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ENVIRONMENTAL PROTECTION

## State Water Resources Control Board

June 5, 2014

Mr. Gregory C. Brandt  
Port of Oakland  
c/o: Wendel, Rosen, Black & Dean, LLP  
1111 Broadway 24th Fl.  
Oakland, CA 94607

Dear Mr. Brandt:

UNDERGROUND STORAGE TANK CLEANUP FUND (FUND), FUND MANAGER  
DECISION (FMD) FOR ELIGIBILITY DETERMINATION: CLAIM NO. 017242; FOR SITE  
ADDRESS: 1195 MARITIME ST., OAKLAND

You requested an FMD on behalf of your client, the Port of Oakland (Port), for reconsideration of the Fund Staff Decision dated September 25, 2006. Fund Staff denied Claim No. 017242 because the Port did not comply with permitting requirements.

### Decision

After reviewing the request, supporting documents, and claim file, I am upholding the Staff Decision. The Port is ineligible for participation in the Fund because the Port failed to comply with the permit requirement in Section 25299.57(d)(4)(A) of the California Health & Safety Code (H&SC). The Port also does not meet the criteria for a waiver of the permit requirements for claims to the Fund that were filed on or after January 1, 1994, and before January 1, 2008.

### Background

The Port is a public entity that owns 5,000 acres of real property within the City of Oakland. Since 1927, the property has been used for industrial and commercial purposes. Both the Port and its tenants owned a large number of USTs on the property.

The site is in the marine terminals area of the Port located at 1195 Maritime, Oakland. Three USTs were installed at the site in 1979. It is unknown whether the Port or the tenant, Stevedoring Services of America (SSA), installed the USTs. SSA operated the USTs. In 1989, the Port reported a discharge from the diesel UST and completed an Underground Storage Tank Unauthorized Release Report (URF). According to the URF, the

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

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filing of the claim, April 26, 2002, must be applied to determine whether the Port is eligible for a waiver of the permit requirements.

At the time the Port filed a claim (April 26, 2002) Section 25299.57(d)(3)(B) of H&SC read, in part:

All claimants who file their claim on or after January 1, 1994, and all claimants who filed their claim prior to that date but are not eligible for a waiver of the permit requirement pursuant to board regulations in effect on the date of the filing of the claim, and who did not obtain or apply for any permit required by subdivision (a) of Section 25284 by January 1, 1990, shall be subject to subparagraph (A) regardless of the reason or reasons that the permit was not obtained or applied for. However, on and after January 1, 1994, the board may waive the provisions of subparagraph (A) as a condition for payment from the fund if the board finds all of the following:

- (i) The claimant was unaware of the permit requirement prior to January 1, 1990, and there was no intent to intentionally avoid the permit requirement or the fees associated with the permit....

In October 2004, the State Water Resources Control Board (State Water Board) issued an order interpreting Section 25299.57(d)(3) of H&SC. (*In the Matter of the Petition of Murray Kelsoe WQ 2004-0015-UST (Kelsoe Order).*) In the *Kelsoe Order*, the State Water Board found that Mr. Kelsoe had not complied with permit requirements because the USTs at issue had not been properly permitted at all times, beginning from when the local agency began issuing UST permits pursuant to Section 25284(a) of H&SC. The State Water Board also held that waivers of the permit requirement, authorized under Section 25299.57(d) (3)(B) of H&SC, may only be used to excuse permit non-compliance that occurred before January 1, 1990.

Mr. Kelsoe filed a petition for writ of mandate in Alameda County Superior Court (Superior Court) challenging the *Kelsoe Order*. After denied by the Superior Court, Mr. Kelsoe filed an appeal with the First District Court of Appeal (Court of Appeal). The Court of Appeal held that the State Water Board should have determined whether Mr. Kelsoe was entitled to a waiver of the permit requirement under Section 25299.57(d)(3)(B) of H&SC. (*Kelsoe v. State Water Resources Control Board* (2007) 153 Cal.App.4th 569, 581.) The Court of Appeal limited the applicability of its ruling to fact patterns similar to those in the *Kelsoe* case (i.e., claimants whose violations began before 1990 and continued beyond January 1, 1990, but who later paid thousands of dollars into the Fund over a period of substantial compliance). (*Id.* at p. 581, fn. 8.) The Court of Appeal reversed the trial court decision and remanded the matter for the limited purpose of determining whether Mr. Kelsoe satisfies the requirements for a waiver of the permit requirement.<sup>2</sup> (*Id.* at p. 581.)

<sup>2</sup> Following the Court of Appeal's decision, the Superior Court directed the State Water Board to partially vacate its *Kelsoe Order* for the limited purpose of determining whether Mr. Kelsoe satisfies the requirements for a waiver of the permit requirement. The Superior Court directed that this determination be made in a

Section 25299.57(d)(3)(B) of H&SC, effective on April 26, 2002, and as interpreted by the *Kelsoe Order*, except to the extent that the *Kelsoe Order* was superseded by the Court of Appeal's decision, in order to obtain a waiver of the permit requirements.

A permit waiver under Section 25299.57(d)(3) (B) of H&SC may be used to excuse permit non-compliance for permits required before January 1, 1990. With the exception of claimants who meet the Kelsoe fact pattern, a permit waiver under Section 25299.57(d)(3)(B) of H&SC cannot be used to excuse permit non-compliance after January 1, 1990. The Port obtained an interim permit in May 1988, but the Port did not maintain compliance with the permit requirements. With the exception of the six month interim permit period, the Port did not comply with the permit requirements until it properly removed the USTs in 1993. A permit waiver under Section 25299.57(d)(3)(B) of H&SC cannot be used to excuse permit non-compliance after January 1, 1990, unless the Port's situation meets the Kelsoe fact pattern (i.e., claimants whose violations began before 1990 and continued beyond January 1, 1990, but who later paid thousands of dollars into the Fund over a period of substantial compliance).

The Port's situation is different than Mr. Kelsoe's. Like Mr. Kelsoe, the Port's permit violations began before 1990 and continued beyond January 1, 1990. However, unlike Mr. Kelsoe, the Port did not have a period of substantial compliance with permitting requirements. Therefore, the Port is not eligible for a waiver of post-January 1, 1990, permit non-compliance under the *Kelsoe Order*.

#### Permit Waiver Requirements for Claims Submitted on or after January 1, 2008

As explained above, under the new statutes effective January 1, 2008, the Port did not comply with the UST permitting requirements pursuant to Section 25299.57(d)(4)(A) of H&SC. Therefore, the Port must meet the requirements for a permit waiver in order to be eligible for the Fund.

The Port obtained an interim permit in May 1988, but the Port did not maintain compliance with the permit requirements. With the exception of the six month interim permit period, the Port did not comply with the permit requirements until it properly removed the USTs in 1993. A permit waiver under Section 25299.57(d)(3)(B) of H&SC cannot be used to excuse the Port's permit non-compliance after January 1, 1990, unless the situation is comparable to the Kelsoe fact pattern. Unlike Mr. Kelsoe, the Port did not have a period of substantial compliance with permitting requirements. Therefore, the Port's situation is not similar to Mr. Kelsoe's.

The Port is not eligible to be considered for a permit waiver for post-January 1, 1990, permit non-compliance under former Section 25299.57(d)(3)(B) of H&SC and the *Kelsoe Order* and Claim No. 017242 is not eligible for the Fund.

Effective January 1, 2008, the requirements for a waiver of the permit requirement were amended by Chapter 282, Statutes 2007. The new requirements for a permit waiver are

Port of Oakland  
Claim No. 017242

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If you have any questions, please call Ms. Lisa Labrado at (916) 341-7361.

Sincerely,

A handwritten signature in blue ink that reads "Lisa Babcock for". The signature is written in a cursive style.

Lisa Babcock, P.G., C.E.G., Fund Manager  
Underground Storage Tank Cleanup Fund

cc: Ms. Donna Drogos  
Alameda County EHD  
1131 Harbor Bay Pkway, 2<sup>nd</sup> floor  
Alameda, CA 94502

Port of Oakland  
Claim No. 017242

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bcc USTCF claim file  
Diana Romero, DFA  
Lisa Labrado, DFA  
Judy Reid, DFA  
Julie Osborn, OCC  
Claim Review Unit, DFA