



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

## Division of Financial Assistance

1001 I Street • Sacramento, California 95814  
P.O. Box 944212 • Sacramento, California • 94244-2120  
(916) 341-5714 • FAX (916) 341-5806 • [www.waterboards.ca.gov/water\\_issues/programs/ustcf/](http://www.waterboards.ca.gov/water_issues/programs/ustcf/)



Arnold Schwarzenegger  
Governor

**FEB 26 2009**

Mr. Richard S. Cochran  
Richard S. Cochran et al  
P O Box 20327  
Oakland, CA 94620-0327

Dear Mr. Cochran:

UNDERGROUND STORAGE TANK (UST) CLEANUP FUND (FUND), FUND  
MANAGER DECISION (FMD) FOR ELIGIBILITY DETERMINATION:  
CLAIM NO. 018392; FOR SITE ADDRESS: 1049 9TH AVE, OAKLAND

By a letter dated June 5, 2006, you requested an FMD for reconsideration of the Fund Staff Decision dated April 17, 2006. Fund Staff denied the claim because of non-compliance with the UST permitting requirements in *Health and Safety Code* (H&SC) Section 25299.57(d)(3)(A)<sup>1</sup> and you did not meet the requirements for a permit waiver in H&SC Section 25299.57(d)(3)(B).

### Decision

Following my review of your letter, and the supporting documents in your file, I find that I must uphold the Fund Staff Decision that you are ineligible for participation in the Fund for the following reasons. You did not comply with the UST permitting requirements pursuant to H&SC Section 25299.57(d)(4)(A). You also do not meet the requirements for a permit waiver for claims to the Fund that were filed on or after January 1, 1994, and before January 1, 2008.

### Applicable Authority

The following sections cited are excerpted from the *Petroleum Underground Storage Tank Cleanup Fund Statutes*, H&SC, Division 20, Chapter 6.75 (Fund Statutes), or the *Petroleum Underground Storage Tank Cleanup Fund Regulations*, Title 23, Division 3, Chapter 18 of the *California Code of Regulations* (Fund Regulations).

<sup>1</sup> Effective January 1, 2008, H&SC Section 25299.57(d)(4)(A) clarified the permit requirement previously located in H&SC Section 25299.57(d)(3)(A).

**FEB 26 2009**

Effective January 1, 2008, H&SC Section 25299.57(d)(4) reads, in part:<sup>2</sup>

(A) Except as provided in subparagraphs (B) and (C), the claimant has complied with the permit requirements of Chapter 6.7 (commencing with Section 25280). A claimant shall obtain a permit required by subdivision (a) of Section 25284 for the underground storage tank that is the subject of the claim when the claimant becomes subject to subdivision (a) of Section 25284 or when the applicable local agency begins issuing permits pursuant to subdivision (a) of Section 25284, whichever occurs later.

(C) All claimants who file their claim on or after January 1, 2008, and who do not obtain a permit required by subdivision (a) of Section 25284 in accordance with subparagraph (A) or (B) may seek a waiver of the requirement to obtain a permit....

(E) All claimants who file a claim before January 1, 2008, and who are not eligible for a waiver of the permit requirements pursuant to applicable statutes or regulations in effect on the date of the filing of the claim may resubmit a new claim pursuant to subparagraph (C) on or after January 1, 2008....

You filed your claim before January 1, 2008. Therefore, pursuant to H&SC Section 25299.57(d)(4)(E), the applicable statutes or regulations in effect on the date of the filing of the claim, on April 11, 2005, must be applied to determine whether you are eligible for a permit waiver.

At the time that you filed a claim, on April 11, 2005, H&SC Section 25299.57(d)(3)(B) 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....

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<sup>2</sup> H&SC Section 25299.57(d)(4)(B), effective January 1, 2008, codifies the Fund's interpretation of H&SC Section 25299.57(d)(3)(A) as it existed before January 1, 2008.

FEB 26 2009

In October 2004, the State Water Resources Control Board (State Water Board) issued an order interpreting H&SC Section 25299.57(d)(3). (*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 permitting 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 H&SC Section 25284(a). The State Water Board also held that permit waivers authorized under H&SC Section 25299.57(d)(3)(B) 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 his petition for writ of mandate was denied by the Superior Court, Mr. Kelsoe filed an appeal with the First District Court of Appeal (Court of Appeal). On July 20, 2007, the Court of Appeal determined that the State Water Board should have determined whether Mr. Kelsoe was entitled to a permit waiver under H&SC Section 25299.57(d)(3)(B). The Court of Appeal modified the July 20, 2007, decision on August 17, 2007. (*Kelsoe v. State Water Resources Control Board* (2007) 153 Cal.App.4th 569, 581 [63 Cal.Rptr.3d 156].) In its August 17, 2007, decision, the Court of Appeal limited the applicability of its ruling in the *Kelsoe* matter to fact patterns similar to *Kelsoe* (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 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 permit waiver.

Following the modification of the Court of Appeal decision on August 17, 2007, the Superior Court directed the State Water Board to vacate its *Kelsoe Order* for the limited purpose of determining whether Mr. Kelsoe satisfies the requirements for a permit waiver. The Superior Court directed that this determination be made in a manner consistent with the holding of the Court of Appeal. In all other respects, the Superior Court denied Mr. Kelsoe's petition for writ of mandate.

Consistent with the July 20, 2007, Court of Appeal decision, as modified on August 17, 2007, the State Water Board issued State Water Board Order WQ 2007-0011 EXEC in December 2007 (*In the Matter of the Petition of Murray Kelsoe* WQ 2007-0011 EXEC), partially amending the *Kelsoe Order*.

#### Background

The site was previously operated as a Chevrolet dealership, under the name of Cochran and Celli Chevrolet. You have indicated the subject USTs were installed "sometime between 1930 and 1979."

FEB 26 2009

In 1979, the business was sold to Mr. Steve Simi. The USTs were operated between 1979 and 1983 under the name of Cochran and Celli Inc. However, after Mr. Simi vacated the site, apparently under an agreement with the new tenant, Mr. Simi continued to use the USTs.

On April 19, 1988, Alameda County Environmental Health Services (ACEHS) issued a six-month permit. Once the permit expired, there are no records of any permits for the USTs. In 1993, a UST Closure Plan was submitted to ACEHS. The USTs were removed under permit issued by the City of Oakland between 1993 and 1994.

On November 10, 1999, ACEHS required you to conduct a Preliminary Site Assessment to determine the extent of the soil and groundwater contamination resulting from the removal of the USTs.

On April 11, 2005, you applied to the Fund to receive reimbursement for the costs incurred for cleanup of the contamination from the USTs. Due to your non-compliance with the permit requirement your claim was denied.

#### Discussion

During your ownership of the USTs you contend that you did not intentionally avoid the permit requirement in order to access the Fund.

To access the Fund, you must be in compliance with the permit requirement of Chapter 6.75 of the H&SC or if the permit was not obtained, you must meet the criteria for a permit waiver.

According to your letter dated June 5, 2006, you state that neither the operator, Mr. Simi, or ACEHS made you aware of the duration of the permit that Mr. Simi, had obtained in 1987. On April 1988, ACEHS issued a six-month permit. As a tank owner, you are responsible for ensuring that all requirements have been met pertaining to the USTs.

In response to your contentions, I will address the compliance with the permit requirement, the permit waiver under the *Kelsoe Order* and how it applies to your situation, and the criteria for a permit waiver effective January 1, 2008.

#### A. Compliance With Permit Requirements

Pursuant to H&SC Section 25299.57(d)(4)(A), in order to be eligible to file a claim with the Fund, the claimant must show that:

...the claimant has complied with the permit requirements of Chapter 6.7 (commencing with Section 25280). A claimant shall obtain a permit required by

FEB 26 2009

subdivision (a) of Section 25284 for the underground storage tank that is the subject of the claim when the claimant becomes subject to subdivision (a) of Section 25284 or when the applicable local agency begins issuing permits pursuant to subdivision (a) of Section 25284, whichever occurs later.

You acquired the property sometime in 1979 and the USTs were present on the property at the time of the acquisition. The requirement for a UST owner to obtain a permit to own or operate a UST was adopted in the law effective January 1, 1984. (See H&SC Section 25284.) You became subject to the permit requirement in H&SC Section 25284 when the applicable local agency ACEHS began issuing permits in 1985. You did not comply with the permit requirements until a Closure Plan dated 1993 was submitted to ACEHS for approval to remove the USTs. Therefore, you do not meet the requirement in H&SC Section 25299.57(d)(4)(A). You must meet the requirements for a permit waiver in order to be eligible for the Fund.

#### B. Compliance With Permit Waiver Requirements

Pursuant to H&SC Section 25299.57(d)(4)(E), I must apply the applicable statutes or regulations in effect on the date of the filing of the claim received on April 11, 2005, to determine whether you are eligible for a permit waiver. You had to meet the requirements of H&SC Section 25299.57(d)(3)(B), as effective on April 11, 2005, and as interpreted by the *Kelsoe Order* in order to obtain a permit waiver.

A permit waiver under H&SC Section 25299.57(d)(3)(B) 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 H&SC Section 25299.57(d)(3)(B) cannot be used to excuse permit non-compliance after January 1, 1990. You did not comply with the permit requirements until December 1993 and July 1994 when you obtained removal permits. Therefore, a permit waiver under H&SC Section 25299.57(d)(3)(B) cannot be used to excuse permit non-compliance after January 1, 1990, unless your 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)

Like Mr. *Kelsoe*, your permit violations began before 1990 and continued beyond January 1, 1990. Unlike Mr. *Kelsoe*, however, you did not pay money into the Fund and you did not have a period of substantial compliance with permitting requirements. Therefore, you are not eligible for a waiver of post-January 1, 1990, permit non-compliance under the *Kelsoe Order*.

#### Summary

As explained above, under the new statutes effective January 1, 2008, you did not comply with the UST permitting requirements pursuant to



FEB 26 2009

H&SC Section 25299.57(d)(4)(A). Therefore, you must meet the requirements for a permit waiver in order to be eligible for the Fund.

You did not obtain a removal permit until December 1993, and July 1994. A permit waiver under H&SC Section 25299.57(d)(3)(B) cannot be used to excuse your permit non-compliance after January 1, 1990, unless the situation is comparable to the Kelsoe fact pattern. As stated above, your situation is not like Mr. Kelsoe. You did not pay money into the Fund and did not have a period of substantial compliance with permitting requirements. Therefore, your situation is not similar to Mr. Kelsoe's. You are not eligible to be considered for a permit waiver for post-January 1, 1990, permit non-compliance under H&SC Section 25299.57(d)(3)(B) and the *Kelsoe Order* thus, your claim is not eligible for the Fund.

Effective January 1, 2008, the requirements for a permit waiver were amended by Chapter 282, Statutes 2007. The new requirements for a permit waiver are applicable only for claims submitted to the Fund on or after January 1, 2008. I have enclosed the H&SC Section 25299.57(d)(4)(C) permit waiver form for your review. Please review the information on the enclosed permit waiver form and if you feel that your situation meets the new permit waiver requirements under H&SC Section 25299.57(d)(4)(C) you may re-apply to the Fund. The new application is located at [http://www.waterboards.ca.gov/water\\_issues/programs/ustcf](http://www.waterboards.ca.gov/water_issues/programs/ustcf).

Pursuant to H&SC Section 25299.57(d)(4)(D), claimants who qualify for a permit waiver under H&SC Section 25299.57(d)(4)(C) must pay a higher deductible on their claim, depending upon the date that the claimant complied with UST permitting requirements or closure requirements. Claimants who comply on or before December 22, 1998, must pay twice the amount of deductible that would otherwise apply to the claim, and claimants who comply after December 22, 1998, must pay a deductible that is four times the amount that would otherwise apply to the claim.

If you believe you meet the new permit waiver requirements under H&SC Section 25299.57(d)(4)(C), you must complete and submit a new application and the enclosed permit waiver form. Any previous applicable backup documentation submitted with this Claim No. 18392, will be incorporated into the new claim application; therefore duplication is not necessary, except for forms that require a current date/signature (e.g., updated financial responsibility documents). You also may be required to provide additional information requested by Fund staff.

#### Appeal Process

This represents an FMD in this matter. In accordance with Section 2814.1 of the Fund Regulations, if you are not in agreement with this FMD, you may request a Final Division Decision (FDD). The appeal must be received by the Deputy Director of the Division of Financial Assistance within 60 days of the date of this letter. If you do not

FEB 26 2009

request an FDD within those 60 days, this decision will become final and conclusive.  
The request should be sent to:

Ms. Barbara L. Evoy, Deputy Director   USTCF Claim No. 018392  
Division of Financial Assistance  
State Water Resources Control Board  
P.O. Box 944212  
Sacramento, CA 94244-2120

The request for an FDD must include, at a minimum: (1) a statement describing how the claimant is damaged by this FMD; (2) a description of the remedy or outcome desired; and (3) an explanation and supporting documentation of why the claimant believes the action or this FMD is erroneous, inappropriate, or improper.

If you have any questions, please call Ms. Shari Knieriem at (916) 341-5714.

Sincerely,



Ronald M. Duff, P.E., Fund Manager  
Underground Storage Tank Cleanup Fund

Enclosure

cc: Ms. Donna Drogos  
Alameda County EHD  
1131 Harbor Bay Pkway, 2nd Fl.  
Alameda, CA 94502-6577

