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FAX
LAW OFFICES OF
HALEY, PURCHIO, SAKAI & SMITH
22320 Foothill Blvd. Suite 620
Hayward, CA 94541
Telephone: (510) 538-6400
Facsimile: (510) 538-0150

COPY

DATE: Thursday, May 06, 2004

TO: Meling Tong FAX: (510) 337-9135
Erio Lebi

FROM: John K. "Jack" Smith, Esq.
Haley, Purchio, Sakai & Smith

NUMBER OF PAGES, INCLUDING THE COVER PAGE: 9
Please call (510) 538-6400 if there are any errors in this transmission

Please see attached...



State Water Resources Control Board



Terry Tamminen
Secretary for
Environmental
Protection

Division of Financial Assistance
1001 I Street - Sacramento, California 95814
P.O. Box 94212 - Sacramento, California - 94244-2120
(916) 341-5632 • FAX (916) 341-5806 • www.swrcb.ca.gov/cwphome/ustwf

Arnold Schwarzenegger
Governor

CERTIFIED MAIL: 7099 3220 0000 1879 9671

MAR 22 2004

Mr. Morey Greenstein
Gordon E. Oliver Trust
39159 Paseo Padre Pkwy. #315
Freemont, CA 94538

*510-537-9135
Melting TONG.
Dino LeBl*

Dear Mr. Greenstein:

UNDERGROUND STORAGE TANK (UST) CLEANUP FUND (FUND); FINAL DIVISION DECISION: CLAIM NUMBER 16353; SITE ADDRESS: 4150 POINT EDEN WAY, HAYWARD, CA

This is in response to your January 9, 2004, letter requesting that I review a December 10, 2003, Fund Manager Decision finding the sum of \$404, 994.70 to be ineligible for reimbursement in the above claim. Fund staff has previously reimbursed \$114, 047.40 for the preparation of workplans, a minor site investigation and the excavation, treatment and disposal of 3,101 tons [approximately 2,200 cubic yards (YD³)] of soil. The \$404, 994.70 in question is for costs associated with the later removal, treatment and disposal of an additional 5,700 YD³ of soil and approximately 300,000 gallons of water. These costs were determined to be ineligible for reimbursement for the following reasons:

- Other ineligible sources of contamination exist at the site.
- The work was not directed by the regulatory agency.
- The work was not in compliance with UST cleanup regulations.
- The work was not reasonable or necessary.

I have reviewed your letter and attachments and the supporting documentation contained in your claim file. Based on my review, I find that I must support the Fund Manager decision that the costs in question are not eligible for reimbursement. I am incorporating the Fund Manager Decision into this decision, as it provides a comprehensive discussion of the issues. A copy of that letter is enclosed for reference.

After reading your letter and reviewing the documents in the file, I feel it is necessary to respond to several of your points. First, you have stated that the Oliver Trust has provided all of the documents that Fund staff has requested. I respectfully disagree. The Fund staff has repeatedly requested that you or your consultant provide a map or figure showing the vertical and horizontal extent of the excavation with reference to the USTs and other site features; a map or figure showing where, and at what depth, soil samples were collected to determine that the soil was contaminated, a table of laboratory data to support the conclusion that excavated soil was actually contaminated and any reports completed that document the work. Such information is routinely generated for projects of this magnitude, and it would be unreasonable to authorize a reimbursement of the amount in question without any supporting information.

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To date we have only received copies of a few loose figures and tables that appear to be out of context and raise as many questions as they answer. For example, the latest reimbursement request submitted for this claim (Reimbursement Request No. 3) includes a series of figures entitled "Boring location map with soil analytical results," with hand written dates, showing two areas of excavation and analytical data from samples taken in the vicinity of the excavations. However there is insufficient information provided to clearly establish where these excavation sites are in relation to the USTs, the train barn or other features on the property. Nonetheless, my review of these figures relative to other available information in the file leads me to conclude that neither of the depicted areas of excavation is in the vicinity of the former USTs. Therefore, I must conclude that this information supports the decision that the costs in question are not eligible. Finally, I note that the above referenced figure is labeled as having been from a report prepared by "Aqua Science Engineers." We have not been provided with a full copy of that report.

There is also the issue that the claim was accepted on the basis of there being two USTs at the site, both storing diesel. However, the limited data available clearly indicate that the principal chemical of concern at this site is gasoline. This is further supported by the figures referenced in the above paragraph. You suggest that the smaller tank may have stored gasoline because of the gasoline found at nearby hand auger locations, but that the 100-gallon tank was in such a state of decay that it is not known for sure what was stored in that tank. I find it unlikely that this tank, which had obviously not been used for many years, would reasonably be the source of the widespread gasoline contamination at this site.

You also state that the contamination was in sand lenses and was spread via these sand lenses, but no supporting documentation, such as soil boring logs, has been provided to show the presence, thickness or lateral extent of any sand lenses or that there was actually contamination in such sand lenses. Logs from the four hand-auger borings that were performed immediately adjacent to the USTs in 1998, prior to the soil excavations, show the subsurface lithology to be composed predominantly of clay, silty clay and sandy clay. The few thin layers that were described as sand were identified as silty to clayey and were described as not yielding water. Based on the description of the soil, I must conclude that this material would not convey contamination away from the immediate vicinity of the USTs. You also contend that the contamination was present from 6 to 12-14 feet below land surface, which supports the position that the petroleum contamination originated from an underground tank. Without a full understanding of the lateral and vertical distribution of petroleum contamination at this property I cannot fairly assess the validity of this claim, and as previously stated, other information strongly suggests the tanks were not the source of the gasoline.

It appears to me that the lack of supporting documentation is largely the result of not complying with the UST cleanup regulations, as Mr. Patton has stated. If a systematic investigation had been performed, as repeatedly requested by the regulatory agencies, the nature and extent of the contamination could have been determined and the need and options for cost-effective cleanup could have been evaluated. However, the soil was removed without first delineating the extent

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of the contamination or collecting sufficient samples to support that the soil was contaminated and needed removal.

You also state that the City of Hayward and the Alameda County Department of Environmental Health demanded that the soil excavation and groundwater extraction project be carried out. The documentation you have provided to support this statement, a series of letters from the regulatory agencies, does not support this conclusion. These letters indicate approval of contamination source removal, but also discuss the need for additional site assessment. In the original project proposal in 1998, your consultant estimated that the amount of contaminated soil was approximately 300 to 600 YD³. The Fund has reimbursed costs associated with this work, and in fact paid for three to six times the original estimate. I find no documentation from either regulatory agency directing you to perform any remediation beyond the removal of the contaminated soil immediately adjacent to the USTs (the contaminated source). I again must conclude that the major soil excavation and groundwater extraction project was not directed.

In conclusion, I agree with Mr. Patton that the costs in question, which are related to the latter soil excavation and groundwater extraction project at the site, are not reasonable or necessary corrective action costs, and are ineligible for reimbursement. This work was not directed, was not consistent with state UST cleanup regulations, and was not related to the USTs at the site. There was no systematic investigation performed to determine the nature and extent of the contamination, to aid in the establishment of appropriate cleanup goals by the regulatory agencies, or to allow for the evaluation of the most cost effective options for attaining those goals prior to implementing the extensive soil excavation. There is also no information to reasonably support that any petroleum pollution that may have been present actually originated from the USTs at the site, and available information supports a finding to the contrary. I also concur with Mr. Patton that the \$114,047.40 previously reimbursed to you for work performed at this site, including the earlier excavation, treatment and disposal of approximately 2,200 YD³ of soil, adequately covers the reasonable eligible costs for removal of any source material in the vicinity of the USTs.

This represents a Final Division Decision. If you disagree with this decision, you may file a petition for review by the SWRCB. The petition must be received by the SWRCB within thirty (30) days from the date of the Final Division Decision, as provided in Title 23, Chapter 18, Article 5 of the California Code of Regulations. Your petition must be sent to Mr. Arthur G. Baggett, Jr., Chairman of the SWRCB, with copies to Mr. Craig M. Wilson, Chief Counsel, and Ms. Barbara L. Evoy, Chief of the Division of Financial Assistance, at the following address:

State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

A petition to the SWRCB must include, at a minimum: (1) the name and address of the petitioner; (2) a copy of the Final Division Decision that the SWRCB is requested to review; (3)

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an explanation why the petitioner believes this Final Division Decision is erroneous, inappropriate, or improper; (4) a statement describing how the petitioner is damaged by the Final Division Decision; and (5) a description of the remedy or outcome desired.

If the SWRCB does not receive a petition for review within thirty (30) days from the date of this letter, this Final Division Decision becomes final and conclusive.

If you have any further questions, please call me at (916) 341-5632, or if you have questions specific to your claim please call Mr. Bob Trommer at (916) 341-5684.

Sincerely,



Barbara L. Evoy, Chief
Division of Financial Assistance

Enclosure

sent By: Greenstein, Rogoff, Olsen; 510 797 1791;

Mar-23-03 17;

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Terry Tamminen
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) 341-3661 FAX (916) 341-3906 www.swrcb.ca.gov/swphome/uscf



Arnold Schwarzenegger
Governor

December 10, 2003

Mr. Jeremiah Hallisey
Hallisey and Johnson
300 Montgomery Street, Suite 538
San Francisco, CA 94104

Dear Mr. Hallisey:

UNDERGROUND STORAGE TANK (UST) CLEANUP FUND (FUND); FUND MANAGER DECISION CONCERNING INELIGIBLE COSTS: CLAIM NUMBER 16353; SITE ADDRESS: 4150 POINT EDEN WAY, HAYWARD, CA

This letter is in response to your October 24, 2003, inquiry to Mr. Arthur Baggett, Chairman of the State Water Resources Control Board, regarding the above claim. Mr. Baggett has referred the matter to me for review and response. After reviewing this claim, I have decided to issue this response in the form of a Fund Manager Decision, as authorized under Section 2814(d) of the Cleanup Fund Regulations¹.

The issue at hand is the decision by Fund staff to withhold payment of certain costs associated with the soil excavation project at the above site. A total amount of \$403,994.70 was placed in our "pending" category by Fund staff on three separate occasions awaiting submittal of supporting documentation of these costs. Specifically, Fund staff has requested that the following be provided:

- A map or figure showing the vertical and horizontal extent of the excavation, with reference to the USTs and other site features.
- A map or figure showing where, and at what depth, soil samples were collected within the soil excavation.
- A table showing the results of soil sample analysis by pollutant.
- Copies of all related correspondence to and from both the City of Hayward Fire Department (HFD) and the Alameda County Environmental Health Department (ACEHD).
- Copies of all technical reports and workplans, including all maps, figures and tables.

Fund staff requested this information to evaluate whether the work was eligible for reimbursement.

¹ All references are to the Petroleum UST Cleanup Fund Regulations, Division 3, Title 23, Chapter 18, Cal. Code of Regulations.

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Absent the requested information, I have reviewed all the available documentation in the file for the above claim. Based on my review I find that the total amount of \$403,944.70 is ineligible for reimbursement from the Fund. The basis for my decision is:

1. The pollution appears to have come from ineligible sources.
2. The work was neither directed nor approved by the HFD or the ACBHD, the local regulatory agencies of jurisdiction.
3. The work was not in compliance with UST cleanup regulations, and
4. The work was unreasonable and unnecessary.

1. Ineligible sources

The only eligible source of petroleum contamination at your site is the two USTs (one 500-gallon and one 100-gallon) that were buried in the elevated soil dike located adjacent to the rinsing pond. According to representatives of the claimant, these tanks formerly stored diesel fuel, and plant operations included the dispensing of diesel fuel. The claim application states that the tanks contained diesel fuel. This would also be consistent with the fact that the USTs were located adjacent the locomotive storage shed, since the locomotive would have used diesel fuel. However, review of the limited laboratory data provided to the Fund indicated that the primary pollutant addressed during the soil excavation was gasoline.

The ineligible sources of petroleum contamination include but are not limited to:

- The locomotive storage shed main room area. An inspection report by the Hayward Fire Department Hazardous Materials Office dated April 21, 1999 noted petroleum staining on the floor in the area where the salt harvester had been historically parked.
- The locomotive storage shed service area. The inspection report stated that this area had a wooden floor that was stained with oils and paints.
- The drum storage area adjacent to the locomotive storage area. The inspection report noted visibly stained soil in this area.
- Other pollution sources associated with the operation of this facility since the early 1900s.

2. The work was not directed

The Fund's authority to reimburse claimants is subject to a number of conditions specified in Chapter 6.75 of the California Health and Safety Code (H&SC) and the

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Cleanup Fund regulations (Chapter 18 of Title 23 Cal. Code of Regulations.) Among these are the conditions that the costs are for reasonable and necessary corrective action work that is directed by the lead oversight agency and in compliance with Article 11 of Chapter 16 of Title 23, California Code of Regulations [Fund Regulations, Section 2812.2(a) and 2811(a)(5)].

The majority of the costs were incurred for work that was not directed by the HFD or the ACEHD. Specifically, the dewatering of the site and the excavation, treatment and disposal of a majority of the soil was not directed. The letter from Mr. Amir Gholami from ACEHD dated January 12, 2000 stated that he generally concurred with the Workplan for Excavation at Old Oliver Salt Plant dated January 2000 but only approved excavation of the contaminated source. He did not approve removal of all the contaminated soil at the site. Mr. Gholami also restated this in letters dated April 27, 2000, May 22, 2000 and September 18, 2000. The contaminated source is the obviously contaminated soils immediately adjacent and below the USTs that pose the greatest threat to groundwater. In addition, the January 6, 2000 workplan did not contain any recommendation for dewatering of the site.

3. The work was not in compliance with state cleanup regulations

I also find that the work was not in compliance with Article 11 of Chapter 16 of Title 23, California Code of Regulations. These regulations set forth a sequential procedure in which information is gathered, the need and options for cost-effective cleanup is assessed, cleanup is carried out, and follow-up monitoring is conducted to confirm success. Corrective action can include interim remedial actions as specified in Section 2722(b), and this may include a limited excavation of obviously contaminated soil. A typical limited excavation during tank removal is in the range of 100 to 200 cubic yards (YD³) or less. However, a major excavation should not be performed for soil cleanup before an investigation is complete, cleanup levels are established by the local regulatory agency and all alternatives are carefully considered.

4. The work was not reasonable and necessary

I also conclude that the work does not meet the reasonable and necessary requirements of the Fund statutes and regulations. Although it is reasonable to remove a limited volume of obviously contaminated soil, if present, during the tank removal project, it is not reasonable to excavate below the static water table and remove approximately 8,000 YD³ of soil. The soil excavation initiated in July 1999 and continued intermittently through January 2002. This clearly indicates that the soil excavation was not performed as an interim remedial action but rather to remove virtually all petroleum contaminated soil from the site. The intent of interim remedial action is to address situations where

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corrective action is necessary to prevent or abate an immediate threat to public health or the environment. It is not a mechanism by which a responsible party can excavate to facilitate property development.

To date, the Fund has reimbursed the Gordon Oliver Trust \$ 114,047.40 for preparation of workplans, site investigation and excavation, treatment and disposal of 3,101 tons (approximately 2,200 YD³) of soil. I find that this amount adequately covers the reasonable eligible costs associated with the removing the contaminated source for the unauthorized release from the two USTs. I attribute the remaining \$404,904.70 for removal and treatment of approximately 5,700 CY³ of additional soil and approximately 300,000 gallons of water as being ineligible for the above reasons.

This represents a Fund Manager Decision. If you are not in agreement with the above decision, you may request a Final Division Decision by the Chief of the Division within 60 days of the date of this letter. If you do not request a Final Division Decision within those 60 days, this decision will become final and conclusive. The request should be sent to:

Barbara L. Evoy, Chief
Division of Financial Assistance
State Water Resources Control Board
P.O. Box 944212
Sacramento, CA 94344-2120

USTCF Claim # 16353

The request to the Chief of the Division must include, at a minimum: (1) A statement describing how the claimant is damaged by the prior staff decision. (2) A description of the remedy or outcome desired. (3) An explanation and supporting documentation of why the claimant believes the action or the decision is erroneous, inappropriate or improper.

If you have any questions regarding this letter, please telephone Mr. Bob Trommer at (916) 341-5684.

Sincerely,

Allan V. Patton, Manager
UST Cleanup Fund

cc: Mr. Morey Greenstein
Gordon E. Oliver Trust
39159 Paseo Padre Pkwy #315
Fremont, CA 94538

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