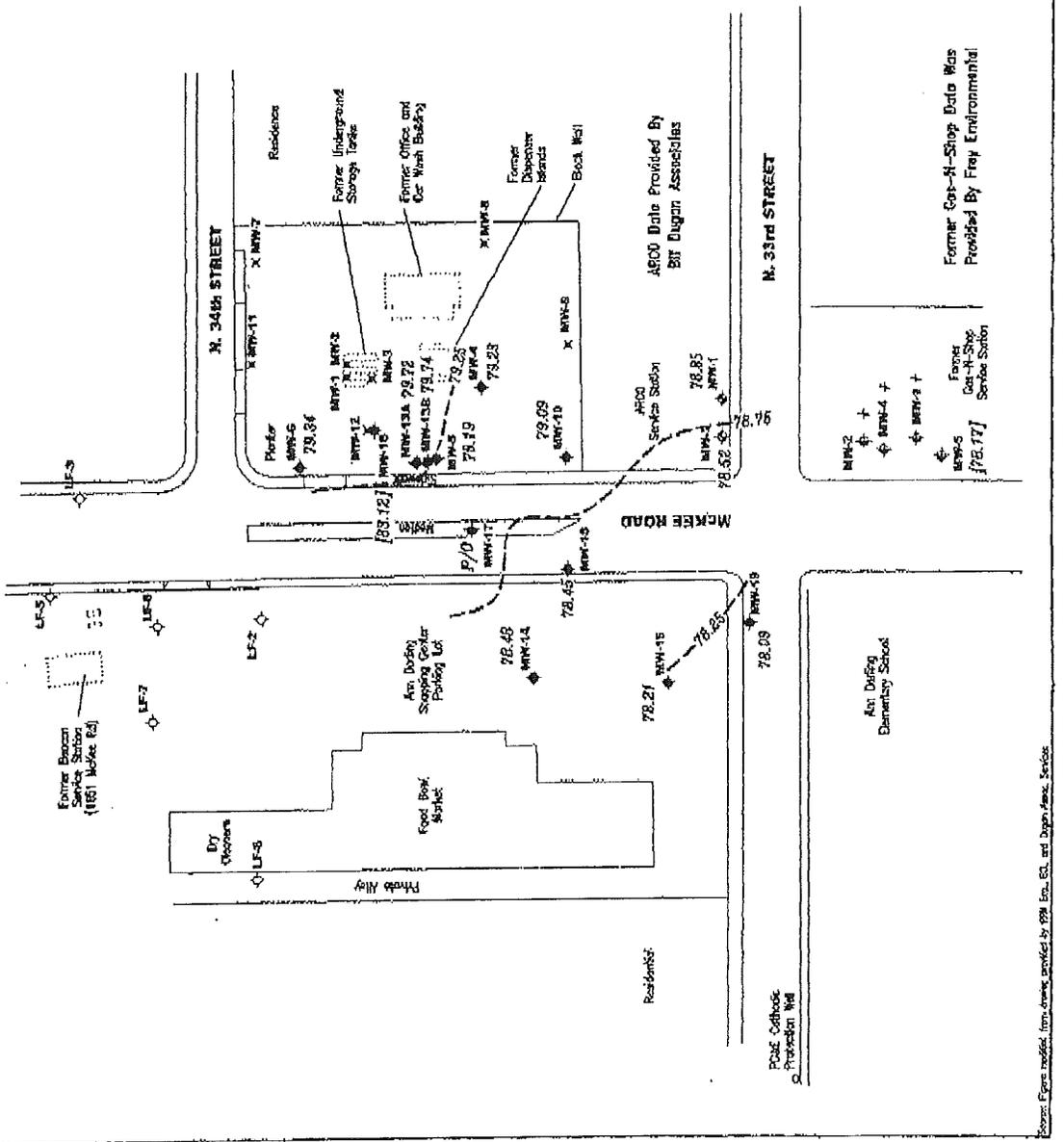
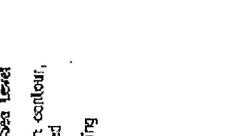


Figure 5

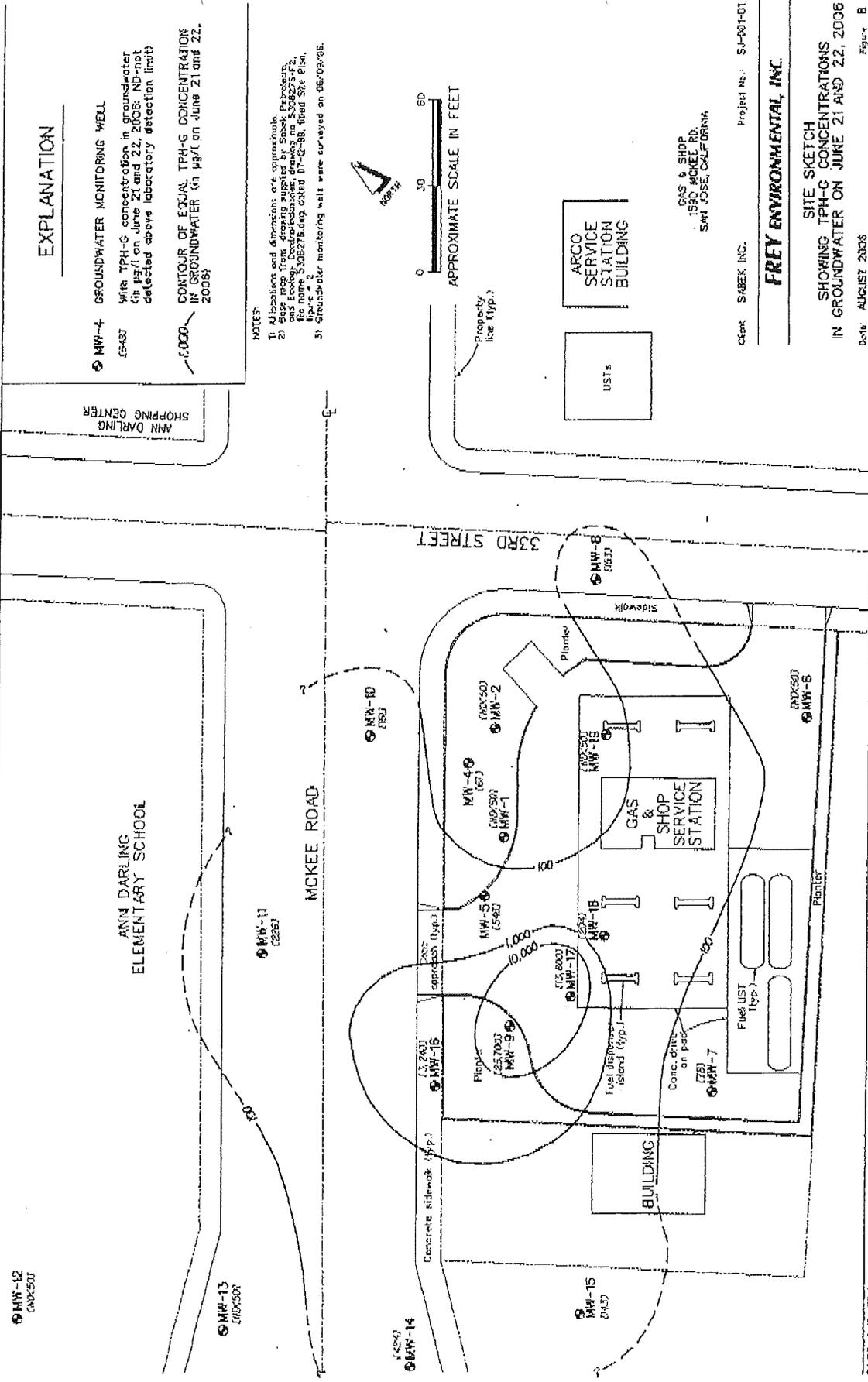
E:\MTE\2010\2187 Moe's ARCO Office\MW-5\DR4\FIG5\1B7 Log MW-5.bgs (12/21/09)

- EXPLANATION**
- ◆ Groundwater monitoring well (ARCO)
 - ◆ Groundwater monitoring well (Former Gas-N-Shop)
 - ◆ Groundwater monitoring well (Former Gas-N-Shop)
 - ◆ Groundwater monitoring well (Former Beacon)
 - ✕ Abandoned well
 - 98.58 Groundwater elevation in feet referenced to Mean Sea Level
 - 98.98--- Groundwater elevation contour, dashed where inferred
 - P/O Not used in contouring
 - ⊕ Paved Over
 - + TOC Not available

Approximate groundwater flow direction at a gradient of 0.003 to 0.001 P/Ft.



Source: Figure modified from data provided by EPA Env. EIS and Dugan Assoc. Services



EXPLANATION

- MW-4
 GROUNDWATER MONITORING WELL
 (5487) WITH TPH-G CONCENTRATION IN GROUNDWATER (in µg/l) ON JUNE 21 AND 22, 2006. ND=NOT DETECTED ABOVE LABORATORY DETECTION LIMIT
- 1,000
 CONTOUR OF EQUAL TPH-G CONCENTRATIONS IN GROUNDWATER (in µg/l) ON JUNE 21 AND 22, 2006

NOTES:
 1) Abbreviations and dimensions are approximate.
 2) Base map from drawing supplied by Sabak, Perobsky, and Ecology, Contra Costa County, drawing no. SC06275-F2, 8/6/06, 3:30:27 PM, dated 07-26-06, 06ed Site Plan.
 3) Groundwater monitoring wells were surveyed on 06/09/06.



0 30 60
 APPROXIMATE SCALE IN FEET

ARCO
 SERVICE
 STATION
 BUILDING

GAS & SHOP
 1590 MCKEE RD.
 SAN JOSE, CALIFORNIA

Client: SABEX INC. Project No.: SJ-001-01

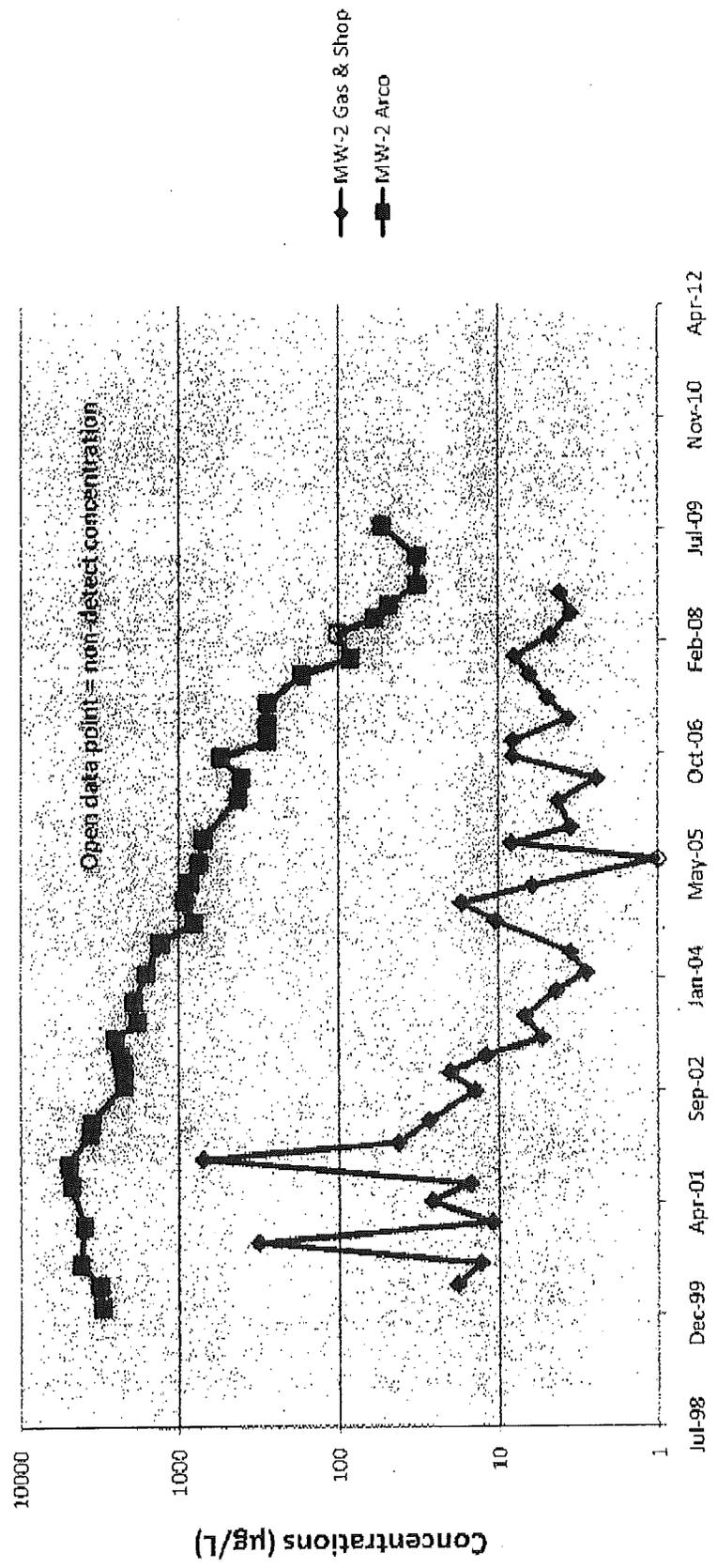
FREY ENVIRONMENTAL, INC.

SITE SKETCH
 SHOWING TPH-G CONCENTRATIONS
 IN GROUNDWATER ON JUNE 21 AND 22, 2006

Date: AUGUST 2006 Figure: B

SJ-001-01/5J-00101-16.dwg

MTBE Concentrations in Arco and Gas & Shop MW-2



Subj: **Re: Andy's BP v. San Jose/Shirazi**
Date: 10/14/2011 3:45:18 P.M. Pacific Daylight Time
From: Jdomski@aol.com
To: Margo.Laskowska@sanjoseca.gov
CC: gwesley00@yahoo.com, tsaberi@aol.com

Ms Laskowska,

We have obtained evidence, as depicted in the attached photographs, that the City, in concert with Mr. Shirazi, has openly violated the Court's Order prohibiting work on the project until the EIR is approved by the Court.

Mr. Shirazi has violated the Court Order by substantial repair on his garage, expansion of his convenience store, allowing cars to use the driveways, repairing the new pumps, etc.-- all of which is prohibited by the Court Order.

This conduct clearly also violates the condition for issuance of the CUP that requires that Shirazi comply with all state and local laws.

It is clear from the City's records that no permit has been issued allowing Mr. Shirazi to conduct the activities described herein.

In fact, there is no indication in the record that Mr. Shirazi resubmitted a permit application after the TRO was vacated by the Court and after Mr. Horwedel said under penalty of perjury that the permit had been revoked. The record shows that notwithstanding Mr. Horwedel's sworn testimony, he later approved the permit, even though the permit had been revoked. Such duplicity reveals further evidence that the City is in concert with Mr. Shirazi to violate the letter and spirit of the Court Order in this case.

This is a meet and confer attempt to demand that the City take immediate action to comply with the Court Order by prohibiting Mr. Shirazi from the conduct described and documented herein.

Please respond to this request by Monday, October 17, 2011. It is also requested that the hearing on Shirazi's EIR be postponed until such time as the City and Mr. Shirazi respond to this request. In addition, this is notice that if necessary appropriate Court intervention will be sought.

Jim Dombroski

In a message dated 8/23/2011 9:53:14 A.M. Pacific Daylight Time,
Margo.Laskowska@sanjoseca.gov writes:

Mr. Dombroski:

As I confirmed to the Court at the hearing on Friday, August 19, the permit to which you refer was revoked. It remained revoked while the TRO was in force.

Thank you.

Margo Laskowska

From: Jdomski@aol.com [<mailto:Jdomski@aol.com>]

Sent: Monday, August 22, 2011 4:14 PM

To: Laskowska, Margo

Cc: gwesley00@yahoo.com; tsaberi@aol.com

Subject: Fwd: Andy's BP v. San Jose/Shirazi

Ms. Laskowska,

EXHIBIT C

Friday, October 14, 2011 AOL: Jdomski

Presumably, Judge Huber discharged the OSC and denied the restraining order based upon the sworn testimony of Mr. Horwedel that "... the Planning Department retroactively rejected the Development Permit Adjustment Application." (Declaration at 3:20-21). As you may recall, I brought this testimony by Mr. Horwedel to Judge Huber's attention during oral argument at the hearing on 8/19/11.

Given Mr. Horwedel's testimony, it reasonably appears that Mr. Shirazi does not have a permit for continuing any work on the subject property, notwithstanding Judge Huber's ruling of this afternoon.

As addressed in my earlier email, Mr. Shirazi initiated work this morning before Judge Huber issued his ruling this afternoon.

In an effort to avoid a further Court hearing before Judge Huber, please confirm that the City has not issued another permit to Mr. Shirazi for any work on the subject property, after Mr. Horwedel signed his declaration. If not, please indicate whether the City will take any steps to halt Mr. Shirazi from any such work unless and until Mr. Shirazi obtains a permit.

Thank you for a prompt response.

Jim Dombroski

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Law Offices of James M. Dombroski
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Petaluma, CA 94975-1027
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Friday, October 14, 2011 AOL: Jdombroski

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Email Address: jdomski@aol.com

November 1, 2011

Via Email (john.davidson@sanjose.ca.gov)

Mr. John Davidson
Senior Planner
Department of Planning, Building
and Code Enforcement
200 E. Santa Clara Street, 3rd Floor
San Jose, California 95113

Re: City File No. CP11-049 (formerly CP09-115)
Final EIR for Moe's Stop Gas & Service Station

Dear Mr. Davidson:

This office represents Andy Saberi, property owner and business owner, and Andy's BP, Inc., dba Gas & Shop (hereinafter "Andy's BP"), located at the southwest corner of McGee Road on N. 33rd Street, across the street from Moe's Gas, applicant in the above-referenced proceeding. This office also represents the same parties in the case against the City of San Jose, as Respondent, and Mr. Amir Shirazi, et al., real parties in interest, in the Superior Court of the State of California for the City and County of Santa Clara, Case No. 110 CV 176412. This letter supplements my letter dated October 17, 2011.

The Final EIR should be rejected for the following reasons:

- The Court's Writ of Mandate did not limit the EIR to traffic impact;
- The issue of hazardous materials was raised in the Verified Petition For Writ of Mandate;
- The City's response to evidence of contamination must be rejected because the reports offered by the City are not made under penalty of perjury;
- The Traffic Impact Analysis (TIA) recommendation for an on-site circulation plan is hazardous and will cause an increase in street congestion; and

Mr. John Davidson
Page 2
November 1, 2011

- The EIR should be rejected because Mr. Shirazi has violated the Court's Order and the City's Stop Work Order.

1. The Court's Writ of Mandate Did Not Limit the EIR to Traffic Impacts.

At page 38, the First Amendment to the EIR states, "Please note that the Court's Writ of Mandate Required that the EIR evaluate traffic impacts, not hazardous material."

The Judgment Granting Peremptory Writ of Mandate is attached as Exhibit A. The Peremptory Writ of Mandate is attached as Exhibit B.

There is nothing in the Judgment or in the Peremptory Writ that limits the EIR to traffic impacts.

In fact, Judge Joseph H. Huber, on August 19, 2011, ruled that: "... there isn't a thing in that Judgment or (Judge) Murphy's two-page order that speaks to we're doing this because of traffic impact." The transcript of Judge Huber's ruling is attached as Exhibit C.

This means that the EIR is flawed on its face and should be rejected. The EIR should include an evaluation of the hazardous materials. The assertion in the First Amendment to the EIR, at page 39, that this EIR "has been prepared in accordance with requirements contained in the Court's Writ of Mandate" is a false statement. The City of San Jose should make the appropriate correction and delete this false assertion and acknowledge the EIR must include hazardous materials.

2. The Issue of Hazardous Materials Was Raised in the Verified Petition For Writ of Mandate and Properly Before the Court.

The issue of hazardous materials was raised in the Verified Petition for Writ of Mandate, as documented in the Reply Brief, as quoted in the undersigned's letter to Mr. Davidson, dated October 17, 2011, as follows:

On August 13, 2009, the County of Santa Clara sent a letter to Shirazi regarding a fuel leak investigation at Moe's Stop. (SJ 87) The letter refers to the fact that Moe's Station was a site where fuel leaks had occurred, i.e., a "fuel leak site." (SJ 87; emphasis added)

The site of the Project was on the "LUST" (Leading Underground Storage Tanks) list, i.e., a site with issues regarding soil contamination involving leakage of

underground gasoline storage tanks. (SJ 107) At a meeting, Respondent's staff member stated, "...I did some further investigation into it and it appears that there still are kind of issues going on with that, so, basically, as an active-active leaking underground storage tank site, while development on the property can still proceed, it is true that we cannot find this to be exempt from CEQA, so that we—the staff—the applicant would need to do some kind of environmental clearance, either a— you know, a negative declaration or, you know, if required, an EIR." (SJ 107; emphasis added..) Respondent's staff speaker further stated, "...I found, you know, a trail of—I guess he discussed correspondence from the Santa Clara County. I did, I believe, find the same correspondence he did. That was dated from June of this year, so, clearly there's still activity on the site with regard to the — to the leaking underground storage tank. So again, you know, it's not an issue that, you know, this development can't happen, it's just that the exemption will not cover it." (SJ 108-109; emphasis added.)

On March 29, 2010, Respondent, through its representative Avril Baty, executed an initial study indicating that the Project would result in 41 net new average daily trips. (SJ 45) It further indicated that:

"The Municipal Environmental Compliance Officer and the Santa Clara County Department of Environmental Health have reviewed the soils report, and have determined that the groundwater at the site has been impacted by an historic release of gasoline,..." (SJ 41; emphasis added.)¹

On April 14, 2010, a supplemental memorandum was prepared regarding the Project, in relation to information received regarding an issue regarding a leaking underground fuel tank not originally identified by the Fire Department. (SJ 58)

The letter from Petitioners' counsel states that substantial evidence supported the conclusion that significant impacts may occur, and as a consequence, an EIR was mandated. (SJ 65) ["The substantial evidence clearly shows: (1) geology and soils may be impacted based upon applicant's leaking gasoline tanks; (b) hazards and hazardous materials may be impacted based upon applicant's leaking gasoline tanks; and (c) transportation/traffic may be impacted based upon the 'Generation Study' by Traffic Data Service. [p] 'If the Planning

¹ The opposition brief submitted by Respondent Shirazi failed to address the issue of Respondent's admission that "the site has been impacted by an historic release of gasoline." This admission alone is good grounds to require an EIR.

Commission simply believes an impact may occur, an EIR must be required. Applicable treatises and laws clearly mandate an EIR if an impact may occur. Here, applicant's history of 'out of compliance' with its underground tanks, coupled with the possible leaking, is sufficient to require an EIR. An impact may occur is sufficient to require an EIR. In addition, there can be no doubt based upon the TDS Study that traffic may be impacted. This is sufficient to require an EIR." (SJ 65].)

On April 21, 2010, a planning commission meeting was held. (SJ 119 et seq.) Based on the report of TDS, Mr. Dombroski argued that the Project would double traffic because Moe's Stop is a origin/destination in and of itself because it has the lowest gasoline prices in the area. (SJ 123) He noted that customers were observed waiting up to 15 minutes in line to use the station, negating the inference that customers arose from driving by the facility alone. (SJ 124) Thomas Saberi further stated at the meeting that Geotracker, a public website, failed to reflect that the site was in compliance with respect to underground gasoline leakage and contamination. (SJ 125) Mr. Saberi requested the commission order an EIR based on issues relating to traffic and contamination from leakage of gasoline. (SJ 125) At the conclusion of the meeting the application for conditional use permit was approved in light of the negative declaration and a finding it was in compliance with CEQA. (SJ 127-128)

Instead of addressing the fact that the issue of hazardous materials was properly before the Court, the City of San Jose ignored this issue and falsely claims the Court's Writ of Mandate required only that the EIR evaluate traffic impacts. As shown above, the City of San Jose is wrong.

The City failed to comply with the Peremptory Writ of Mandate by failing to require that the EIR evaluate hazardous materials. For this reason, the EIR should be rejected.

3. The City's Response to Evidence of Contamination Must Be Rejected Because the Reports Offered by the City are not Made Under Penalty of Perjury.

The City, at page 38 to 39 of the First Amendment to the EIR, rely on the reports in Attachment 1, August 21, 2011 letter from Well Test, Inc., and the August 31, 2011, letter from Well Test, Inc., attached. However, these reports must be rejected. Both reports fail to include perjury statements. The letter to Mr. Moe Shirazi, dated July 28, 2011, from Mr. Gerald O'Regan, PG, Environmental Geologist, Local Oversight Program with the County of Santa clara (attached as Attachment C), states, in part, as follows:

Perjury Statement

All proposals and reports submitted to this office must be accompanied by a cover letter from the responsible party which states, at a minimum, the following:

"I declare, under penalty of perjury, that the information and/or recommendations contained in the attached proposal or report is true and correct to the best of my knowledge."

This letter must be signed by an officer or legally authorized representative of your company. Future submittals made without a perjury statement may be returned as insufficient, which could affect your eligibility for reimbursement from the State Cleanup Fund. (Emphasis added.)

There is no perjury statement submitted by the City which shows that an officer or legally authorized representative of Well Test, Inc., the agent for Mr. Shirazi, or Mr. Shirazi himself, signed the perjury statement regarding the issue of hazardous materials. This is an additional reason for rejecting the EIR.

4. The Traffic Impact Analysis (TIA) Recommendation for an On-Site Circulation Plan is Hazardous and Will Cause An Increase in Street Congestion.

Attached as Exhibit D is a review of the TIA, by Robert I. Harrison, dated October 25, 2011. For the reasons addressed by Mr. Harrison, the TIA should be rejected.

5. The EIR Should Be Rejected Because Mr. Shirazi Has Violated the Court's Order and the City's Stop Work Order.

In the letter to this office dated October 17, 2011, Deputy City Attorney, Ms. Margo Laskowska, stated, in part, "Because the Court specifically indicated that the City should not allow driveway relocation, driveway relocation is not part of that permit adjustment." The letter is attached as Exhibit E.

In the sworn declaration by the San Jose Director of Planning, Mr. Joseph Horwedel, dated August 3, 2011, Mr. Horwedel testified in paragraph 8: "In response to the Court's Amended Temporary Restraining Order dated July 27, 2011, the Planning Department retroactively rejected the Development Permit Adjustment Application." Mr. Horwedel's declaration is attached as Exhibit F. Attached to Mr. Horwedel's declaration is a drawing of the Shirazi project which specifically states: "Driveway relocation 'not' approved with this adjustment subject to CUP for service station."

Mr. John Davidson
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Based upon the above-referenced statements made by the City Attorney Ms. Laskowska, and the sworn statement by Mr. Horwedel, the City of San Jose acknowledged and admitted (1) the Court specifically indicated that the City should not allow driveway relocation, and (2) the driveway relocation is not part of the permit adjustment.

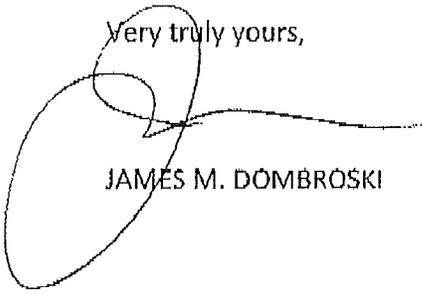
This means that Mr. Shirazi, dba Moe's, must comply with the Court ruling that the driveway relocation is not part of the permit adjustment. Furthermore, Mr. Shirazi must comply with the Stop Work Order, dated March 14, 2011, attached as Exhibit G.

Mr. Shirazi has openly violated the Court's Order prohibiting "driveway relocation" and openly violated the Stop Work Order. This is demonstrated by the photographs taken within the last week, attached hereto as Exhibits H and I. These photographs show that the driveway relocation has been completed by Mr. Shirazi. The photographs show that new driveway installed and that customers are using the "new driveway", all of this while the old driveway remains open.

Mr. Shirazi's application for a CUP must be in compliance with all state and local laws, as a condition for issuance of a CUP, including the Court's Order, as addressed above. As shown, Mr. Shirazi violates both the Stop Work Order and the Court Order.

For the above-stated reasons, the EIR should be rejected.

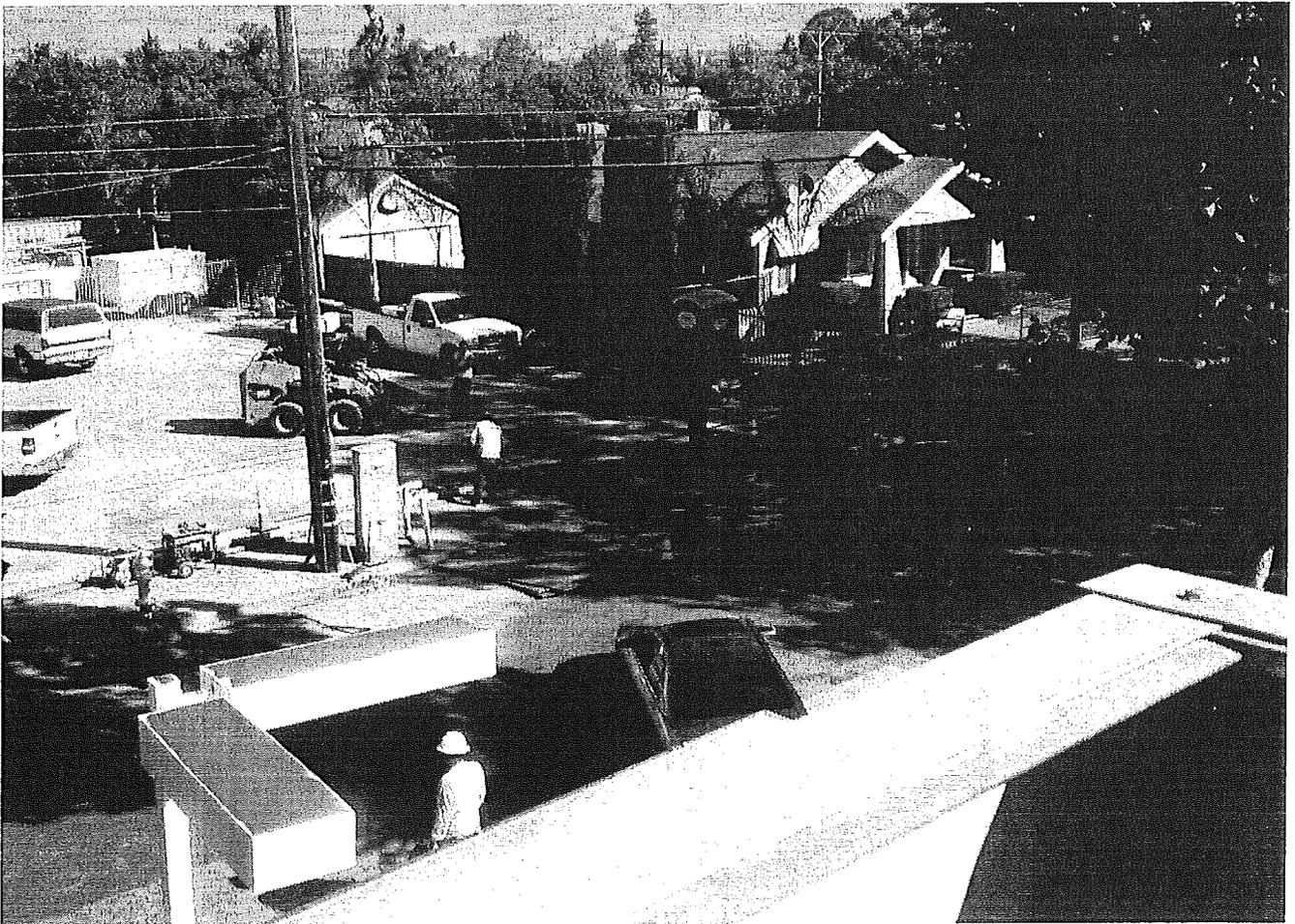
Very truly yours,



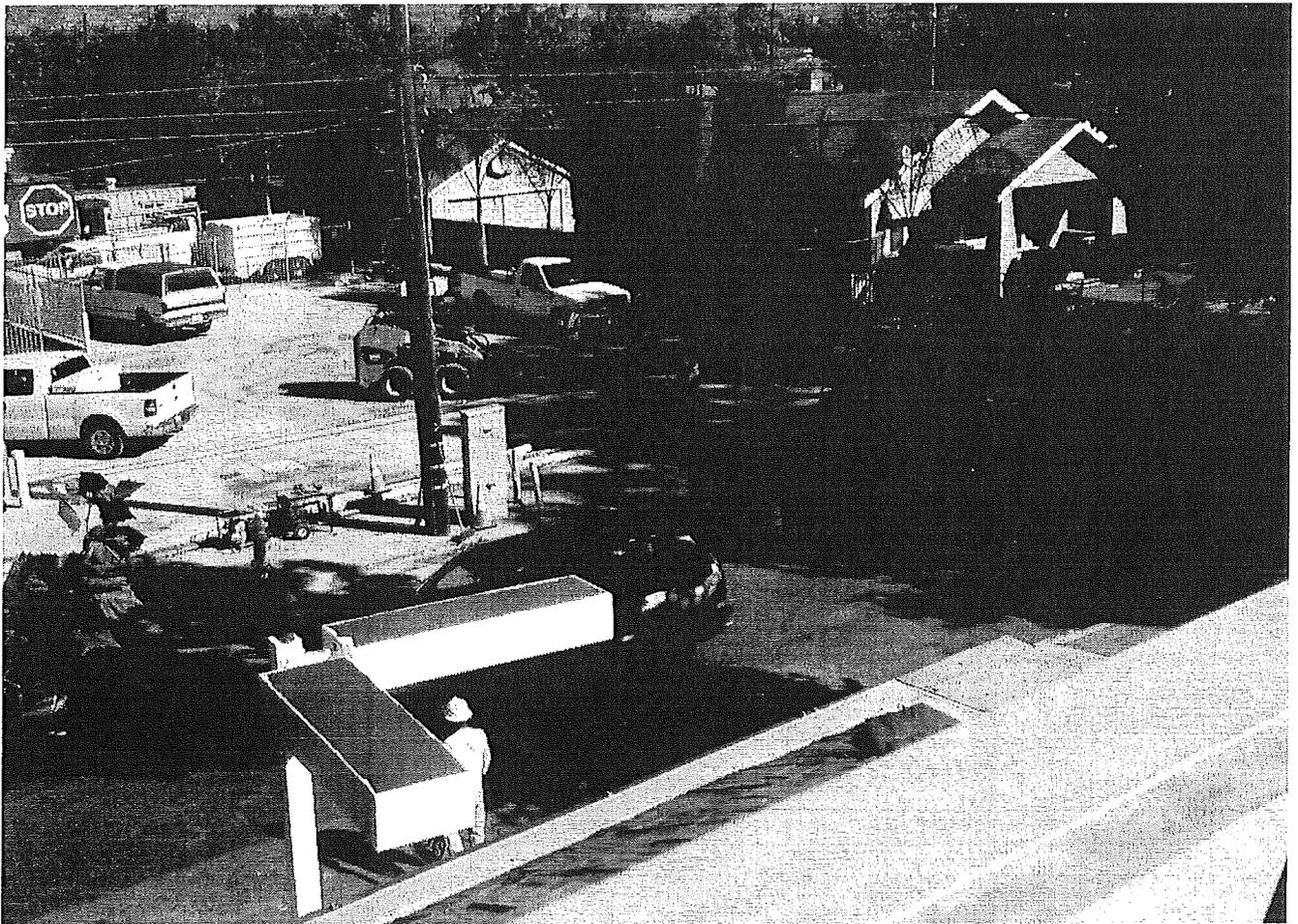
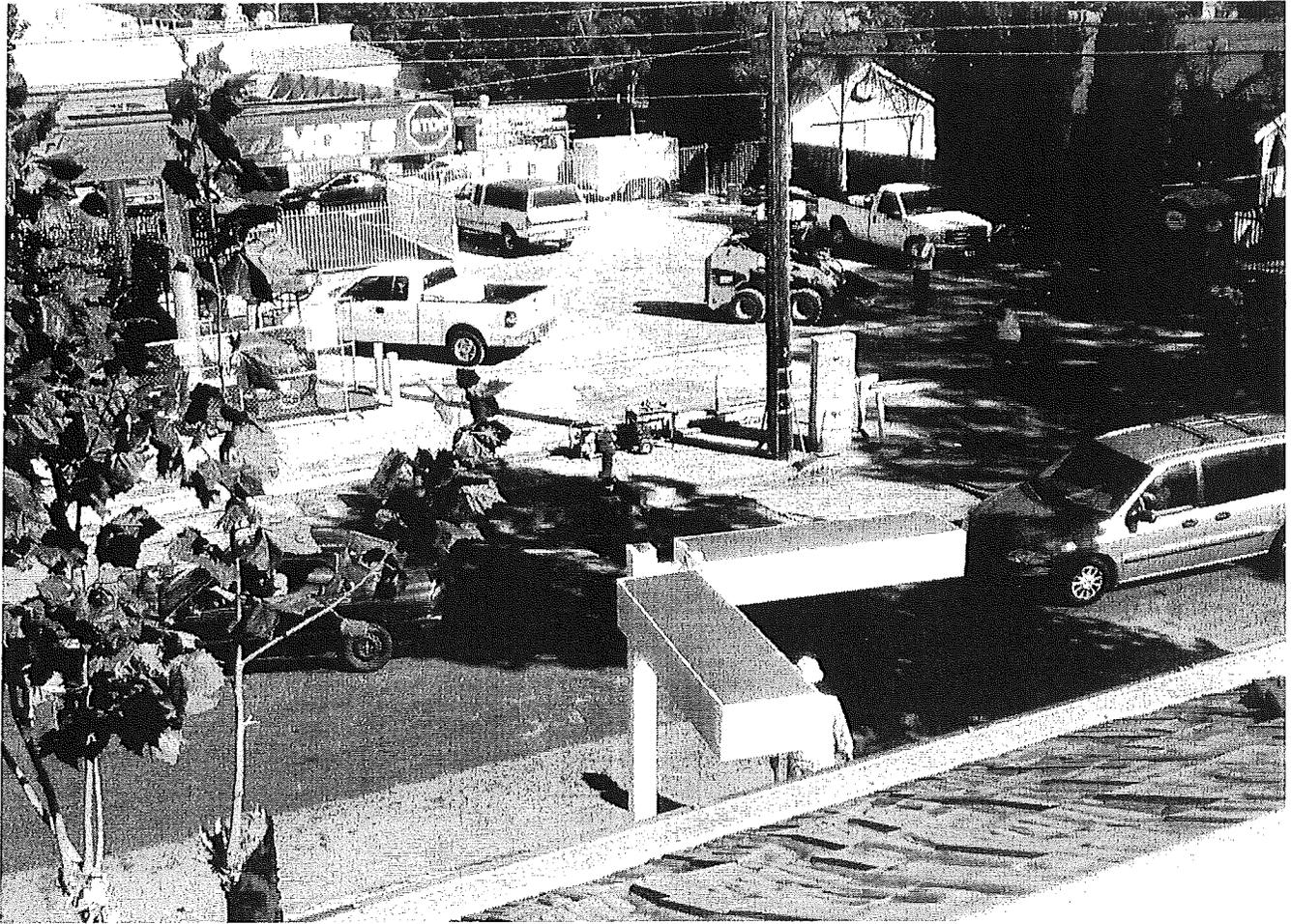
JAMES M. DOMBROSKI

JMD:sd
Enclosures













2011/10/21 14:13:25



2011/10/21 14:13:27







2011/10/21 14:13:00

EXHIBIT A

1 JAMES M. DOMBROSKI (CSBN 56898)
2 LAW OFFICE OF JAMES M. DOMBROSKI
3 Post Office Box 751027
4 Petaluma, CA 94975
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FILED

MAR 29 2011

UCS

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DAVID H. YAMASAKI
Clerk/Executive Officer/Clerk
Superior Court of CA County of Santa Clara

13 Attorneys for Petitioners
14 ANDY'S BP, INC. and ANDY SABERI

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 FOR THE COUNTY OF SANTA CLARA
17 UNLIMITED CIVIL CASE

18 ANDY'S BP, INC., a California corporation,
19 and ANDY SABERI, an individual,

20 Petitioners,

21 vs.

22 THE CITY OF SAN JOSE, and DOES 2-25,
23 inclusive,

24 Respondents.

25 AMIR SHIRAZI, individually and dba MOE'S
26 STOP, and AMIR SHIRAZI, as Trustee for the
27 MOHAMMAD M. SHIRAZI LIVING TRUST,

28 Real Parties in Interest.

CASE NO. 110cv176412

JUDGMENT GRANTING
PEREMPTORY WRIT OF MANDATE

Assigned CEQA Judge
Hon. Kevin J. Murphy, Department 22
Pursuant to Public Resources Code,
Section 21167.1(b)

1 This matter came on regularly for hearing on March 14, 2011, in Department 22 of this
2 Court, located at 161 North First Street, San Jose, California. James M. Dombroski and Thomas
3 Saberi appeared on behalf of Petitioner Andy's BP, Inc., a California corporation, and Andy
4 Saberi, an individual; Margo Laskowska appeared on behalf of Respondent City of San Jose; and
5 Gary B. Wesley appeared on behalf of Real Parties in Interest, Amir Shirazi, individually and
6 dba Moe's Stop, and Amir Shirazi, as Trustee for the Mohammad M. Shiarzi Living Trust.

7 The Court having reviewed the record of Respondent's proceedings in this matter, the
8 briefs submitted by counsel, and the arguments of counsel; the matter having been submitted for
9 decision, and the Court having issued an order that judgment and a peremptory writ of mandate
10 issue in this proceeding,

11 IT IS ORDERED that:

- 12 1. Judgment be entered in favor of Petitioners in this proceeding;
- 13 2. A peremptory writ of mandate directed to Respondent issue under seal of this
14 Court, and ordering Respondent to:
 - 15 a. Set aside and void the San Jose Planning Commission's Resolution No. 10-
16 036 adopting the Negative Declaration and approving the Shirazi Conditional
17 Use Permit No. CP09-015, known as Moe's Stop, located at 1604 McKee
18 Road, San Jose, California (hereinafter "Shirazi CUP");
 - 19 b. Set aside Respondent City Council Resolution No. 75434 Upholding the
20 Planning Commission's Decision to Adopt a Negative Declaration for the
21 Expansion of an Existing Gasoline Service Station of a Site Located on the
22 Southeast Corner of McKee Road, San Jose, and 33rd Street;
 - 23 c. An environmental impact report shall be prepared, pursuant to Public
24 Resources Code § 21080(d);
 - 25 d. Respondent is further ordered to suspend all activities of the Shirazi CUP, as
26 defined in the Verified Petition for Writ of Mandate at page 4:3-8, that could
27 result in an adverse change or alteration to the physical environment until
28 completion of the environmental impact report and until Respondent has

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brought its determination, finding or decision into compliance with the requirements of CEQA.

3. This Court will retain jurisdiction over Respondent's proceedings by way of a return to the peremptory writ of mandate until the Court has determined that Respondent has complied with the provisions of CEQA;

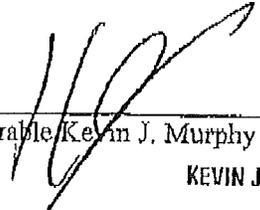
4. Petitioners' second cause of action for declaratory relief is denied as unnecessary pursuant to CCP § 1061;

5. Petitioners' third cause of action for injunctive relief is denied as moot and redundant in light of the Court's finding of a CEQA violation;

6. This Court will retain jurisdiction to determine entitlement to attorney's fees;

7. Petitioners shall be awarded its costs of suit.

DATED: March 2nd, 2011.



Honorable Kevin J. Murphy
KEVIN J. MURPHY

EXHIBIT B

1 JAMES M. DOMBROSKI (CSBN 56898)
2 LAW OFFICE OF JAMES M. DOMBROSKI
3 Post Office Box 751027
4 Petaluma, CA 94975
5 Telephone: (707) 762-7807
6 Facsimile: (707) 769-0419
7 Email: jdomski@aol.com

8 *Law Offices of*
9 WILLIAM H. PAYNTER
10 THOMAS I. SABERI, ESQ. (CSBN 169652)
11 1045 Airport Boulevard, Suite 12
12 South San Francisco, CA 94080
13 Telephone: (650) 588-2428
14 Facsimile: (650) 873-7046

15 Attorneys for Petitioners
16 ANDY'S BP, INC. and ANDY SABERI

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA
UNLIMITED CIVIL CASE

ANDY'S BP, INC., a California corporation,
and ANDY SABERI, an individual,

Petitioners,

vs.

THE CITY OF SAN JOSE, and DOBS 2-25,
inclusive,

Respondents.

AMIR SHIRAZI, individually and dba MOE'S
STOP, and AMIR SHIRAZI, as Trustee for the
MOHAMMAD M. SHIRAZI LIVING TRUST,

Real Parties in Interest.

CASE NO. 110cv176412

PEREMPTORY WRIT OF MANDATE

Assigned CEQA Judge
Hon. Kevin J. Murphy, Department 22
Pursuant to Public Resources Code,
Section 21167.1(b)

1 Judgment having been entered in this proceeding, ordering that a peremptory writ of
2 mandate be issued from this Court,

3 IT IS ORDERED that, immediately on service of this Writ, Respondent The City of San
4 Jose shall:

- 5 a. Set aside and void the San Jose Planning Commission's Resolution No. 10-
6 036 adopting the Negative Declaration and approving the Shirazi Conditional
7 Use Permit No. CP09-015, known as Moe's Stop, located at 1604 McKee
8 Road, San Jose, California (hereinafter "Shirazi CUP");
- 9 b. Set aside Respondent City Council Resolution No. 75434 Upholding the
10 Planning Commission's Decision to Adopt a Negative Declaration for the
11 Expansion of an Existing Gasoline Service Station of a Site Located on the
12 Southeast Corner of McKee Road, San Jose, and 33rd Street;
- 13 c. An environmental impact report shall be prepared, pursuant to Public
14 Resources Code § 21080(d);
- 15 d. Respondent is further ordered to suspend all activities of the Shirazi CUP, as
16 defined in the Verified Petition for Writ of Mandate at page 4:3-8, that could
17 result in an adverse change or alteration to the physical environment until
18 completion of the environmental impact report and until Respondent has
19 brought its determination, finding or decision into compliance with the
20 requirements of CEQA.

21 IT IS FURTHER ORDERED that this Court will retain jurisdiction over Respondent's
22 proceedings by way of a return to the peremptory writ of mandate until the Court has determined
23 that Respondent has complied with the provisions of CEQA.

24 IT IS FURTHER ORDERED that Respondent must file a return to the Writ no later than
25 March 18, 2012.

26 DATED: March 27, 2011.



Honorable Kevin J. Murphy

EXHIBIT C

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

---000---

ANDY'S BP, INC., ET AL.,)	
)	
PLAINTIFF,)	
)	
VS.)	
	)	NO. 1-10-CV-176412
THE CITY OF SAN JOSE, ET AL.,)	
)	
DEFENDANT.)	

O.S.C./T.R.O.

AUGUST 19, 2011

Judge Joseph M. Huber
Sept. 21

APPEARANCES:

FOR THE PETITIONERS:	JAMES. M. DOMBROSKI ATTORNEY AT LAW
FOR THE RESPONDENT:	MARGO LASKOWSKA CHRIS NIELSEN ATTORNEY AT LAW
FOR THE REAL PARTY IN INTEREST:	GARY B. WESLEY ATTORNEY AT LAW
OFFICIAL COURT REPORTER:	CATHY JAMELLO C.S.R. NO. 5653

1 WOULD IN NO WAY VIOLATE JUDGE MURPHY'S ORDER, THERE'S
2 ABSOLUTELY NO BASIS FOR FURTHER INJUNCTION IN THE CASE
3 WHATSOEVER.

4 THANK YOU, YOUR HONOR.

5 THE COURT: WELL, I FIND IT KIND OF INTERESTING,
6 BECAUSE WHAT I HAD IN FRONT OF ME ON THE T.R.O. WAS ONLY
7 THE WRIT AND MAYBE THE JUDGMENT AND I HAD A LOT OF
8 VERBAGE ARGUING IT WAS ALL TRAFFIC-RELATED TO IT, BUT
9 THERE ISN'T A THING IN THAT JUDGMENT OR MURPHY'S TWO-PAGE
10 ORDER THAT SPEAKS TO WE'RE DOING THIS BECAUSE OF TRAFFIC
11 IMPACT. FOR ALL I KNOW, IT'S BECAUSE IT MIGHT RAIN ON
12 THURSDAY. THAT'S A VERY, VERY BROAD ORDER, NEEDLESS TO
13 SAY. I UNDERSTAND THE SITUATION.

14 WHAT I'M GOING TO DO IS TAKE THIS UNDER
15 SUBMISSION.. I WILL FOR OUR PURPOSES CONTINUE IN EFFECT
16 THE T.R.O. UNTIL I MAKE THE RULING, WHICH WOULD BE IN THE
17 NEXT, PROBABLY IT WILL GO OUT MONDAY.

18 ANYTHING ELSE I NEED TO KNOW?

19 MR. DOMBROSKI: NO. THANK YOU, YOUR HONOR.

20 THE COURT: THANK YOU ALL,

21 MS. LASKOWSKA: THANK YOU, YOUR HONOR.

22 (WHEREUPON, THE PROCEEDINGS WERE ADJOURNED.)
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1 STATE OF CALIFORNIA)
2 COUNTY OF SANTA CLARA)
3

4 I, CATHY L. JAMELLO, DO HEREBY CERTIFY: THAT I
5 WAS APPOINTED BY THE COURT TO ACT AS COURT REPORTER IN
6 THE ABOVE-ENTITLED ACTION; THAT I REPORTED THE SAME IN
7 STENOTYPE AND THEREAFTER TRANSCRIBED THE SAME INTO
8 TYPEWRITING AS APPEARS BY THE FOREGOING TRANSCRIPTION;
9 THAT SAID TRANSCRIPT IS A FULL, TRUE, AND CORRECT
10 STATEMENT OF THE PROCEEDINGS, TO THE BEST OF MY ABILITY.

11 I FURTHER CERTIFY THAT I HAVE COMPLIED WITH CCP
12 237(A)(2) IN THAT ALL PERSONAL JUROR IDENTIFYING
13 INFORMATION HAS BEEN REDACTED IF APPLICABLE.
14

15 DATED THIS 25TH DAY OF OCTOBER, 2011.
16

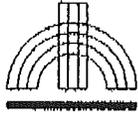
17
18 *Cathy Jamello*
19 CATHY JAMELLO
20 OFFICIAL COURT REPORTER
21 C.S.R. NO. 5653

22 ATTENTION: CALIFORNIA GOVERNMENT CODE
23 SECTION 69954(D) STATES:

24 "ANY COURT, PARTY OR PERSON WHO HAS PURCHASED A
25 TRANSCRIPT MAY, WITHOUT PAYING A FURTHER FEE TO THE
26 REPORTER, REPRODUCE A COPY OF PORTION THEREOF AS AN
27 EXHIBIT PURSUANT TO COURT ORDER OR RULE, OR FOR INTERNAL
28 USE, BUT SHALL NOT OTHERWISE PROVIDE OR SELL A COPY OR
COPIES TO ANY OTHER PARTY OR PERSON."

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EXHIBIT D



Robert L. Harrison
Transportation Planning and Project Management

2370 Vista Del Mar Lane
Tiburon, California 94920
Tel 415 435-2871
Fax 415 435-0118

October 25, 2011

Mr. James M. Dombroski, Esq.
Attorney-at-Law
P.O. Box 751027
Petaluma, CA 94975

Dear Mr. Dombroski:

This is in response to your request to prepare a review the Moe's Stop Gas Station Expansion traffic impact analysis (TIA) authored by Hexagon Transportation Consultants, Inc., dated August 15, 2011.

Overall Analysis Procedures

The Hexagon analysis follows standard TIA procedures in that it proceeds from an analysis of existing conditions to an existing plus project condition and then evaluates a baseline and baseline plus project condition. The analysis also includes the cumulative condition.

The scope of the analysis is limited to the study of the impact of the project on a single intersection that is adjacent to the project site. It is assumed that if the project has less than significant impact on this nearby intersection it will, therefore, have no significant impact on more distant intersections. This appears to be a reasonable assumption.

The Hexagon TIA includes no freeway impact analysis because the standard for such a study is that the project should generate trips equal to at least 1% of the capacity of the mixed flow lanes on the nearest freeway segment. While the TIA estimates freeway capacity at a "generous" 6,900 vehicles per hour or 2,300 vehicles per hour per mixed flow lane, even using a more standard 2,000 vehicles per hour per lane would result in a mixed flow lane capacity of 6,000 vehicles, a capacity so large that the project traffic would not equal 1% of the standard mixed flow lane capacity.

Existing Traffic Conditions

Traffic was counted at the intersection nearest to the project site, McKee Road and North 33rd Street, on May 25, 2011. The intersection Level of Service (LOS) at the intersection was found to be LOS C in both the AM and PM peak hours. This is an acceptable condition within the City of San Jose. However, it should be noted that while the major street, McKee Road operates at LOS C, significant delay is experienced by motorists on North 33rd Street. According to the LOS calculations, an average delay of about 58 seconds per vehicle or LOS E in both the AM and PM peak hours is experienced by drivers southbound on North 33rd Street.

Exhibit D

Project Trip Generation

The Hexagon TIA asserts that trip rates per fueling position are typically reduced when more pumps are added to a site. Based on this assertion, the TIA assumes that the project adding 6 fueling positions to the existing 6 fueling position would not double the existing trip generation.

The assertion is, however, not supported by data provided by the Institute of Transportation Engineers (ITE) in the publication *Trip Generation Handbook*, 2nd Edition. For the land use Gasoline/Service Station (944), the ITE provides a fitted curve equation relating trip generation to the number of fueling positions. According to the fitted curve equation, the expansion from 6 to 12 fueling positions would more than double the number of trips generated. The AM peak hour trips would increase by 110% and the PM peak hour trips would increase by 143%.

The Hexagon TIA approach to estimating project trips uses traffic counts taken in November 2009 at the Moe's Stop gas station and on May 24, 2011 at the nearby Gas & Shop service station. Because the Gas & Shop station has 12 fueling positions, the TIA asserts that the trips generated at Gas & Shop provide an appropriate trip rate to estimate what Moe's Stop would generate with 12 fueling positions. The net new project trips are then calculated by subtracting the Moe's Stop 6 fueling position trips as existed in 2009 from the existing May 2011 Gas & Shop 12 fueling position trips.

It is not clear that two different retailers would necessarily generate equivalent trips under any set of assumptions. It is particularly doubtful that these two retailers with differing products and prices and with trip counts taken at dates nearly two years apart would be so comparable that a trip generation estimate could, or should, be made using a procedure that subtracts one trip count from the other.

An alternative trip estimate procedure uses trip generation research compiled by the ITE. Using the Moe's Stop existing 143 and 162 AM and PM peak hour trips respectively as counted in November 2009 and the trip growth factors for expansion from 6 to 12 fueling positions as described above from the ITE data, the net new project trips would be 157 trips and 232 trips in the AM and PM peak hours respectively. This trip generation estimate is compared to 72 and 76 AM and PM peak hour trips respectively as shown in the Hexagon TIA.

Pass-by Trips. The Hexagon TIA properly includes a reduction in net new trip generation due to pass-by trips. Pass-by trips are caused by motorists already in the traffic flow and merely stopping by the service station on their way to another destination. These trips do not add to the traffic flow on the local street system.

Letter to Mr. James M. Dombroski, Esq.
Page Three of Four

The Hexagon TIA uses data from the ITE Trip Generation Handbook referenced above to estimate a pass-by trip rate for the project. The TIA indicates the assumed pass-by rate is a "conservative" estimate as it is somewhat lower than found in the ITE data. The TIA report does not explain why a conservative approach was used.

However, the Moe's Stop and the Gas & Shop stations are known to offer some of the lowest priced fuel in the local area and as such may be described as more akin to destination stations rather than typical pass-by stations. The conservative approach to estimating a pass-by rate is therefore appropriate but would be better based on actual data rather than the arbitrary 50% pass-by rate used in the TIA.

The ITE trip research presents a range of pass-by trip rates from which an average is presented. For a typical service station the average rate is most appropriate. However, for these destination stations a rate at the lower end of the range of the research data should be used. Thus, for the Gasoline/Service Station (944) land use, the ITE research summary reports the lowest pass-by rates are 32% and 20% for the AM and PM peak hours respectively.

Using the ITE lowest pass-by rates, the net new trips generated by the project would be 107 trips and 186 trips in the AM and PM peak hours respectively. This compares to 36 and 38 net new trips in the AM and PM peak hours respectively as shown in the Hexagon TIA. The project would generate a significantly greater number of net new trips than as presented in the TIA. A summary of project trip generation using alternative calculation methods is shown in the table below.

Project Trip Generation Estimates				
Trip Generation Estimate Factors	Hexagon Consultants TIA		Alternative Procedure	
	AM Peak Hour	PM Peak Hour	AM Peak Hour	PM Peak Hour
Moe's Stop 2009 Traffic Count 6 fueling positions	143	162	143	162
Gas & Shop 2011 Traffic Count 12 fueling positions	215	238	N/A	N/A
ITE Trip Growth for expansion from 6 to 12 fueling positions	N/A	N/A	110%	143%
Project Trip Estimate Method	Subtract Moe's Stop Count from Gas & Shop Count		Use ITE Trip Growth Factors	
New Project Trips	72	76	157	232
Less Pass-by Trips	-36	-38	-50	-46
Net New Project Trips	36	38	107	186

Sources: Hexagon Consultants; Moe's Stop Gas Station Expansion TIA, Table 4.
Robert L. Harrison Transportation Planning.

Letter to Mr. James M. Dombroski, Esq.
Page Four of Four

On-Site Circulation Issues

The Hexagon TIA recommends an on-site circulation plan (see TIA report Figure 9) that is intended to reduce traffic congestion on city streets. However, there are questions on the effectiveness of the plan that need to be resolved. For example:

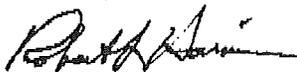
1 – Access from N. 33rd Street – A full access driveway is planned for N. 33rd Street. This driveway would serve inbound traffic using N. 33rd Street from the north and south. However, there is no direct on-site route for departing drivers to return to the N. 33rd Street driveway. According to the TIA plan, to return to N. 33rd Street Moe's Stop patrons would be required to first exit the site onto westbound McKee Road, reenter the site, and travel through the site to reach the N. 33rd Street driveway. It is not likely that most drivers would choose to use such circuitous route resulting in on-site congestion in front of the store and the potential for outbound left turns onto McKee Road from the proposed right-turn-in only driveway. Such a turning movement occurring on McKee Road just 50 feet west of the intersection with N. 33rd Street would be hazardous and cause increased street congestion.

2 – Westerly Driveway on McKee Road – Planned to be right-turn-in and right-turn-out only. The current driveway provides full access including left turns to and from McKee Road. About 20% of existing Moe's Stop patrons make a left turn from this driveway onto eastbound McKee Road. Under the proposed plan these drivers would be directed to exit at the driveway on N. 33rd Street and then make a left turn at the intersection with McKee Road. However, as was described above, there is no direct on-site route proposed from the fuel pumps to the N. 33rd Street driveway. Drivers would first have to exit the site onto westbound McKee Road, reenter the site, and travel through the site to reach the N. 33rd Street driveway. As was described above, is not likely that most drivers would choose to use such an indirect route resulting in outbound left turns onto McKee Road from the proposed right-turn-in only driveway and/or on-site congestion in front of the existing store, or both.

3 – Easterly Driveway on McKee Road – Planned to be right-turn-out only. This driveway, located just 50 feet from the intersection with N. 33rd Street, will be difficult to limit to outbound traffic only. This is because it is the first project driveway motorists will see when traveling westbound on McKee Road. Some drivers will want to turn into Moe's Stop at this location. The driveway is proposed to be 16 feet wide and will not serve two-way traffic efficiently. The safety of traffic on McKee Road would be impacted if this driveway is used by two-way traffic.

Please let me know if there are any questions on the above analysis.

Sincerely,



Robert L. Harrison

EXHIBIT E



Office of the City Attorney
RICHARD DOYLE, CITY ATTORNEY

MARGO LASKOWSKA
Deputy City Attorney
Direct Line: (408) 535-1935

October 17, 2011

James M. Dombroski, Esq.
LAW OFFICE OF JAMES M. DOMBROSKI
P. O. Box 751027
Petaluma, CA 94975

BY FAX ONLY

Re: ANDY'S BP, INC. v CITY OF SAN JOSE, et al.
Court Case Number: 1-10-CV-176412

Dear Mr. Dombroski:

This is in response to your e-mail from last Friday at about 3:45 p.m.

At the order-to-show-cause hearing on August 19, 2011, the Court found that the City did not violate the writ by issuing the permit adjustment AD11-574 that allowed the applicant, Moe's Stop, to cover-up exposed gas pipes, perform sidewalk repairs or replacement, and relocate a fire hydrant. Therefore, after the Court discharged the order-to-show-cause and denied Andy's BP's temporary restraining order, the permit adjustment no. AD11-574 was re-instated. (Because the Court specifically indicated that the City should not allow driveway relocation, driveway relocation is not part of that permit adjustment.)

As to your representation that Moe's Stop 1) repaired a pre-existing garage, 2) expanded the convenience store, 3) repaired the new gas pumps, and 4) allows cars to use pre-existing driveways, it is unclear from your e-mail and photographs how any of these alleged activities would trigger a City permit requirement or CEQA review. Repairs to a pre-existing garage and allowing cars to use pre-existing driveways appear permissible. Keeping the site safe by repairs to gas-pumps also appears permissible. While you have not indicated in what manner Moe's Stop has expanded the convenience store (and such information is not evident from the photographs provided), if the claimed expansion consists of merely adding display or adding stock and trade, it would not implicate any City review. While the City appreciates your interest in keeping the City informed as to activities occurring on the Moe's Stop site, thus far, it is not apparent from the information provided that City involvement is necessary.

200 East Santa Clara Street, 16th Floor Tower, San José, CA 95113-1905 tel (408) 535-1900 fax (408) 998-3131

804435

Exhibit E

Finally, as to your request to postpone the City Planning Commission hearing regarding the EIR for the Moe's Stop site, City staff have indicated that they are prepared to move that item forward for Planning Commission consideration and know of no reason such hearing would need to be deferred.

Thank you.

Very truly yours,

RICHARD DOYLE, City Attorney

By: Margo Laskowska
MARGO LASKOWSKA
Deputy City Attorney

MKL/mkl

Cc: Thomas Saberi, Esq. (by fax only)
Gary Wesley, Esq. (by fax only)

EXHIBIT F

1 RICHARD DOYLE, City Attorney (88625)
NORA FRIMANN, Assistant City Attorney (93249)
2 MARGO LASKOWSKA, Deputy City Attorney (187252)
Office of the City Attorney
3 200 East Santa Clara Street, 16th Floor
San José, California 95113-1905
4 Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
5 E-Mail Address: cao.main@sanjoseca.gov

6 Attorneys for THE CITY OF SAN JOSE

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA
10 UNLIMITED JURISDICTION

11 ANDY'S BP, INC., a California corporation,
and ANDY SABERI, an individual,

12 Petitioners,

13 v.
14

15 THE CITY OF SAN JOSE, and DOES 2-25,
16 inclusive,

17 Respondents.

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19 AMIR SHIRAZI, individually and dba MOE's
20 STOP, and AMIR SHIRAZI, as Trustee for
the MOHAMMAD M. SHIRAZI LIVING
21 TRUST,

22 Real Parties in Interest.
23

Case Number: 1-10-CV-176412

**DECLARATION OF JOSEPH
HORWEDEL IN SUPPORT OF CITY
OF SAN JOSE'S RESPONSE TO
ORDER TO SHOW CAUSE RE
CONTEMPT**

Date: August 19, 2011
Time: 9:00 a.m.
Dept.: 21

24 I, JOSEPH HORWEDEL, declare that:

- 25 1. I am the Director of the City of San Jose's Department of Planning, Building, and
26 Code Enforcement. I have held that position since November 2006. I have been
27 employed with the City of San Jose since 1983. I have personal knowledge of each
28

1 fact stated in this declaration. As to matters stated on information and belief, I believe
2 them to be true.

3 2. My duties include managing the development review functions for the City and
4 assisting customers in the permit process. Permit adjustment applications such as
5 the one submitted on July 14, 2011 regarding file number AD11-574, attached here
6 as Exhibit A are one type of permit applications. On July 21, 2011, I reviewed the
7 development permit adjustment, attached here as Exhibit B. The permit adjustment
8 includes a map of the site with my handwritten notation that driveway relocation was
9 not approved. The Adjustment was formally approved on July 22, 2011.

10 3. This permit allowed only to cover up piping, sidewalk improvements, and fire hydrant
11 relocation. Those items were unrelated to the previous Conditional Use Permit for
12 this property for gas station expansion.

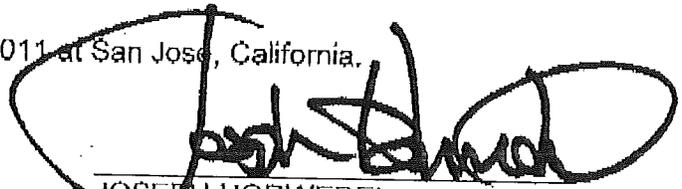
13 4. The Planning Department does not issue permits for moving fire hydrants. Fire
14 hydrants are not within the jurisdiction of the Planning Department because they are
15 not "building[s], structure[s], or land" within the meaning of Chapter 24.10 of the San
16 Jose Municipal Code that regulates commercial zoning districts. The fire hydrant is in
17 the public right-of-way and belongs to the Water Company, and in order to have it
18 moved, the City of San Jose's Public Works Department needs to issue an
19 encroachment permit. Out of abundance of caution, however, the Planning
20 Department reviewed the issue in order to ensure that Public Works is informed that
21 relocation of the fire hydrant would not violate the California Environmental Quality
22 Act ["CEQA"] and is not covered by the old Conditional Use Permit ["CUP"].

23 5. The same logic applies to replacement or repairs to sidewalks—typically they do not
24 need Planning Department permits. The City, however, required the applicant in this
25 case to go through the permitting process regarding proposed sidewalk improvements
26 as an additional precaution to ensure that it would not violate CEQA or the CUP. I
27 understand that sidewalk improvements in this case would involve removal of an old
28

- 1 unused driveway; because such uneven surface could potentially constitute a trip
2 hazard, installation of a new sidewalk is advisable, anyway.
- 3 6. As to covering up the hole in the pavement, again, the Planning Department does not
4 issue permits for such work—inspections of gas tanks are in the jurisdiction of the
5 Santa Clara County Fire Department. I am informed that the excavation at the site
6 was done to move an existing gasoline pump to the area with the three new, non-
7 functioning, pumps. Covering up the excavation would place concrete where there
8 was concrete before. I am informed and believe that the exposed pipes in the fenced
9 off area on the property are active and service the pumps that are currently in
10 operation. I am informed and believe that the fiberglass piping was not designed for
11 prolonged exposure to ultraviolet radiation—it degrades in sunlight. The pipes
12 should, therefore, be covered up for safety reasons. Additionally, even though the
13 area is fenced off, the chain-link fence would not protect the gas lines and tank if
14 there was an accident, for example if a car swerved into them.
- 15 7. In contrast to the fire hydrant relocation, sidewalk improvements, and covering gas
16 pipes, I did not approve the requested permit adjustment for driveway relocation
17 because it could arguably be related to the CUP as it would affect circulation on the
18 site.
- 19 8. In response to the Court's Amended Temporary Restraining Order dated July 27,
20 2011, the Planning Department retroactively rejected the Development Permit
21 Adjustment Application.

22 I declare under penalty of perjury under the laws of the State of California that the
23 foregoing is true and correct.

24 Executed this 3rd day of August 2011 at San Jose, California.

25 
26 JOSEPH HORWEDEL
27
28



CITY OF SAN JOSE
 Planning, Building and Code Enforcement
 200 East Santa Clara Street
 San José, CA 95113-1905
 tel (408) 535-3555 fax (408) 292-6056
 Website: www.sanjoseca.gov/planning

PERMIT/MAJOR PERMIT ADJUSTMENT APPLICATION

TO BE COMPLETED BY PLANNING COUNTER STAFF			
FILE NUMBER	AD 11-574	RECEIPT #	
PROPERTY LOCATION/ ADDRESS	1604 MCKEE RD.	DATE	7/14/11
QUAD #	—	ZONING	CP
PD ZONING FILE #	—	PERMIT FILE #	—
		AMOUNT	\$314-
		BY	A. BATTY
<input type="checkbox"/> RESIDENTIAL <input checked="" type="checkbox"/> COMMERCIAL <input type="checkbox"/> INDUSTRIAL			

TO BE COMPLETED BY THE APPLICANT (PLEASE PRINT OR TYPE)	
PROPERTY LOCATION/ ADDRESS	1604 MCKEE ROAD, SAN JOSE, CA 95116
ASSESSOR'S PARCEL NUMBER(S) (Attach Map)	481-03-016 481-03-017
DESCRIPTION OF THE PROPOSED MINOR CHANGE (Approval is limited to description contained herein)	
COVER-UP PIPING, DRIVEWAY RELOCATION & SIDEWALK IMPROVEMENT , FIRE HYDRANT RELOCATION	
DOES THE PROJECT INVOLVE HUD FEDERAL FUNDING/ASSISTANCE? <input checked="" type="checkbox"/> NO <input type="checkbox"/> YES Please indicate whether HUD Funding has been awarded, is proposed, or is anticipated, for the proposed project. If yes, indicate type of funding (i.e. CDBG Grant, HOME Investment Partnership Program, Section 108 Loan Guarantee, etc.), funding amount, whether awarded (if known) or application is pending, and fiscal year of award or application request.	
PLEASE NOTE: Projects involving 1) acquisition of real property involving a change of use, or 2) new construction require an Environmental Assessment (EA). Concurrent environmental review per the California Environmental Quality Act (CEQA) is also required. The obtainment of a qualified environmental consultant to provide documentation services (i.e. a combined Initial Study/EA) is strongly required.	

SIGNATURE OF PROPERTY OWNER REQUIRED			
Check One:			
<input type="checkbox"/> I hereby certify that a Homeowner's Association/Architectural Review Committee does exist and have reviewed this project. Please include a copy of their letter and comments with the application.			
<input checked="" type="checkbox"/> I hereby certify that a Homeowner's Association does not exist to comment on the requested change to my property.			
PRINT NAME OF PROPERTY OWNER	DAYTIME TELEPHONE #		
AMIR CHIRAZI	(408) 206-9088		
ADDRESS	CITY	STATE	ZIP CODE
1604 MCKEE ROAD	SAN JOSE	CA	95116
REQUIRED SIGNATURE OF PROPERTY OWNER (see page 2)	DATE		
	7-14-11		

PLEASE SUBMIT THIS APPLICATION IN PERSON TO THE DEVELOPMENT SERVICES CENTER, 1ST FLR, CITY HALL. APPOINTMENTS ARE NOT REQUIRED BUT MAY BE ACCOMMODATED BY CALLING (408) 535-3555.

PERMIT ADJUSTMENT APPLICATION

CONTACT PERSON			
PRINT NAME/COMPANY VICTOR YATCO / ZAMORA & ASSOC			
ADDRESS 2828 TIMBERLAKE COURT	CITY SAN JOSE	STATE CA	ZIP CODE 95128
PHONE # (408) 274-4926	FAX # (408) 274-4926	E-MAIL ADDRESS YATCOV@PRODIGY.NET	

Please complete the FRONT Sheet of this application and provide the following.
INCOMPLETE APPLICATION WILL NOT BE ACCEPTED

 FILING FEE:

- \$314* - Checks are made payable to the "City of San Jose".
- \$749* for Major Adjustment.
- \$623* for each adjustment after the 1st to process simultaneously
- \$156* per hour for consultation regarding review of a proposal prior to filing the application.

**includes the General Plan Update fee*

-
- PROPERTY OWNER SIGNATURE.**
- Can be submitted as original wet signature, faxed copy signature or electronic signature or only the property owner or representative who has Power of Attorney (POA) can sign this application. A copy of the POA must be submitted with this application.

-
- ASSESSOR'S PARCEL MAP**
- marked with the project location.

-
- PHOTOGRAPHS**
- of existing building or subject area.

-
- Four (4) COPIES**
- of the development plans. An Additional plan set is required if stormwater is required. The development plan should include:

- a. A **SITE PLAN* DRAWN TO SCALE** showing the location of the proposed changes on the subject property, and
- b. A **DRAWING TO SCALE** of the proposed change (elevations, floor plans, construction, details, as appropriate).

* A **Site Plan** should contain the following basic information:

- Dimensions of subject property, lot lines, and existing and proposed driveways.
- Streets adjoining the subject property.
- Existing and proposed buildings and structures, including proposed building removal.
- Dimensions of existing and proposed setbacks.
- Existing and proposed off-street parking, loading, landscape and circulation areas.

- Existing trees to be removed. Include circumference of tree at 2 feet above ground level as well as distances from existing and proposed structures and/or trees on the site.

- **Stormwater Control Plan:**

(A Stormwater Control Plan is required for all projects creating, replacing or expanding impervious surface by 10,000 square feet or more)

- a. Complete the Pervious and Impervious Surfaces Comparison Table located below.
- b. All existing natural hydrologic features (depressions, names of watercourses, etc.) and significant natural resources.
- c. Specify soil type(s).
- d. Specify depth to groundwater.
- e. 100-year flood elevation.
- f. All existing and proposed topographic contours with drainage areas and sub areas delineated and arrows showing flow direction.
- g. Separate drainage areas depending on complexity of drainage network.
- h. For each drainage areas, specify types of impervious area (roof, plaza, sidewalk, streets, parking, etc) and area of each.
- i. Show location, size, and identification (including description), of Source Control Measures (SCMs) and Water Quality Treatment Control Measures (TCMs) such as swales, detention basins, infiltration trenches, etc.
- j. Details of all proposed water quality treatment control measures.
- k. Location, size and identification of proposed landscaping/plant material.
- l. Ensure consistency with Grading and Drainage Plan and Landscape Plan.
- m. Supplemental Report :
 1. Calculations illustrating water quality treatment control measures meet numerical standards set forth in Post-Construction Urban Runoff Management Policy No. 6-29.
 2. Name and location of receiving water body.

PLEASE SUBMIT THIS APPLICATION IN PERSON TO THE DEVELOPMENT SERVICES CENTER, 1ST FLR, CITY HALL. APPOINTMENTS ARE NOT REQUIRED BUT MAY BE ACCOMMODATED BY CALLING (408) 535-3555.



DEVELOPMENT PERMIT ADJUSTMENT

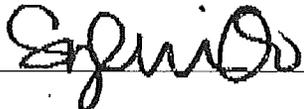
PROJECT FILE NO.: AD11-574
PERMIT TO BE ADJUSTED: N/A
PROJECT DESCRIPTION: Permit Adjustment to cover-up piping, sidewalk improvements, and fire hydrant relocation.
PROJECT LOCATION: 1604 MCKEE ROAD
A.P.N.(s): 481-03-017
ZONING: CP Pedestrian Commercial
GENERAL PLAN: GC

ACTION: Approved

SUBJECT TO THE FOLLOWING CONDITIONS: This permit to allow to allow the cover up of piping, sidewalk improvements, and fire hydrant relocation only. Driveway relocation was not approved as part of this Permit Adjustment and shall be subject to a Conditional Use Permit for the service station.

Conformance with Municipal Code. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code, including, but not limited to, use of property and off-street parking requirements.

Plan Set: Yes No

Approved by: Sylvia Do Signature: 

Action Date: July 22, 2011

This permit sheet is only valid when accompanied by an original signature and when fastened to a stamped plan set, if applicable.



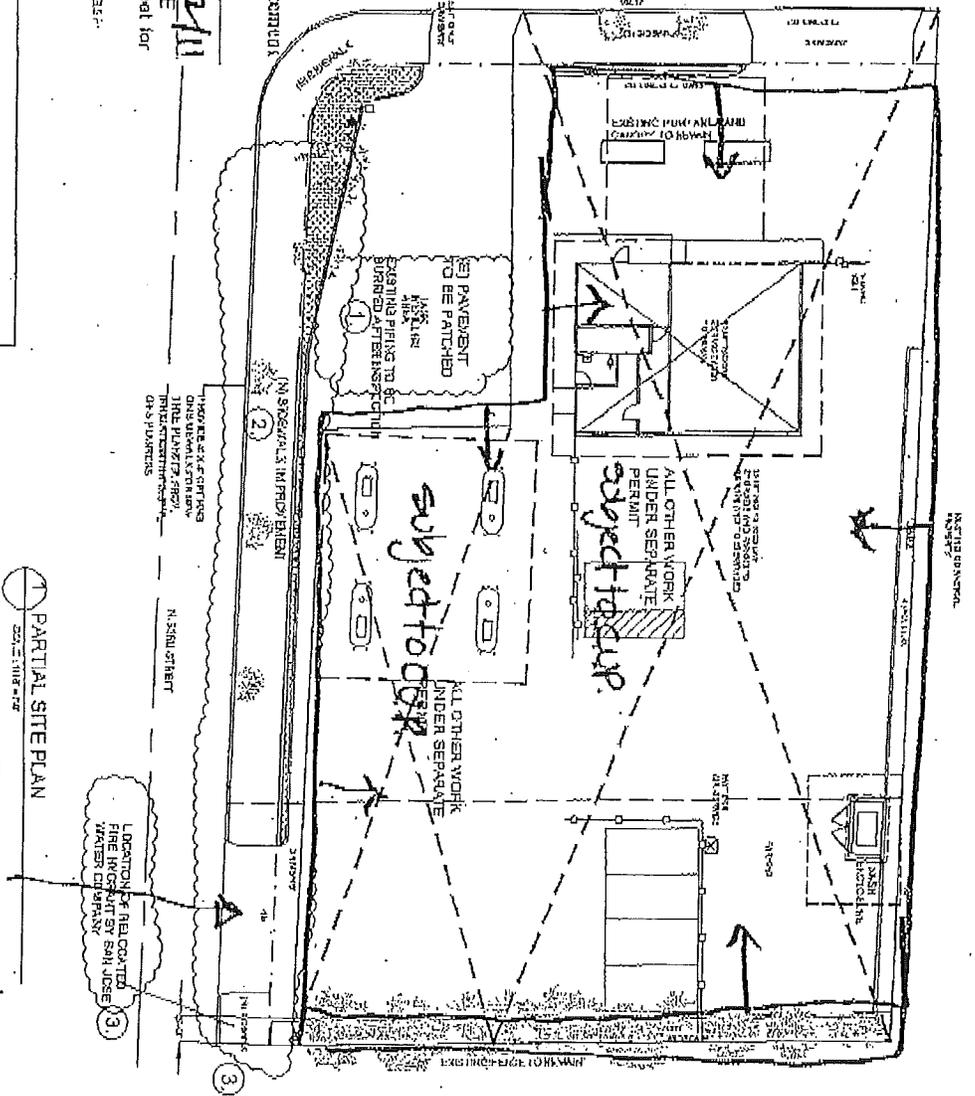
CITY OF SAN JOSE
Department of Planning, Building & Code Enforcement

File No.: AD11-074

By: sqw/td DATE: 7/22/11

See attached Development Permit Adjustment sheet for conditions of approval.
Note: A Building Permit may also be required. Please check with the Building Division.

- LEGEND SCOPE OF WORK
- ① FINISH PIPING AND COVER PIPING/TANK
 - ② ~~RELOCATE FIRE HYDRANT TO NEW LOCATION FOR FUTURE DRIVEWAY~~
 - ③ SIDEWALK ALONG N. 33RD STREET IMPROVEMENT - REPAVING AND LANDSCAPING



Driveway relocation
Not approved with
this adjustment. Subject
to CUP for service
station

ASSOCIATES 1001 WOODLAND SAN JOSE, CA 95128 408-261-1100 www.associates.com		SOUTHWALEY CONSULTING 1001 WOODLAND SAN JOSE, CA 95128 408-261-1100 www.southwaley.com	
PERMIT ADJUSTMENT FOR MOE'S STOP GAS AND SERVICE STATION 1001 WOODLAND SAN JOSE, CA 95128			
SHEET TITLE ENLARGED SITE PLANS		SHEET NO. A-1	

EXHIBIT G



Department of Planning, Building and Code Enforcement

BP # 10-029749

STOP WORK ORDER

ADDRESS 1604 McKee Road Bldg. # _____ Suite # _____

Residential Commercial Industrial Other

Description of purported violation (s):

You are directed to cease and desist the work described above because:

- No permit (s) have been located in our files for the work in progress.
- The work does not conform to the approved plans and / or building permit (s).
- The work is in violation of the Zoning Ordinance.
- The work does not conform to Planning Permit No. _____
- Other: ENVIRONMENT REPORT NEEDS APPROVED BY PLANNING

The above cited work cannot resume until the Stop Work Order has been rescinded in writing by:

- Building Division 200 East Santa Clara Street, San Jose, CA 95113. (408) 535-3555
- Building Code Compliance Section 170 West San Carlos Street, San Jose, CA 95113 (408) 277-4528

Inspector: M. HSIEN / M. Akmal / 3-14-11
Print Sign Date

First page - Office Copy Second page - Customer Mail Out Copy

Red hard Copy - Posted at Job Site

APPLICANT: AMIR SHIRAZI