

City Hall East
200 N. Main Street
Room 800
Los Angeles, CA 90012

(213) 978-8100 Tel
(213) 978-8312 Fax
CTrutanich@lacity.org
www.lacity.org/atty



CARMEN A. TRUTANICH
City Attorney

September 22, 2011

Mr. Anthony G. Patchett, Esq.
Law Offices of Anthony G. Patchett
P.O. Box 5232
Glendale, California 91221-1099

Subject: Rancho LPG Facility, 2011 North Gaffey Street, San Pedro, California

~~7004~~
Dear Mr. Patchett:

Thank you for your letters expressing various concerns regarding the Rancho LPG facility located in San Pedro (hereinafter "Rancho Facility"). To summarize your primary issues, you have requested that this Office seek an injunction in Superior Court against this privately-owned Facility, as well as raised questions relating to the City's previous environmental review of the Facility and related pipelines. Separately, you sent a letter to the President of the Los Angeles Board of Harbor Commissioners, who has forwarded it to this Office for response. Lastly, you recently alleged that there is a conflict of interest in the Office of the Los Angeles City Attorney that purportedly would preclude this Office from further reviewing these matters. I respond to all of these issues below, after a brief discussion of the relevant background facts, as I currently understand them.

Obviously, City Attorney Carmen Trutanich takes any allegations of potential threats to public safety very seriously. As a former environmental crimes prosecutor, and current City Attorney, who has successfully prosecuted, and continues to prosecute, environmental violations and polluters, City Attorney Trutanich is fully committed to undertake every effort within the power and authority of his Office and the law to investigate, prosecute, abate and remediate any actual or potential threats to the residents of this City.¹ With that commitment in mind, on Friday, August 26, 2011, the City Attorney personally visited and toured the Rancho Facility over the course of three hours to inspect and review its operations. Drawing upon his decades of environmental and regulatory experience, the City Attorney directly questioned the Facility's operators regarding any potential threats to public safety, including those raised in both your letters and from others in the community.

¹ As you are aware, I have also served as a local, state and federal environmental crimes and workplace safety prosecutor for nearly 25 years, and once served as Assistant Secretary for Law Enforcement and General Counsel for the California Environmental Protection Agency ("Cal/EPA").

I. Overview

As you are aware, there is a lengthy regulatory and permitting history at the Rancho Facility, including its interactions with the community. I will attempt to summarize my current understanding of the Facility's relevant history.

A. City's Past and Current Involvement with the Rancho Facility.

The Rancho Facility property was originally acquired in fee simple by Rancho's predecessor, Petrolane, and developed into a liquid bulk tank facility pursuant to an environmental impact report (EIR) certified in 1973 under the California Environmental Quality Act by the City of Los Angeles as lead agency. There were no legal challenges to the EIR at that time and the project was therefore approved.

On July 1, 1974, the Los Angeles Harbor Department entered into Revocable Permit No. 1212 for the construction and operation of a railroad spur track. On May 27, 1974, the Los Angeles Harbor Department entered into Permit No. 263 with Rancho's predecessor, Petrolane, for subsurface pipelines on Harbor Department property, which was subsequently terminated in October 2010. The Harbor Department had previously terminated the use of Berth 120, closing down the ocean shipping operation.

Rancho currently possesses Harbor Department Revocable Permit No. 10-05 dated February 23, 2011, which authorizes a right of way for a railroad spur -- the same one permitted under the 1974 Permit No. 1212. The railroad spur is one section of railroad used by the Pacific Harbor Line. The City does not own or lease the property comprising the Rancho Facility.

B. Other Federal, State and Local Agencies.

The most serious concerns that you and the community members have raised obviously relate to the potential risk of explosion resulting from operations occurring on the premises of the Rancho Facility. For that precise reason, the Rancho Facility is heavily regulated by many local, state and federal regulatory and enforcement agencies, including, but not limited to, the following: U.S. Department of Homeland Security, U.S. Department of Transportation, U.S. Environmental Protection Agency (EPA), U.S. Department of Occupational Safety and Health Administration, Cal/EPA, California Emergency Management Agency, California Department of Toxic Substances Control, the South Coast Air Quality Management District, the Los Angeles County Fire Department, the City of Los Angeles Fire Department, the Los Angeles Police Department, and the City of Los Angeles Bureau of Sanitation Industrial Waste Management Division among others. These agencies have the regulatory authority to issue applicable permits, review, assess and require safety procedures and protocols, as well as the enforcement authority over the operation of such facilities should they fail to comply with any applicable environmental, public safety and other requirements.

C. Technical Analysis of Facility Risk.

The concerns expressed in Dr. Miller's note (included in your letter) and in the Cornerstone Quantitative Risk Analysis (Attachment A), have been provided to the EPA's Risk Management Plan Enforcement Unit, which is an agency responsible for determining the acceptable level of risk for the Rancho Facility. In direct response to these concerns, the EPA engaged Michigan

Technological University's Department of Chemical Engineering to conduct essentially a peer review of the Cornerstone Risk Analysis and Rancho's assertions (Attachment B) regarding the potential risk that the location poses to the community. The independent expert opinion from Michigan Tech is noteworthy (Attachment C). In sum, the Michigan Tech Report states that the Rancho Facility has design features that significantly reduce the risk the Facility poses to the community. The Report further notes that any analysis that does not recognize and analyze these features "...will not have a meaningful result and will very likely *dramatically overestimate the consequence and risk.*" (Michigan Tech Report, 2 emphasis added). Specifically, according to the Michigan Tech Report, these design features at the Rancho Facility include:

1. The butane is stored in refrigerated storage vessels at a temperature of 28°F, below the normal (1 atm) boiling point of 31.1°F.
2. A remote impoundment area exists a short distance from the storage vessels to collect and contain any liquid that is discharged during an emergency situation.
3. The storage vessels are insulated, low pressure, vertical storage vessels. (Michigan Tech Report, 2).

Accordingly, Professor Crowl, the author of the Michigan Tech Report, concludes:

"...the design features I ... discussed [those listed above] dramatically reduce the accident consequences and risk. If these features are not included in the QRA, the consequences of an accident and subsequent risk will be substantially overestimated.

It is clear to me that the Cornerstone Technologies report did not include these design features in their analysis and as a result they overestimated the consequences of an accident scenario and over-predicted the risk." (Michigan Tech Report, 4).

It appears that the note from Dr. Miller does not reflect the hereinabove-described low pressure/temperature method in which butane is stored in the subject tanks at the Rancho Facility. Consequently, Dr. Miller states that:

"[b]utane must be stored at elevated pressure. The pressure within the tank varies according to temperature. Pressure is needed to maintain the butane in a liquid state. At 68 degrees F, the tank pressure is approximately 16 pounds per square inch (PSF) greater than atmospheric pressure." (Patchett letter dated August 24, 2011, page, 2).

It is therefore my understanding that, contrary to Dr. Miller's assertions, the Rancho Facility uses refrigerated, low pressure insulated tanks that maintain the butane in a liquid state at 28°F. (Michigan Tech Report, 3). Nor does Dr. Miller's note mention the existence of the remote impoundment area or other existing design features that the Michigan Tech Report emphasized are critical to a complete and accurate risk analysis.

Michigan Tech's Professor Crowl also discusses Rancho's existing design features, including its use of refrigerated tanks, to conclude that the potential for a disastrous boiling liquid expanding vapor explosion (BLEVE) "is not possible" at that Facility's storage tanks. Specifically, in opining that such an explosion is not physically possible, Professor Crowl states in pertinent part:

“The remote impoundment area also decreases the consequences of an accident and decreases the risk. Any liquid butane that leaks out of the storage vessels or associated piping is drained away from the storage vessels to the impoundment area. This decreases the accident consequences in the following two ways. First, the impoundment area is remote from the storage vessels. Thus, if the impoundment area fills with butane and catches on fire, the storage vessels will not be directly exposed to this fire. This is important since a storage vessel exposed to fire might eventually fail. Second, the impoundment area reduces the surface area of the potential pool decreasing the evaporation rate of the butane.

The North Gaffey Street facility storage vessels are also insulated. This is used to reduce the heat transfer to the butane from the outside of the tanks to reduce the refrigeration load required to keep the butane at 28°F. It also decreases the consequences of an accident by providing addition (sic) fire protection in the event of an external fire. The insulation decreases the heat transfer to the butane liquid from the external flames.

The storage vessels are also low pressure storage vessels. This means that a BLEVE – boiling liquid expanding vapor explosion – is not possible. A BLEVE requires a high pressure storage vessel.” (Michigan Tech Report 3-4).

As you know, the City Attorney’s Office does not have the authority nor the resources to directly employ in-house technical personnel having the capability to respond to the direct technical questions raised in your letters. However, during my inspection of the Rancho Facility, I challenged its operators to address each and every question and concern found in your letters based purely upon scientific evidence. (Attachment D). I welcome and would greatly appreciate your thoughts and those of others to their responses.

This Office has also reviewed the results of all recent inspections conducted by the above-mentioned government regulatory agencies charged with the oversight of the Rancho Facility. More specifically, I have been advised that on May 12, 2011, an environmental strike force conducted an unannounced inspection of the Facility. The task force members included Cal/EPA’s Department of Toxic Substances Control, the South Coast Air Quality Management District, the Los Angeles County Fire Department, the City of Los Angeles Fire Department, and the Los Angeles Industrial Waste Management Division. The surprise inspection included:

1. Review of air permits;
2. Compliance with Department of Toxic Substance Control regulations regarding toxic substances;
3. A physical audit of hazardous waste storage and handling procedures and associated permits;
4. Review of emergency plans; and
5. A physical inspection of the entire facility.

It is my understanding that this inspection found no violations at the Rancho Facility. Similarly, I understand that on August 9, 2011, the Federal Department of Transportation Federal Railroad Administration (FRA), conducted a hazardous materials inspection at the Facility. The

FRA inspected security plans, security training, hazmat training, and other elements of the Facility's operations and also apparently found no violations.

The foregoing information is the general, relevant evidentiary backdrop in which you have requested this Office to file an injunction against the Rancho Facility, as well as contend that further environmental review is required by the City of Los Angeles.

II. The Ultrahazardous Standard for Tort Liability Does Not Apply Where, as Here, No Harm has Occurred

As you recognize in your letter, the Rancho Facility has been in business, in various forms, at its current location on Gaffey Street in San Pedro since the 1970s. Your letter also asserts that its business activities are "ultrahazardous," as defined in Section 520 of the Restatement Second of Torts, and contends that such activities can be enjoined on that theory. However, your letter does not provide facts that would support a valid cause of action upon which to seek injunctive relief in the Los Angeles Superior Court. The "ultrahazardous" legal concept is one of tort law. The *SKF Farms v. Superior Court* case that you have cited defines an "ultrahazardous" activity, but does not obviate proof of the legally-required elements of the underlying tort necessary to obtain legal relief and is therefore, not a legal basis upon which to seek an injunction.

As you know, "ultrahazardous" activities can be, and often are, legally permitted and regulated throughout the state. Accordingly, the activity, as shown in the case you cite, is argued to be "ultrahazardous" in a tort action brought after the damage has occurred to determine the appropriate standard of proof (*strict liability vs. negligence*), not as a basis for halting or enjoining the activity from taking place:

"The doctrine of ultrahazardous activity provides that one who undertakes an ultrahazardous activity is liable to every person *who is injured* as a proximate result of that activity, regardless of the amount of care he uses." (*Pierce v. Pacific Gas & Electric Co.* (1985) 166 Cal. App.3d 68, 85 emphasis added).

Further, you cite CACI Jury Instruction 460 in support of your position that the Rancho Facility is engaged in ultrahazardous activity and should be enjoined as such, yet that instruction's second element also requires that the plaintiff establish that he/she "...was harmed." (CACI 460).

As discussed hereinabove, to date, there has been no demonstration of facts leading to a claim of harm or damage caused as a result of Rancho's activities. Similarly, while there is considerable concern expressed for the possibility of a threat to safety, we have not received any factual information documenting the allegations of unsafe situations necessary to counter the inspection and audit results from any governmental agencies, including those listed hereinabove. Unfortunately, although we recognize the potential threats posed by such operations, and clearly understand and sympathize with the community's sincere and longstanding concerns, without more information and a factual basis, this Office cannot at this time proceed with any legal or enforcement action. Obviously, you may (and are certainly within your rights to) disagree with the current assessment of this Office. As such, if you believe there is any credible evidence of violations at the Facility, you have the right to independently assess and initiate any appropriate civil suit on behalf of your clients.

III. Injunctive Relief is Not Available Based on Known Facts

It appears from your correspondence that the community's goal is the cessation of all activities and operations at the Rancho Facility. However, as a general matter, injunctions prohibit specific activities that are found unlawful, but would not necessarily shut down a facility unless the entirety of the operation was found unlawful. Therefore, in addition to analyzing potential liability under the "ultrahazardous activity" standard that you proposed, we have reviewed two other legal theories that could serve as the basis for such an injunction, namely: California Business and Professions Code Section 17200 et. seq., commonly referred to as California's Unfair Competition Law, and a public nuisance theory under California Civil Code Sections 3479 and 3480. This Office has been very successful in obtaining injunctive relief under both theories in situations involving environmental, workplace safety, health care fraud, slumlords, billboards, gang headquarters, red light abatements, narcotics locations and many other public health and safety violations and nuisances.

An injunction sought through Business and Professions Code Section 17200 et seq. requires an unlawful or unfair business practice – essentially something "...that can properly be called a business practice and that at the same time is forbidden by law." (*People v. McKale* (1975) 25 Cal.3d 626 at 634.) While our Office welcomes new and credible information, we are not aware, at this time, of any conduct on the part of the Rancho Facility that can be considered an unlawful or unfair business practice. As detailed hereinabove, the Facility has been recently inspected by local, state, and federal regulators, who to our knowledge, apparently did not find any violations. I know that you, also as a former and well-respected and experienced environmental prosecutor, understand that this Office has a professional responsibility to uphold the law, and that courts have warned prosecutors that "...the unfair competition law is not a roving warrant for a prosecutor to use injunctions and civil penalties to enforce criminal laws. Its application to conduct which violates the penal law is limited to circumstances where such conduct is also a business practice." (*People v. E.W.A.P. Inc.* (1980) 106 Cal.App.3d 315, 320).

As such, without an underlying violation of the law that constitutes a business practice, a Section 17200 action seeking a permanent injunction does not appear to be legally cognizable at this time. Your letters do not indicate that you are aware of any such violation upon which such an action can be pursued. Furthermore, assuming that there were such an underlying violation of law and that the violation could be considered a business practice sufficient to warrant the filing of a Section 17200 action, any injunction would likely be fashioned to address the specific violation and award civil penalties – not necessarily authorize the complete closure of the Facility.

We have also considered a nuisance theory, but found that the Rancho Facility's predecessor, Petrolane, was unsuccessfully sued on both private and public nuisance theories in a case decided in 1980. (See *Don Brown v. Petrolane* (1980) 102 Cal.App.3d 720). More importantly, as mentioned hereinabove, recent surprise inspections conducted by the agencies charged with regulating this permitted Facility apparently found no violations.

My Office relies upon the diligent and competent performance of regulatory and law enforcement agencies in developing the technical information and evidence of violations of law upon which we can act. To date, no enforcement agency has provided any information alleging or suggesting any unlawful or dangerous conduct, nor requested in any manner whatsoever that this Office file any form of law suit or enforcement action, including any such action whose object is the

cessation of all operations at the Facility. Moreover, as discussed above, the Michigan Tech Report conflicts with the results of the studies upon which you apparently rely.

In considering a public nuisance theory, we recognize that there are numerous public nuisance cases brought under California Civil Code 3479 and 3480 against activity which "...interfere[s] with the comfortable enjoyment of life or property...." (California Civil Code section 3479). California courts have found a wide variety of different activities that constitute a nuisance: offensive odors, the sale of narcotics, loud noises, display of offensive materials, and others. At this time, this Office, however, either through your letters or otherwise, possesses no evidence that any previously recognized nuisance activities are occurring at the Facility. Rather, what is clearly at issue here is the potential for a disaster, combined with our residents' sincere concern relating to that possibility. Unfortunately, I am aware of no California court that has held that fear or concern for future harm alone, no matter how sincere and understandable, is sufficient to constitute a public nuisance and thereby support a request for an injunction of that activity.

As I have stated hereinabove, the door to my Office is always open to additional evidence that would change the analysis of the situation. At this time, however, we are not aware of any legal basis upon which to bring an action seeking to enjoin any permitted business activities or operations at the Facility.

IV. CEQA Comments are Untimely and/or Misinformed

Your letters also contend that the City improperly exempted the Rancho Facility from CEQA. Contrary to your claims, the environmental impacts of the Rancho Facility, pipelines, rail line and marine terminal were in fact fully assessed in an Environmental Impact Report certified as compliant with the California Environmental Quality Act by the City prior to approval of the Rancho Facility project (for Rancho's predecessor Petrolane) in 1973. In the very same letter you also referenced and stated that you have reviewed the Petrolane EIR, which clearly covered the Facility:

"This project is composed of three elements: first, a marine unloading arm supported on four (4) new piles at the outboard side of existing Berth 120; second, an underground pipe supply line which commences at Berth 120 in Los Angeles Harbor and ends at the terminal facility approximately one mile inland; and third; a storage and distribution terminal facility.

The storage and distribution facility is located on the east side of Gaffey Street approximately one and one-third (1 1/3) miles north of the intersection of Gaffey Street and the Harbor Freeway in San Pedro. It occupies a site of approximately 20 acres and is directly opposite a two-tank petroleum storage facility occupied by the Bray Oil Company." (Petrolane EIR, p. 1).

Furthermore, the rail line leading to the Rancho Facility was analyzed and depicted in the site plan in the Petrolane EIR (Petrolane EIR, Figure 2). As such, there is no question that the Rancho Facility and associated rail line were assessed in the EIR. Moreover, the public comment period and legal challenge period for the 1973 Petrolane EIR expired 38 years ago. There is no provision within CEQA that would apply the CEQA standards in 2011 to invalidate an EIR that was certified as compliant with CEQA 38 years earlier. In addition, there is no provision in CEQA mandating a new environmental impact report of the Rancho Facility at this time in the absence of a new

discretionary project proposing a physical change to the Facility and the environment. This Office is not aware of any new such discretionary project at or concerning the Facility.

In addition, following the City's 1973 EIR assessment of the Rancho Facility's environmental impacts, the Harbor Department entered into various permits covering Berth 120 and associated pipelines that were previously assessed in the EIR, as described in the EIR excerpt above. The Harbor Commission Board Order 4579 from a 1976 board action referenced in your letter was an amendment to Permit No. 263, which governed the pipelines from Petrolane to Berth 120 and was previously assessed in the EIR. This action was found exempt and, as explained above in regard to the EIR itself, the comment and legal challenge period has long since expired. In any event, a challenge at this time is moot in that Permit No. 263 was terminated by the Harbor Department in October 2010.

Lastly, you have stated in letters to this Office and to Harbor Commission President Miscikowski that the closure of Berth 120 and the pipelines leading to the Rancho Facility caused an increase in truck and rail traffic that should have caused the City to conduct an environmental review. The Harbor Department informs me that the pipelines have not been used since 2004. Consequently, the termination of inactive pipelines in 2010 would have no effect on the environment as it could not have increased rail or truck traffic. More importantly, the termination of both the Berth 120 Permit and the pipelines Permit were within each Permit's terms, did not alter the Permit premises and therefore, did not constitute a new discretionary project subject to CEQA. Furthermore, you request that the Port suspend Rancho's existing use of a rail spur under its existing permit based upon your opinion that CEQA was not followed in the closing of Berth 120 (which caused the pipelines to the Rancho Facility to become inactive). This Office does not agree with your assertion, as the Port's permit for the rail spur is an existing use of a previously assessed rail line and exempt pursuant to Article III, Class 1 (3) of the Los Angeles City CEQA guidelines. We also note that the time period to contest the action under CEQA has expired.

Moreover, California Code of Regulations Section 15321 that you cite in support of your contention that CEQA was not adhered to in relation to the closure of Berth 120, is actually a Categorical Exemption from CEQA that would exempt both the Port of Los Angeles and the City from having to take the action that you have requested. However, Section 15321 does not apply here, as it relates to regulatory agencies and not an entity such as the Port.

V. There is No Conflict of Interest

Finally, you allege that this Office has a conflict of interest and therefore, request that the matter be reviewed by the Los Angeles County District Attorney's Office. Nowhere, however, do you identify the specific nature of the alleged conflict - making an informed response to your allegation impossible at this time. This Office is aware of no actual or perceived conflict. To the extent that you wish for the District Attorney's Office to investigate the Rancho Facility, we certainly have no objection and openly welcome review by any and all local, state and federal agencies. We do understand, however, that you have already contacted the District Attorney's Office and that it responded to you on or about October 28, 2010, informing you that it was reviewing the matter. I have not been advised of the current status of any such investigation being conducted by the District Attorney's Office.

I again state and affirm that this Office has been, and always will be, willing to review any and all evidence relating to this Facility or any other potential threat to public safety or the environment.

However, this Office, as a public law office governed by prosecutorial rules of ethics, as well as the guardian of the public trust and treasury, does not, at this time, possess any facts or evidence upon which it can justify the expenditure of the significant amount of public resources necessary to commence and maintain a credible lawsuit or any other enforcement action against the Rancho Facility. The receipt of any relevant and credible evidence could obviously change that current posture.

I look forward to receiving and reviewing any additional information and materials on this matter, including additional complaint or inspection reports, as well as meeting with residents and other members of the community to fully discuss their concerns and any proposed solutions. Thank you again for your continued attention, commitment and service to the community, and for providing this Office with this very important information.

Sincerely,

CARMEN A. TRUTANICH
City Attorney



WILLIAM W. CARTER
Chief Deputy City Attorney

Attachments

cc: Honorable Harbor Commissioners
Geraldine Knatz, Ph.D, Executive Director
Brian L. Cummings, Fire Chief, Los Angeles Fire Department
Thomas Russell, General Counsel, Harbor Department
Janet Jackson, Fire General Counsel
Reed Sato, Chief Counsel, California Dept. of Toxic Substances Control
Brian Hembacher, Deputy Attorney General, California Dept. of Justice