

2012



# State Water Resources Control Board



## Division of Financial Assistance

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Linda S. Adams  
Secretary for

Arnold Schwarzenegger  
Governor

Environmental Protection  
**MAY 08 2010**

Alameda County

**MAY 10 2010**

Environmental Health

Mr. Edward E. Martins  
A Professional Law Corporation  
1164 A Street  
Hayward, CA 94541

Dear Mr. Martins:

UNDERGROUND STORAGE TANK (UST) CLEANUP FUND (FUND), FUND  
MANAGER DECISION (FMD) FOR ELIGIBILITY DETERMINATION:  
CLAIM NO. 018757; FOR SITE ADDRESS: 16301 14TH ST E, SAN LEANDRO

By a letter dated November 17, 2008, you requested an FMD on behalf of your client, Estate of John M. Holland Sr. (Estate), claimant to the Fund for reconsideration of the Fund Staff Decision dated February 14, 2007. Fund Staff denied the claim because of non-compliance with the UST permitting requirements in the *Petroleum Underground Storage Tank Cleanup Fund Statutes, Health and Safety Code (H&SC) Section 25299.57(d)(3)(A)*<sup>1</sup> and the Estate 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, supporting documents, and the Estate's claim file for Claim No. 18757, I find that I must uphold the Fund Staff Decision that this claim remains ineligible for participation in the Fund for the following reasons. The Estate failed to comply with the permit requirements in H&SC Section 25299.57(d)(4)(A). The Estate also does not meet the requirements 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.

### Applicable Authority

The following sections are excerpted from the H&SC, Division 20, Chapter 6.75.

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).

<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).

<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.

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....

The Estate filed Claim No. 18757 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, June 12, 2006, must be applied to determine whether the Estate is eligible for a waiver of the permit requirement.

At the time that the Estate filed a claim, June 12, 2006, 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....

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 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 H&SC Section 25284(a). The

State Water Board also held that waivers of the permit requirement authorized under H&SC Section 25299.57(d)(3)(B) may only be used to excuse permit noncompliance 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). 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 H&SC Section 25299.57 (d)(3)(B). (*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>3</sup> (*Id.* at p. 581.)

#### Background

The subject site is approximately 3.5 acres and was historically operated as a bulk fuel storage and retail facility from the early 1960s to mid 1980s. The recent past usage of the site appears to have been for an automotive repair facility and as a storage area for used vehicles. The site is located to the west-southwest of the intersection of 14<sup>th</sup> Street and 163<sup>rd</sup> Avenue in San Leandro. Surrounding areas in the vicinity of the site comprises of mixed commercial and residential properties. Pertinent site features included several building structures and a warehouse and parking area for used vehicles. At this point in time, there were eight USTs - three 10,000-gallon gasoline, two 5,000-gallon kerosene, one 5,000-gallon and one 6,000-gallon diesel, and one 12,000-gallon Stoddard solvent and twenty aboveground storage tanks (ASTs).

In a letter dated May 24, 1989, Alameda County Environmental Health (ACEH) informed the Estate they had conducted a site inspection on April 21, 1989. During the inspection, four split soil samples were taken above two of the claimant's diesel USTs (5,000 and 6,000 gallon). Diesel was detected in the soil from both USTs with high concentrations of contamination. In addition, ACEH made the Estate aware that the UST's were not permitted and were in violation of the H&SC Section 25284(a). ACEH required the Estate to prepare a plan of correction which included registering the USTs within 30 days of the receipt of their letter.

<sup>3</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 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.

In 1987, Mr. Holland passed away. Mr. Holland's daughter, Ms. Ann Marie Holland Tiers, was appointed Executor of his Will. According to documents in the file, Ms. Holland Tiers did not know of the permit requirements until ACEH's letter dated May 24, 1989, informing her of the permit requirement. On February 20, 1990, the Estate completed the State of California Form A & B to permit the eight USTs. There is no additional documentation to support any further permit compliance.

A site investigation completed in September 1990 by Crosby and Overton detected contamination in both the shallow and deeper soils near USTs located in the immediate vicinity of ASTs on the southwest corner of the property. Soil samples collected near the fill port detected significantly higher contamination at shallow depths. Crosby and Overton in their investigation report dated November 27, 1990, indicated significant visible surface staining and contamination that was probably attributable to historical product overfills. Additionally, the lack of a concrete pad above the UST may have caused migration of spilled hydrocarbon to subsurface. One of the UST system failures may have also contributed to the contamination. On December 4, 1990, ACEH requested additional investigative work at the site.

Records show that on November 14, 1995, Compliance & Closure Inc., (CCI) on behalf of Ms. Barbara Holland<sup>4</sup> prepared a Work Plan for Preliminary Site Assessment for the subject site. ACEH approved the Work Plan in December 1995, and CCI began field-work in February 1996.

In April 1996, CCI completed installation of three wells (MW-1 to MW-3) that detected low to moderate levels of petroleum hydrocarbon soil contamination. However, gasoline, diesel and heavy oil hydrocarbon contamination in groundwater was significantly higher.

On September 9, 1998, ACEH observed the removal of the USTs. After the removal of the USTs, contamination was present. As stated above, ACEH required additional site investigation.

On June 12, 2006, the Estate submitted a claim application to the Fund. In a letter dated February 14, 2007, the claim was found ineligible for placement on the Priority List.

#### Discussion

In your request for a waiver of the permit requirement, you contend that the Holland business was properly permitted for the period of its operation. The documentation

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<sup>4</sup> Ms. Barbara Holland has agreed to contract for the removal of the USTs that are on parcels of property in which she has a 50 percent interest; and she will also pay 50 percent of the excavation costs.

submitted to support Holland's business compliance is dated prior to the UST law, which went into effect January 1, 1984. After the law became effective in 1984, the Holland business became subject to the permit requirement in H&SC Section 25284. At that time, the authority for issuing UST permits was under ACEH.

In 1990, after the Estate completed an application for UST permits, you state that the USTs were emptied and the facility no longer sold fuel. Although the facility no longer sold fuel, the Estate was still under the requirements to obtain UST permits or comply with the UST closure requirements if the USTs were not in operation. The only viable documentation submitted with the claim application referencing the Holland businesses permit compliance was the application for a new permit dated in 1990, and the application for a removal permit dated in 1998. Because there are no permit records at ACEH, the Estate cannot confirm that they maintained permit compliance from 1990 until the USTs were removed in 1998.

Payment of UST storage maintenance fees is a Fund requirement pursuant to H&SC Section 25299.57(d)(6). Collection of the fee began January 1, 1991. In order to access the Fund under the *Kelsoe Order*, claimants are required to provide documentation that thousands of dollars in UST storage fees have been paid. In the Estate's case, the USTs were emptied and taken out of service prior to 1991. Therefore, the Estate would not have been required to pay the storage maintenance fees and does not meet the criteria under the *Kelsoe Order*.

The Fund's Technical Staff reviewed the historical releases at the site. Based on the investigation reports available on ACEH website and Geotracker, the site has several sources of releases and contaminants. Among the areas impacted by surface spills, the vehicle parking area located southeast in the vicinity of borings B-2, SB-12, B-7 and SB-11, appeared to have localized and significant shallow contamination. As a result of the site's activities as a bulk fuel storage and retail facility, auto maintenance facility, and used-car lot, there are several areas of localized surface spills or shallow contamination that includes light and heavy petroleum hydrocarbons, and solvents. The primary areas of subsurface soil and groundwater contamination are located in the UST locations and its vicinity to the West. Contamination in the AST locations appeared to be shallow and limited, and would not be eligible for reimbursement. Based on the reviewed technical documentation, it appears that unauthorized petroleum hydrocarbon releases had occurred from the USTs and are likely to be over 51 percent of the contamination at the site.

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### 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 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.

The Estate acquired the site in the early 1950's. The requirement for a UST owner to obtain a permit to own or operate a UST became effective January 1, 1984. (See H&SC Section 25284.) The Estate became subject to the permit requirement in H&SC Section 25284 when the applicable local agency, ACEH, began issuing permits in 1985. The Estate applied for a permit in 1990 but could not support maintenance of the permits through 1998. The Estate did not comply with the permit requirement until September 9, 1998, when the Estate properly removed the USTs. Therefore, the Estate does not meet the requirement in H&SC Section 25299.57(d)(4)(A). The Estate must meet the requirements for a waiver of the permit requirements 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 June 12, 2006, to determine whether the Estate is eligible for a waiver of the permit requirements. The Estate had to meet the requirements of former H&SC Section 25299.57(d)(3)(B), as effective on June 12, 2006, 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 requirement.

A permit waiver under former 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 former H&SC Section 25299.57(d)(3)(B) cannot be used to excuse permit non-compliance after January 1, 1990. The Estate remained out of compliance with the permitting requirements until September 9, 1998, when the Estate properly removed the USTs. Therefore, a permit waiver under former H&SC Section 25299.57(d)(3)(B) cannot be used to excuse permit non-compliance after January 1, 1990, unless the Estate'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).

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Like Mr. Kelsoe, the Estate's permit violations began before 1990 and continued beyond January 1, 1990. Unlike Mr. Kelsoe, however, the Estate did not pay money into the Fund and the Estate did not have a period of substantial compliance with permitting requirements. Therefore, the Estate is 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, the Estate did not comply with the permitting requirements pursuant to H&SC Section 25299.57(d)(4)(A). Therefore, the Estate must meet the requirements for a waiver of the permit requirement in order to be eligible for the Fund.

The Estate remained out of compliance with the permit requirements until September 9, 1998, when they properly removed the USTs. A permit waiver under former H&SC Section 25299.57(d)(3)(B) cannot be used to excuse the Estate's permit non-compliance after January 1, 1990, unless the situation is comparable to the Kelsoe fact pattern. Unlike Mr. Kelsoe, the Estate did not pay money into the Fund and did not have a period of substantial compliance with permitting requirements. Therefore, the situation is not similar to Mr. Kelsoe's. The Estate is not eligible to be considered for a permit waiver for post-January 1, 1990, permit non-compliance under former H&SC Section 25299.57(d)(3)(B) and the *Kelsoe Order*, and Claim No. 18757 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 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 requirements for a waiver of the permit requirement under H&SC Section 25299.57(d)(4)(C) you may re-apply to the Fund. It appears the Estate is not eligible for the permit waiver based on current information, but if the Estate re-applies, the Fund will make the final determination. The new application is located at: [http://www.waterboards.ca.gov/water issues/programs/ustcf](http://www.waterboards.ca.gov/water%20issues/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.

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Estate Of John M. Holland Sr.  
Claim No. 18757

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If you believe you meet the new requirements for a waiver of the permit requirement 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. 18757, 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

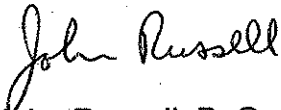
This represents an FMD in this matter. In accordance with Section 2814.1 of the Fund Regulations, if you are not in agreement with this FMD, you may request a Final Division Decision (FDD). The appeal must be received by the Deputy Director of the Division of Financial Assistance within 60 days of the date of this letter. If you do not 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. 18757  
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,



John Russell, P. G., Fund Manager  
Underground Storage Tank Cleanup Fund

Enclosures

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

Ms. Ann Marie Holland Tiers  
Estate of John M. Holland Sr.  
1498 Hamrick Lane  
Hayward, CA 94544