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State Water Resources Control Board

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Executive Office

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Arnold Schwarzenegger
Governor

JUL 22 2009

2009 JUL 27 P 2:

CERTIFIED MAIL

Mr. Tony Sullins and Mrs. Rita Sullins
Don-Sul Inc.
187 L Street North
Livermore, CA 94550

Dear Mr. and Mrs. Sullins:

PETITION OF DON-SUL INC. (USTCF CLAIM 389), 187 L STREET NORTH, LIVERMORE, CALIFORNIA: DISMISSAL
SWRCB/OCC FILE UST-257

After careful consideration, it is concluded that the petition in this matter fails to raise substantial issues that are appropriate for review by the State Water Resources Control Board (State Water Board). (See Cal. Code Regs., tit. 23, § 2814.4 subd. (a)(1); see also *People v. Barry* (1987) 194 Cal.App.3d 158, *Johnson v. State Water Resources Control Board (*2004) 123 Cal.App 4th 1107.) Accordingly, the petition is dismissed as of this date.

You have submitted a petition seeking review of the Division of Financial Assistance's (Division) Final Division Decision (FDD) dated March 5, 2007. The FDD determined that the Fund would reimburse 85 percent of the corrective action costs at your site. The FDD determined that you and your consultant Geological Technics Inc. (GTI) had not presented sufficiently compelling arguments to reverse prior Division decisions that concluded an 85 percent reimbursement level was appropriate. This petition lists a series of alternative bases for the Fund to increase reimbursement.

After reviewing the claim files, as well as your petition, supplemental materials received on January 3, 2008, and other documentation in the record, it is concluded that the FDD correctly determined that 85 percent of corrective action costs are due to eligible Underground Storage Tank (UST) releases. Fifteen percent of corrective action costs are determined to be ineligible for Fund reimbursement because a portion of the soil and groundwater contamination was the result of a fuel delivery error.

APPLICABLE LAW

The Barry Keene Underground Storage Cleanup Trust Fund Act of 1989 (Act) authorizes the State Water Board to administer a program to reimburse UST owners and operators for eligible

JUL 22 2009

costs incurred cleaning up contamination from petroleum USTs. (Health and Saf. Code, §§ 25299.10 - 25299.99.3.)[1]

In order to gain access to the Fund, specific statutory and regulatory requirements must be met. Only eligible claimants are entitled to reimbursement from the Fund. Fund regulations state, "only a current or former owner or operator of an underground storage tank or residential tank who has paid or will pay for the costs for which reimbursement from the Fund is requested may file a claim against the Fund." (Cal Code Regs., tit. 23, § 2810.1 subd.(a).) In addition, only unauthorized releases from eligible USTs are reimbursable. Fund regulations state, "an owner or operator of an underground storage tank or residential tank ... shall be entitled to reimbursement ... [if] ... there was an unauthorized release of petroleum from the underground storage tank or residential tank." (Cal Code Regs., tit. 23, § 2811 subd. (a)(1).)

Thus, a claimant must satisfy two basic criteria to be eligible for fund reimbursement. First, the claimant must establish that there is an eligible UST on site and second, that any petroleum contamination originated from the eligible UST. Merely establishing that the site contained an eligible UST is insufficient; the eligible UST must be the source of contamination.

FACTUAL BACKGROUND

The site was operated as a Mobil service station from 1951 until about 1968. Arrow Rentals (Arrow), the business operated by Don-Sul Inc., purchased the property in 1972. In 1972, three of the five reported USTs on site were removed after they failed integrity tests.[2] In 1984, a single 1,000 - gallon UST was installed along with an adjacent subsurface monitoring well.

In 1985, a fuel-truck delivery driver from Pitcock Petroleum (Pitcock) mistook the vapor monitoring well for the UST fill pipe and pumped an estimated 600 gallons of gasoline into the vapor monitoring well. The actions following the discharge are disputed. A 1991 signed declaration from the employee on duty at Arrow states that the driver called his supervisor on the truck radio to report that he had just "dropped 600 gallons of gas into the dirt." The driver was told to "get off the radio" and reportedly left shortly after making a call from Arrow's office phone. However, a representative for Pitcock later claimed that after the driver realized his mistake, he began to pump gas back out of the well and may have recovered as much as 300 gallons.

Multiple sources report that soon after the spill Mr. Sullins poured water from a garden hose into the well for one to two days. It appears that he may have been trying to flush the gasoline from the well. An October 1992 letter from Mobil Oil Corporation to the Sullins' attorney alleges that this action caused the gas to quickly spread into the groundwater plume causing both up gradient and down gradient contamination.

[1] All statutory references are to the California Health and Safety Code unless otherwise noted.

[2] The other two USTs passed integrity tests and remained in use until they were removed in 1986.

Between 1988 and 1992, Livermore Redevelopment Agency considered acquiring the property through condemnation proceedings and hired Woodward Clyde Consultants (WCC) to perform a series of site investigations. In 1989, WCC encountered detectable petroleum contamination in soil and groundwater at the Arrow site. On August 1, 1989, an Unauthorized Release/Contamination Site Report was submitted to the Alameda County Department of Environmental Health. This was the first recorded report of the Pitcock discharge to a regulatory agency.

In 1991, WCC prepared a site assessment report and concluded that approximately 85 percent of the soil contamination and 1 to 3 percent of the groundwater contamination came from piping leaks from Mobil USTs that were located on the site prior to 1972. Correspondingly, WCC concluded that 15 percent of the soil contamination, and 97 to 99 percent of the gasoline "floating on and dissolved in the groundwater" was due to the sudden discharge of gasoline into the monitoring well by the Pitcock driver in 1985. Additionally, based on forensic analysis, WCC concluded that the floating gasoline found in monitoring well W-1 about 40 feet downgradient from the location of the Pitcock discharge was from the 1985 incident. To explain the presence of free product 40 feet from the discharge location, WCC stated that the "addition of water from a hose ... for about 30 hours ... could easily have washed the gasoline from the area of the vapor monitoring well and moved it to its present location."

Fund Claim No. 389 was received by the Fund on January 13, 1992. A Letter of Commitment (LOC) was issued on October 4, 1993. On November 17, 1993, you reached a settlement with Pitcock and insurance companies for the 1985 Pitcock discharge.[3]

On July 22, 1994, the Fund Manager, relying on the 1991 WCC report, issued a "Final Staff Decision" letter determining that 15 percent of the total soil and groundwater remediation costs would be ineligible for reimbursement because they were attributable to the Pitcock release.

Between 1994 and 2006, intermittent site monitoring continued but no cleanup occurred. On March 1, 2006, the City of Livermore sent you a Notice and Demand for cleanup of the site under the Polanco Development Act.[4]

On April 3, 2006, nearly twelve years after the Fund Staff Decision was issued, GTI requested a Fund Manager Decision (FMD) on your behalf. Largely based on the use of arithmetic mean to estimate contaminant amounts, GTI requested that eligibility be increased to 96 percent. The FMD rejected GTI's analysis and its use of the arithmetic mean method to evaluate the data. The FMD affirmed that an 85 percent eligible allocation for soil and groundwater contamination was proper. You appealed the decision to the Deputy Director of the Division and a FDD was issued on March 5, 2007. The FDD also rejected the use of the arithmetic mean method to estimate contaminant amounts and determined that an 85 percent allocation was appropriate.

[3] After review of the settlement documents, the Fund determined that of the $112,500 settlement, you received twenty thousand dollars to settle the claim against Pitcock. According to your submissions, none of the settlement money was applied to the cleanup of the Pitcock spill. In any event, the corrective action costs relative to the Pitcock spill exceeds $20,000.

[4] Section 33459 et seq.

On April 3, 2007, the State Water Board received your request for review of the FDD. On July 3, 2007, the State Water Board received your request for a six month extension to submit supplemental information to your petition. The extension was granted and a supplemental petition was received on January 3, 2008.

On July 30, 2008, you formally petitioned Alameda County Health Care Services Agency (County) for site closure. By letter dated September 4, 2008, the County stated that it does not believe "the requisite level of drinking water quality will be attained within a reasonable time period at your site ... [as] highly elevated concentrations of petroleum hydrocarbons still remain in soil and groundwater beneath the site." The County denied the request for case closure.

To date, the Fund has reimbursed $334,213 in corrective action costs although no cleanup of the contamination has yet occurred.

DISCUSSION

In your petition, you raise a number of alternative arguments that you allege justify an adjustment in the percentage of eligible costs. Each of the assertions and the State Water Board's rationale for denying a reapportionment of costs will be discussed below.

Arguments that the Fund Should Reimburse 100 percent of Costs.

Your petition claims that the Fund considers Pitcock a "responsible party" despite the fact that all applicable agencies decided not to list Pitcock as a responsible party. With respect to the reimbursement of your claim, it is irrelevant if Pitcock is designated as a responsible party. It is undisputed that some of the contamination on the site is due to the discharge of gasoline into a vapor monitoring well. This was not a release from an eligible UST. Only the unauthorized release of petroleum from an underground storage tank or residential tank is eligible for Fund reimbursement. (Cal Code Regs., tit. 23, § 2811 subd. (a)(1).) The decision not to list Pitcock as a responsible party has no bearing on the percentage of your corrective action costs that are eligible for Fund reimbursement.

You also claim that the Fund should reimburse 100 percent of the corrective action costs because the Fund did not limit eligible costs to 85 percent when you submitted your first reimbursement request in 1993. The fact that the Fund may have reimbursed excess costs when it did not account for the Pitcock spill in the first reimbursement does not authorize the continued payment of ineligible costs. Despite your assertions, it is not within the discretion of the Fund to reimburse ineligible costs.

Additionally, your petition claims that you were misled by receiving a letter of commitment for $100,000 on October 15, 1993. You claim that when you received this letter "you had no idea" the Fund would later be paying only 85 percent of your claim. You allege that this, and other representations by Fund staff, led to an unfavorable settlement with Pitcock. First, the State Water Board had no role in your settlement with Pitcock and is not in a position to evaluate your

settlement terms and whether you received adequate compensation to address the Pitcock release. Second, Fund regulations clearly state that the issuance of a letter of commitment does not "guarantee that the costs claimed in an application are eligible or will be reimbursed by the Fund." (Cal Code Regs., tit. 23, §2812 subd.(a).) Finally, at this point, it is impossible to determine what Fund staff might have told you in 1992-1993 during the processing of your claim. Fund regulations in place at the time were clear; only unauthorized releases from USTs are eligible for reimbursement. At no time were Fund representatives authorized to expand the scope of coverage beyond that which Fund regulations allow.

Argument that the Fund Should Follow GTI's Recommendation and Reimburse 96 percent of Corrective Action Costs.

In the alternative to finding 100 percent of the costs eligible for reimbursement, your petition asks that the State Water Board find 96 percent of the corrective action costs eligible. Your request is largely based on a 2006 report submitted by GTI.

The FDD found the GTI report unpersuasive. First, to evaluate the magnitude of contamination on the site, GTI advocated the use of an arithmetic mean method. In its report, GTI divided soil layers into five-foot thick layers and averaged the data within each layer. Using this method, GTI estimated that a higher proportion of contamination on the site could be attributed to eligible UST piping leaks.

The FDD disagreed with the use of arithmetic mean to evaluate the data. The FDD determined that where data points differed by four orders of magnitude, geometric mean method was the more appropriate method for evaluating contaminant levels. The FDD concluded that "using a simple averaging of a few widely variable data points as an indicator of the overall contaminant mass ... is not an appropriate approach."

Your petition essentially restates GTI's arguments. You generally discuss contamination on the site without presenting any new evidence. You state, "[a]rithmetic mean taken for each 5-foot layer seems very legitimate since one would naturally expect a lateral decrease in concentration of contaminants from the source outward." Even if this were true, simple averaging of the data does not account for the significant variation in concentrations. The contaminant levels range from 5 mg/kg to 16,000 mg/kg in a relatively short area of coverage. Where contaminant values differ significantly both vertically and laterally, geometric mean is a more appropriate method to evaluate contamination levels. Arithmetic mean method assumes a linear correlation between data points and is appropriate where the variation in data is not significant.

Further, as was noted in the FDD, when GTI estimated relative contaminant amounts it ignored the highest level of soil contamination at 40 feet below surface in well W-1. This is significant because WCC concluded that the free product found in W-1 was entirely attributable to the Pitcock discharge. But when GTI calculated the magnitude of the Pitcock spill, it excluded the contaminated soil directly above the free product. GTI claimed that it excluded this data point due to commingling of pre-1985 releases with the 1985 discharge. This conclusion is unsupported. A forensic analysis of the lead content of the petroleum in W-1 showed that it is consistent with gasoline produced in 1985 and discharged into the vapor monitoring well by

Pitcock.[5] Thus, the soil contamination directly above this floating free product should have been attributed to the Pitcock release.

Based on the evidence submitted, the FDD determination that the Fund should reimburse 85 percent of the corrective action costs is reasonable and supported by the evidence, and your argument that eligible reimbursement costs should be increased to 96 percent is unconvincing.

Argument that Based on the Estimated Cleanup Time, the Fund Should Find 91.5 percent of Costs Eligible for Reimbursement.

In the alternative to adjusting eligibility to 96 percent, you allege that the Fund should reimburse 91.5 percent of corrective action costs because the 1994 Fund Staff Decision relied on an incorrect estimate of the time it would take to remediate the contamination.

Your petition argues that the Fund Staff Decision, which made the initial determination that 85 percent of corrective action costs were eligible, misinterpreted a 1994 WCC letter where WCC provided a time and cost estimate for cleaning up each contamination source. You allege that the Fund based its "entire decision to use 15% of the contamination as ineligible based solely on the number of months the UST Fund perceived WCC said it would take to remediate." You assert that the Fund used incorrect times, and if correct cleanup times for each source of contamination are used, the Pitcock contamination represents a smaller proportion of the total cost of remediation.

First, the 1994 WCC letter provided *estimates* of the time it would take, and costs that would be incurred cleaning up the site. WCC noted, "total project costs may vary because of the time to reach closure." As was also stated in the FDD, "many factors bear on the costs of corrective action, the lateral and vertical extent of the contamination, the nature of the subsurface conditions, the nature of the contaminant itself, and the selected method of cleanup ... " For purposes of this petition, WCC's 15-year old estimations of the time and costs involved in cleaning up the contamination are not relevant -- particularly since WCC is not involved in current remediation efforts on the site.

Second, based on the evidence WCC provided, the Fund Staff Decision arrived at a corrective cost allocation that was appropriate. Regardless of the cleanup time estimates that the Fund Staff Decision used, the Decision arrived at a corrective cost allocation that was consistent with WCC's estimates of eligible and ineligible contaminant volumes on the property.[6] The FDD affirmed the allocation, concluding that a comparison of relative volumes was an important parameter in designing a treatment system.

The Fund Staff Decision, FMD and FDD were consistent. All three decisions relied on the 1991 WCC report and its estimation of the relative contaminant plumes. The FDD found that the

[5] Woodward Clyde Consultants Report, *Soil and Groundwater Characterization Study*, June 12, 1991, page 22.

[6] The Fund Manager decided to apply an 85 percent reimbursement level to groundwater remediation as well soil remediation despite the fact that WCC concluded that a small percentage of the groundwater contamination was due to eligible releases. A lower percentage of reimbursement could have been justified if the relatively low contribution of eligible releases to groundwater contamination had been taken into account.

1991 WCC report offered "the best approximation of the soil and free product plumes circa 1991." Your petition does not present substantial evidence challenging the conclusions of the 1991 WCC report, nor do you offer an alternative conceptual model to evaluate site conditions.[7] Therefore, increasing eligibility to 91.5 percent is not appropriate.

Design and Installation Costs.

Your petition requests reimbursement of all design and installation costs regardless of whether the percentage of eligible costs is changed. You assert that these costs are not increased due to the Pitcock spill and paying "only a percentage of these costs can only be said to be punitive." As was previously noted, Fund regulations only allow for corrective action costs that are incurred due to the unauthorized release from an eligible UST. Because the Fund has determined that 15 percent of the contamination is due to the Pitcock discharge into the vapor monitoring well, the corrective action costs associated with cleaning up this contamination are not reimbursable — including any associated design and installation costs.

CONCLUSION

Based on a thorough review of the record, the WCC report, and your consultant's reports, it is determined that reimbursing 85 percent of corrective action costs is appropriate. The soil and groundwater contamination on the site is due to releases from historical USTs and piping, and from an approximate 600-gallon spill in 1985. The 1991 WCC report offers the best representation of conditions on the site. That report concluded that 85 percent of the soil contamination and 1-3 percent of the groundwater contamination was due to historical UST leaks. The remainder of the contamination is due to the 1985 Pitcock discharge. Accordingly, it is appropriate to limit reimbursement of your total corrective action costs to 85 percent.

The dismissal of this petition constitutes final agency action. (Section 25299.56 subd.(d).) If you have any questions regarding this matter, please contact Nathan Jacobsen, Staff Counsel in the Office of Chief Counsel at (916) 341-5181.

Sincerely,

Dorothy Rice

Dorothy Rice
Executive Director

cc: See next page

[7] It is worth noting that the Fund is reimbursing you for 85 percent of the corrective action costs to remediate groundwater contamination despite the fact that it appears Mr. Sullins exacerbated the problem by pouring large amounts of water into the contaminated well immediately after the spill. In these circumstances, the FDD determination that the Fund should reimburse 85 percent of the corrective action costs appears generous.

cc: Continued

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