

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY (ADEQ)
Public Hearing
on Roosevelt Irrigation District
Early Response Action (ERA)

March 23, 2010

My name is Jerry D. Worsham II. I am an environmental attorney with the law firm of Gammage & Burnham, PLC in Phoenix, Arizona and I am here today representing HEAD/Penn Racquet Sports ("Penn") concerning this matter. My client is currently named as a defendant in the case titled *Roosevelt Irrigation District v. Salt River Project Agricultural Improvement and Power District, et al.*, Case No. 2:01-CV-00290-ROS, United States District Court, District of Arizona (02/09/2010). Allegedly, Penn is named as a defendant by the Roosevelt Irrigation District ("RID") because of historical operations at a facility located at 306 S. 45th Avenue¹ in Phoenix, Arizona. My client is within the geographic confines of the West Van Buren Water Quality Assurance Revolving Fund ("WQARF") Site administered by the Arizona Department of Environmental Quality ("ADEQ").

My client generally agrees with the technical and legal positions described today by the other identified defendants, which have presented testimony covering the ill-conceived proposal by the RID as an Early Response Action ("ERA") under the Arizona Administrative Code ("AAC") Regulations R18-16-405. Penn requests that the ADEQ reject the proposed ERA. I wish to add the following additional information and comment for the record.

¹ Penn owns the property which includes a 115,000 square-foot, one-story manufacturing building with a 6,000 square-foot second-story area and smaller administration, development, and storage buildings. The property was initially developed from agricultural land in 1972. The site was previously operated to manufacture tennis balls and racquetballs. Currently, the property is a distribution and warehouse facility for HEAD/Penn products.

BACKGROUND

Penn received RID's notice letter dated August 19, 2009, and attended the RID meeting on September 16, 2009. At that meeting, RID distributed the "RID Fact Sheet" for Penn (See Exhibit 1). Penn has reviewed the historical facts and the documents on the Penn facility identified by RID. Although the aquifer below the Penn facility is known to be contaminated with chlorinated solvents both up and down gradient from the Penn facility,² Penn asserts that it is not a potentially responsible party ("PRP") and certainly does not have any liability to RID.

RID owns and operates approximately 100 groundwater wells in the western portion of Maricopa County. Allegedly, over 20 of those wells have been impacted by contaminated groundwater caused by upgradient facilities that have released hazardous substances or contaminants of concern ("COCs"), including trichloroethene ("TCE"), 1,1,1-trichloroethane ("TCA"), methyl tertiary butyl ether ("MTBE"), and tetrachloroethene ("PCE"). To recover any damages, RID would be required to incur response costs related to Penn's activity for identified contamination that was necessary and consistent with the National Contingency Plan (*See* 42 U.S.C. §§ 9605 and 9607). The identified COCs that the RID has asserted to contaminate their irrigation water have not been associated with the Penn facility. Therefore, cost recovery by RID would not be probable against Penn.

² The property is located within an area of known regional groundwater contamination identified by the ADEQ as the West Van Buren Water Quality Assurance Revolving Fund (WQARF) site. A plume of contamination in the aquifer underlying the subject property stretches the length of the West Van Buren study area, from 7th Avenue to 83rd Avenue, and is approximately 1.5 miles wide, centered around Van Buren Road. The subject property is approximately 1/2 mile south of Van Buren Road and, therefore, within the area of the West Van Buren WQARF contamination.

RID's Negotiating Position

The source document which RID relies upon to list Penn in the Draft Complaint is the ADEQ's *Draft West Van Buren Remedial Investigation Report*, p 2-3, Terranext (October 2008) which states:

20. Penn Athletic, 306 S. 45th Avenue – Conducted soil investigations associated with UST release which indicated that no COCs released. Preliminary assessment report by ADEQ 6/18/90 recommended no further action under CERCLA. ADEQ Voluntary Remediation Program issued an NFA letter dated 6/4/02. **(See Exhibit 1)**

Clearly, this source document and reference quoted by RID describes a set of facts that support the **deletion** of Penn from the list of defendants. Unfortunately, RID takes a limited view of any legal or factual defense as expressed in RID's following statement to another defendant:

A. Hydraulic Oil Leak. – A release of a small amount of hydraulic fluid from hydraulic lift system basement enclosure was reported on October 22, 1987. The ADEQ Solid Waste Division acknowledged that a small amount of impacted soil was removed from the basement elevator area and ADEQ did not require additional investigation or remediation. The ADEQ Water Pollution Compliance Unit issued a **Case Closure Letter** ADEQ LUST File #0356.01 on November 6, 1987. (See Exhibit 2)

B. Surface Pipeline Leak of No. 2 Fuel Oil. – In the southwest corner of the property, Penn had an above-ground steel tank (“AST”) for storing No. 2 fuel oil. The fuel oil was used for firing two steam boilers within the manufacturing facility. Fuel was piped from the AST into the manufacturing facility. Two breaks, each approximately 1/32-inch wide by 3/4-inch long, were discovered in the supply pipeline near where the line enters the manufacturing building. This surface leak was reported on January 20, 1987 and extensive site investigations have been completed. As part of the Penn leak investigation, three soil borings around the leak were completed and five groundwater monitoring wells surrounding the property were installed. The horizontal extent of the hydrocarbon contamination was defined

After the completion of an extensive subsurface investigation and site characterization of the tank area under the VRP, the following conclusion was reached:

Arizona Revised Statutes (“A.R.S.”) Title 18, Chapter 7 establishes Soil Remediation Levels (“SRL”) to govern the requirements of soil remediation. If detection levels of Extractable Fuel Hydrocarbons, BTEX (including hexane) or Polynuclear Aromatic Hydrocarbons exceed the SRL, then remediation of the soil may be required. The laboratory analysis results of the Extractable Fuel Hydrocarbons (C₁₀ to C₃₂), BTEX (including hexane) and Polynuclear Aromatic Hydrocarbons did not indicate the presence of any constituent at concentrations higher than the SRLS for the respective contaminant.

Based upon the facts, ADEQ issued a “**No Further Action Letter**” ADEQ Site Code: 501369-00 concerning the removal of these tanks on June 4, 2002. (See Exhibit 4)

Petroleum Exclusion Under CERCLA

CONCLUSION

Penn has operated under the environmental regulatory authority of the Arizona Department of Health Services (“ADHS”) or ADEQ since inception. Environmental management, environmental response and permitting have been a key part of the Penn operation from the start of the manufacturing process. Penn requests that ADEQ recognize the significance of those ADEQ regulatory responses and provide Penn, and the regulated community, with some assurance that responsible environmental management will be acknowledged and supported by ADEQ in current and future actions asserted by third parties.

My client generally agrees with the technical and legal positions against the RID as described today by the other identified defendants that have presented testimony covering the ill-conceived proposal by the RID as an ERA under AAC Regulations R18-16-405. Penn requests that ADEQ reject the proposed ERA.

EXHIBIT 1

ROOSEVELT IRRIGATION DISTRICT POTENTIALLY RESPONSIBLE PARTY FACT SHEET

Background:

Roosevelt Irrigation District ("RID") owns and operates approximately 100 groundwater wells in the western portion of Maricopa County. The wells are used to supply water to public and private entities and individuals for industrial, agricultural and residential uses. Over 20 of these wells have been impacted by contaminated groundwater caused by upgradient facilities that have released or threaten to release hazardous substances, including, but not limited to, trichloroethene ("TCE"); 1,1,1-trichloroethane ("TCA"); methyl tertiary butyl ether ("MTBE"); and tetrachloroethene ("PCE").

Research:

RID has reviewed numerous public documents in order to identify facilities that are potentially responsible for the groundwater contamination that has impacted or threatens to impact its wells. Some of these documents include remedial investigation reports, summary source reports, ADEQ fact sheets, site assessments, work plans, PRP searches and soil and groundwater reports. RID's research revealed the following information in identifying **Penn Racquet Sports, Inc.** as a potential owner or operator of a facility that released or threatened to release hazardous substances for which RID has incurred response costs:

FACILITY ADDRESS

306 S. 45th Ave.

CONTAMINATION AND MEDIA

UST release of Hydrocarbons

Soil

The release of petroleum hydrocarbons into contaminated groundwater generates new hazardous substances and, therefore, subject to CERCLA liability

SOURCE DOCUMENT(S)

WEST VAN BUREN RI REPORT: 2-3

Conclusion:

RID is considering remedial alternatives that will utilize RID's impacted wells and existing pipelines and easements to design and operate a single, regional "pump and treat" system that could effectively address the groundwater contamination that currently impacts and/or threatens to impact RID wells. More significantly, if the necessary funding can be obtained for well field integration, the required water treatment facility(ies), and a separate delivery system for the treated water, RID is prepared to enter into consent decrees with settling parties that could eliminate liability for the very significant future long-term "pump and treat" operation and maintenance costs. Participation in the consent decree by ADEQ also could provide protection from any contribution claims from any non-settling potentially responsible party under Section 113(f)(2) of CERCLA. 42 U.S.C. § 9613(f)(2); and A.R.S. § 49-292(C).



4050 E. Cotton Center Blvd., Suite 73, Phoenix, AZ 85040

**DRAFT
REMEDIAL INVESTIGATION REPORT
West Van Buren Area WQARF Registry Site
Phoenix, Arizona**

Volume I

Terranext Project No. 03103154

Prepared For:

**Arizona Department of Environmental Quality
1110 West Washington
Phoenix, Arizona 85007**

October 2008

12. CoStar Corp/Data Packaging Corp, 425 S. 67th Ave – Investigated soil release at oil separator and at drywell where contaminated soil excavated to 25 feet below ground surface (bgs). Soil remediation confirmed and groundwater monitor wells requested by ADEQ in letter dated 9/9/93 but were never completed.
13. Grow Group, Inc. 4940 W. Jefferson St. – During a preliminary site assessment, soils were sampled and analyzed for pesticides, herbicides, PCBs, and petroleum hydrocarbons, ADEQ requested copies of report. Not sampled for WVBA COCs.
14. Hi-Tech Plating, Inc., 4313 W. Van Buren St. – PCE & TCE detected in drywell. Investigated drywell area but found no VOCs in soil or groundwater. No letter issued by ADEQ.
15. Jacquay's Equipment Co., 1219 S. 19th Ave. – Recommended for physical testing in Kleinfelder Phase I report but no record of testing in file. No letter from ADEQ.
16. Joe's Diesel Repair, 6316 W. Van Buren St. – TCA and TCE detected at concentrations slightly greater than the detection limits in soil sample collected during Phase I investigation but less than concentrations detected in background samples.
17. LaSalle Draperies, 710 W. Buchanan St. – PCE and TCE detected in soil gas but not soil samples. Tom Curry, former ADEQ project manager for WVBA, telephone record dated 7/30/92 indicated that additional sampling could result in issuing a no action letter.
18. Maricopa By-Products Inc., 3602 W. Elwood St. – TCA and TCE detected at concentrations slightly greater than the detection limits in soil sample collected during Phase I investigation but less than concentrations detected in background samples.
19. Owens-Corning Fiberglass Corp., 1880 W. Fillmore St. – Submitted preliminary site assessment report as part of questionnaire request response to ADEQ. ADEQ letter dated February 9, 1990 stated that the facility was not considered for further evaluations.
20. Penn Athletic, 306 S. 45th Ave – Conducted soil investigations associated with UST release which indicated that no COCs released. Preliminary assessment report by ADEQ 6/18/90 recommended no further action under CERCLA. ADEQ Voluntary Remediation Program issued a NFA letter dated 6/4/02.
21. Petco, Inc., W. Side of 67th Ave. N. of railroad – TCA and TCE detected at concentrations slightly greater than the detection limits in soil sample collected during Phase I investigation but less than concentrations detected in background samples.
22. Phoenix Vegetable Distribution, S. Side of Buckeye Rd. E. of 83rd Ave. – TCE detected at concentration slightly greater than the detection limit in soil sample collected during Phase I investigation but less than concentrations detected in background samples.
23. Phoenix Tank Farm, 51st Ave/Van Buren St. – Not under WQARF jurisdiction.

EXHIBIT 2



ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Fife Symington, Governor

Russell F. Rhoades, Director

July 10, 1996
REF: ICU96-758

Mr. Jerry Geering
Penn Racquet Sports
306 South 45th Avenue
Phoenix, Arizona 85043

RE: Penn Racquet Sports Facility, 306 South 45th Avenue, Phoenix
PCS# 1579-H; LUST File No. 0356.01

Dear Mr. Geering:

The Arizona Department of Environmental Quality has recently adopted new standards regarding the remediation of soils contaminated with petroleum. In an effort to insure proper closure of existing cases, the Solid Waste Section, Inspections and Compliance Unit (ICU), is reviewing all cases which involved the remediation of soils contaminated with petroleum. The ICU has completed its review of the above referenced file and has the following comments:

A letter from Richard Thielen, dated November 3, 1987, indicating that all soils contaminated with hydraulic fluid had been excavated and stored in "two 55 gallon drums". However, there was no evidence indicating that these soils were removed from the site.

A telephone call from you on July 9, 1996, indicated that the drummed soils were removed from the site for incineration prior to the start of your employment with Penn in 1988.

Based on the above documentation, the ICU considers this case to be closed and no additional environmental investigations, sampling, or remedial action will be required at this time. However, if future evidence comes forth which indicates the existence of contamination above regulatory levels, this case may be reopened.

If you have any questions, please call me at (602) 207-2368 or toll free in Arizona 1-800-234-5677 ext. 2368.

Sincerely,

A handwritten signature in cursive script, reading "Deborah A. Garron".

Deborah A. Garron
PCS Compliance
Solid Waste Inspections and Compliance Unit
Waste Programs Division



ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Fife Symington, Governor

Russell F. Rhoades, Director

UST Ref. #96-0037030
July 5, 1996

Mr. Jerry Geering
Penn Racquet Sports
306 South 45th Avenue
Phoenix, Arizona 85043

RE: CASE REFERRAL TO THE ADEQ SOLID WASTE SECTION
LUST File #0356.01
Facility ID #0-003656
Maricopa County
Penn Racquet Sports Facility
306 South 45th Avenue
Phoenix, Arizona 85043

Dear Mr. Geering:

The Arizona Department of Environmental Quality (ADEQ) Underground/Leaking Underground Storage Tank (UST/LUST) Section staff have reviewed the information contained within the referenced case file. Based on this review, it has been determined that this case contains information concerning a **release of hydraulic fluid from a hydraulic lift system.**

Based upon federal and/or State law excluding such systems and related releases, this case is not within the jurisdiction of Arizona's UST Section. As a result, this case is being transferred to the ADEQ Solid Waste Section for any follow-up action. If you have any questions about Solid Waste Section requirements or need further assistance, please contact Eric Lewis, Inspection & Compliance Unit, Solid Waste Section at (602) 207-4119.

This incident was discovered on or about October 23, 1987. The release information was reported to the ADEQ on October 22, 1987. This site had confirmed soil contamination due to the release of hydraulic fluid at this facility. The ADEQ Water Pollution Compliance Unit staff issued a case closure letter on November 6, 1987.

To obtain copies of any UST program case file information, contact UST file room staff at (602) 207-4345. The UST program will maintain jurisdiction of any regulated UST issues at this facility. This letter does not affect the status of any other ADEQ program or ADEQ UST Section case file. If you have any questions regarding this case referral, please contact me at (602) 207-4292.

Sincerely,

Quinn Thacker, RES
Environmental Program Specialist
UST Section Technical Support Unit
QRT:cd

cc: Sandy Vargas, AA II, UST/LUST Section Inspections & Compliance Unit
Eric Lewis, EPS, Solid Waste Section
Les Glascoe, UST/LUST Section SAF Administrator
Lisa Swisher, Peterson Consulting Limited Partnership
Chris Long, Manager, UST/LUST Section Financial Programs Unit

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*Contacted
Chris Conley 7/10*

3033 North Central Avenue, Phoenix, Arizona 85012, (602)207-2300

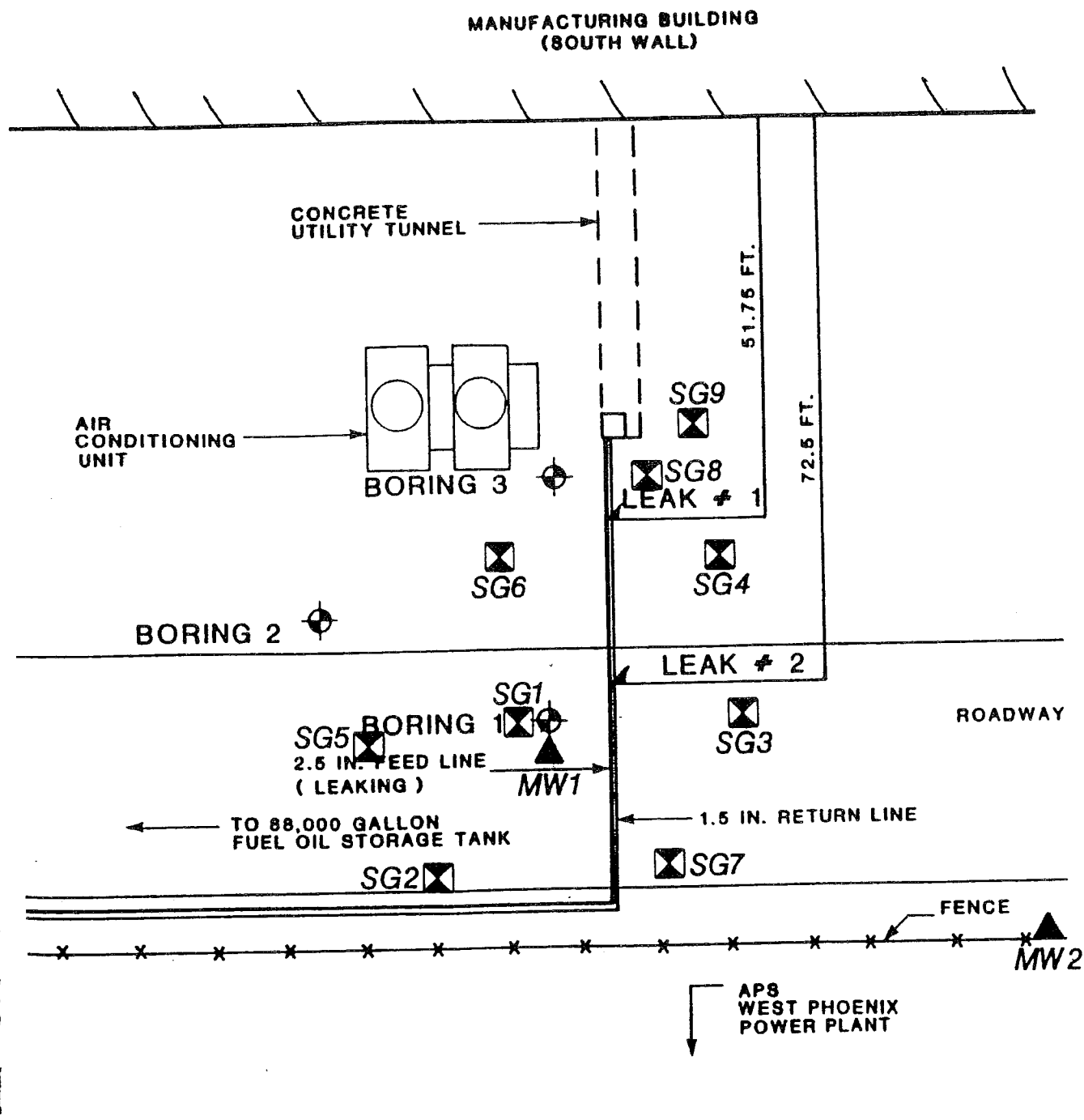
*Closure letter
sent by
Debra Garman
7/10/96.
207 2368*

EXHIBIT 3

PENN ATHLETIC PRODUCTS Environmental Site Assessment

SOIL GAS SURVEY

Figure 2



⊕ BORING LOCATION (DAMES & MOORE)

▲ MONITORING WELL LOCATION

⊗ SOIL GAS SURVEY LOCATION

REVIEWED
W. SHONERD, P.E.
PREPARED
SANTIAGO

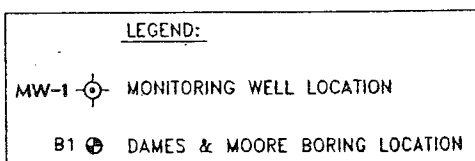
JOB NO. 2177J218

NOT TO SCALE

WESTERN TECHNOLOGIES INC.
The Quality People



Site Diagram



Reviewed: D. Pettigrew	Review Date: 7/6/92
Client: Penn Racquet Sports	Prepared: K. Eppley
Western Technologies Inc.	
Job No. 7172JC150	Figure: 2 of 5



ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Fife Symington, Governor

Russell F. Rhoades, Director

August 29, 1996

REF: ICU96-944

Mr. Gerald Geering, Director
Safety, Health & Environmental Engineering Services
Penn Racquet Sports
306 South 45th Avenue
Phoenix, Arizona 85043

RE: Penn Racquet Sports AST Facility, 306 South 45th Avenue, Phoenix
PCS# 1580-A; LUST File #4715.0268

Dear Mr. Geering:

The Arizona Department of Environmental Quality has recently adopted new standards regarding the remediation of soils contaminated with petroleum. In an effort to insure proper closure, the Solid Waste Section, Inspections and Compliance Unit (ICU) is reviewing all existing cases which involved the remediation of soils contaminated with petroleum. The ICU has completed its review of the closure report, dated August 28, 1996, and analytical sampling results for the above referenced facility. Results indicate levels for total petroleum hydrocarbons to be below residential levels pursuant to the *Interim Soil Remediation Standards*.

Based on the supporting documentation, the ICU considers this case to be closed and no additional environmental investigations, sampling, or remedial action will be required at this time. However, if future evidence comes forth which indicates the existence of contamination above regulatory levels, this case may be reopened.

Thank you for your submittal. If you have any questions, please call me at (602) 207-2368 or toll free in Arizona 1-800-234-5677 ext. 2368.

Sincerely,

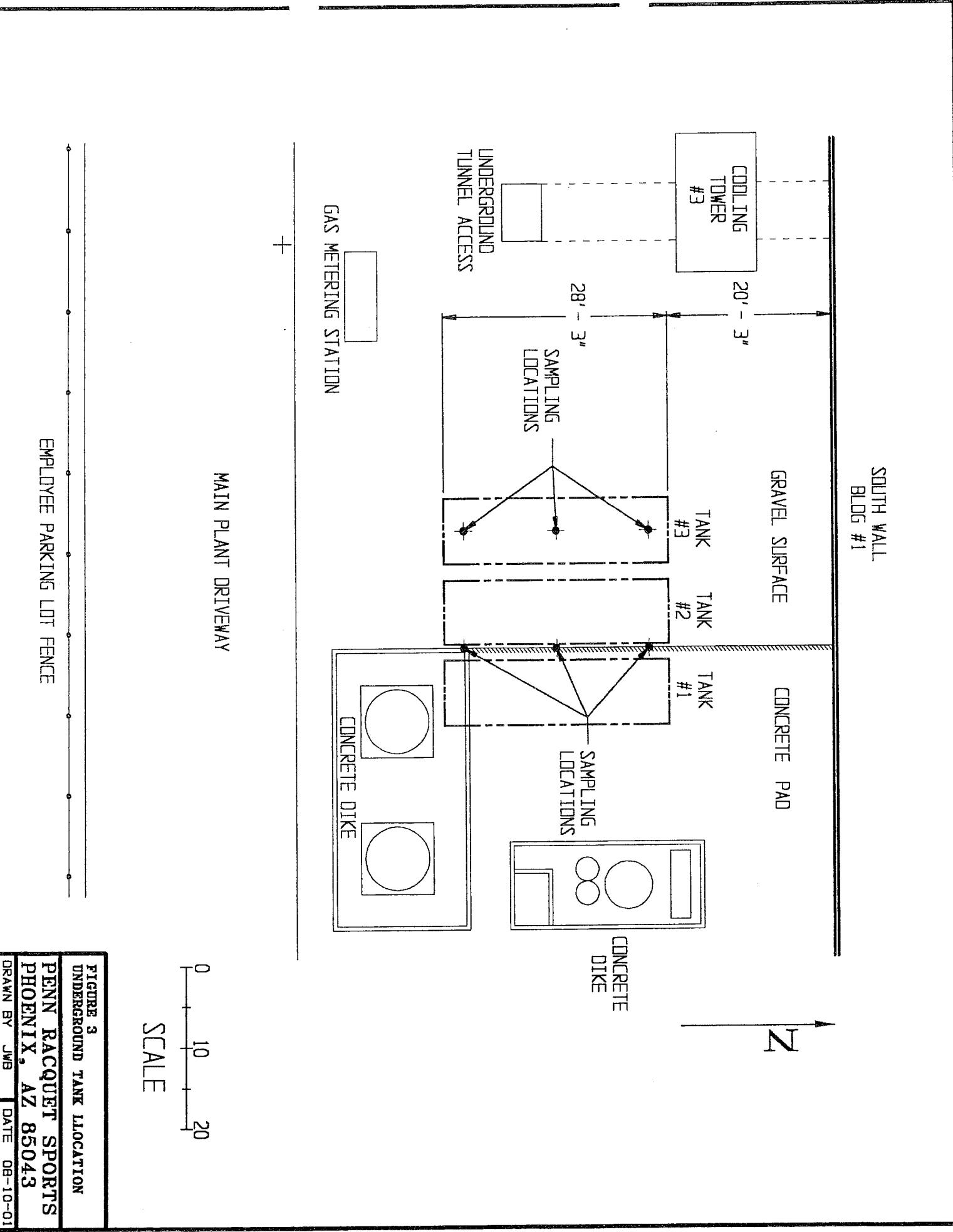
A handwritten signature in cursive script, reading "Deborah A. Garron".

Deborah A. Garron
PCS Compliance
Solid Waste Inspections and Compliance Unit
Waste Programs Division

DAG:dag

cc: Facility file

EXHIBIT 4





Jane Dee Hull
Governor

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

3033 North Central Avenue • Phoenix, Arizona 85012-2809
(602) 207-2300 • www.adeq.state.az.us



Jacqueline E. Schafer
Director

June 4, 2002

VSU:246

Mr. Wayne Bushnell, Manager
Environmental, Safety and Health
Penn Racquet Sports
306 South 45th Avenue
Phoenix, Arizona 85043

**RE: No Further Action Determination for Soil Only: Former Underground Storage Tank
Excavation Area, Penn Racquet Sports, 306 South 45th Avenue, Phoenix, Arizona.
Site Code: 501369-00.**

Dear Mr. Bushnell:

Pursuant to Arizona Revised Statute (A.R.S.) §49-181, the Arizona Department of Environmental Quality (ADEQ) grants Penn Racquet Sports' request for a No Further Action (NFA) determination for soil only at the former underground storage tank (UST) excavation (approximately 27 feet by 30 feet).

This NFA determination applies only to the soil portion of the former UST excavation area located south of the Office and Manufacturing Building No. 1, southeast of Cooling Tower No.3 and immediately to the west of the volatile organic compound recovery system. The location of the UST excavation area is shown in Figures 1 and 2 (attached), as identified in the request for a NFA determination to the ADEQ Voluntary Remediation Program. The Department's determination is based upon the submittals of Penn Racquet Sports. Information relating to the NFA request may be found in the ADEQ files for this applicant.

Analyses of all soil samples by U.S. EPA Method 8260 for benzene, toluene, ethylbenzene and xylenes (BTEX) modified for hexane (CAS No. 110-54-3), hydrocarbons (HC10 – 32) following Arizona Department of Health Services (ADHS) Method 8015 AZR1, and polynuclear aromatic hydrocarbons (PAHs) following U.S. EPA Method 8310 demonstrated that none of those chemical compounds were present above laboratory detection limits and, therefore, are not contaminants of concern at this site.

Pursuant to A.R.S. §49-181(G), this NFA determination means that no further action shall be taken by the Department to remediate or require remediation at the identified portion of the site except that the Department may rescind or amend this NFA determination and require remedial actions at this site pursuant to A.R.S. §49-181(F). The Department reserves the right to remediate or require remediation for future releases of contamination which occur after the effective date of this determination.

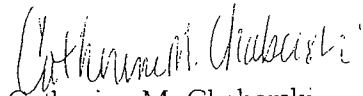
Mr. Wayne Bushnell

June 4, 2002

Page 2

Please note that the NFA determination does not address any other area of land, media or any other contaminants. Pursuant to A.R.S. §49-184, the Department reserves the right to recover penalties or to take any action authorized by law for any violation of A.R.S. Title 49.

Sincerely,



Catherine M. Chaberski

Manager, Voluntary Remediation Program

Waste Programs Division

c: Amanda Stone, Section Manager, Capacity Development Section
Juan M. Velasco, VRP Specialist