STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of MR. AND MRS. WILLIAM R. SCHMIDL AND MR. AND MRS. RUSSELL P. SCHMIDL For Review of Cleanup and Abatement Order No. 88-701 of the California Regional Water Quality Control Board, Central Valley Region. Our File No. A-532.	ORDER NO. WQ 89-1

BY THE BOARD:

On February 5, 1988, the California Regional Water Quality Control Board, Central Valley Region (Regional Board) issued a Cleanup and Abatement Order (No. 88-701) naming Tom De Kellis, d.b.a. Bowles Flying Service as the primarily responsible party and the two Schmidl couples -- who own the land -- as secondarily responsible parties. On March 1, 1988, the Schmidls filed a timely but incomplete petition for review of the Regional Board Order. The Petition was later supplemented and thereafter found to be complete on July 28, 1988.

I. BACKGROUND

De Kellis operates Bowles Flying Service, an aerial pesticide spraying business in Live Oak. The facility consists of crop dusters, an airstrip and maintenance buildings that are located on land owned by Mr. and Mrs. William R. Schmidl and Mr. and Mrs. Russell P. Schmidl. It has been owned and run by De Kellis, since 1977, when be bought the business from Thomas R.

Bowles. The Schmidls bought the land from Thomas R. Bowles ten years after transfer of the business to De Kellis, in March 1987.

As part of the crop-dusting operation, before 1987, De Kellis washed the aircraft exteriors and pesticide tanks on an asphalt and gravel wash area on the property. Before 1981, the rinse water, which contains pesticide residue, was allowed to flow from the wash pad through a ditch tributary to Morrison Slough and on to the Sutter Bypass. In 1981, De Kellis constructed an impoundment to contain the rinse water. Based on analysis of samples from the impoundment, the Regional Board notified De Kellis by letter of December 3, 1985 that the surface impoundment is subject to the Toxic Pits Cleanup Act (TPCA).[1] The Regional Board's initial determinations showed 25,800 ppm copper in the soil beneath the impoundment.

On June 4, 1987, De Kellis informed the Regional Board that he had bulldozed over the impoundment and that while aircraft exteriors were still being washed at the facility, tanks were not. Also, a berm had been constructed to direct rinse water back to the wash area. Further Regional Board sampling and analysis in September, 1987, revealed the presence of the

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1. The Cleanup and Abatement Order addresses pesticides found in a well at the facility. It does not address the TPCA issues. The Petition itself challenges only the Cleanup and Abatement Order and does not raise the TPCA issues. Accordingly, this Order is limited to issues raise in the Cleanup and Abatement Order.

pesticides thiobencarb, simazine, molinate, and diuron in a commercial-use well on the property. The area has a high water table and the well may be acting as a conduit for pesticide movement to deeper groundwater, thus creating or threatening a condition of nuisance and pollution. Residences within one-quarter mile of the facility are served by the ground water. In this regard the Regional Board's basin plan provides that "facilities developed for handling pesticide reuse waters shall not allow percolation to underlying soils or ground waters". Pesticide handling practices at Bowles Flying Service may also have affected the beneficial uses of Morrison Slough, which include irrigation, stock watering, and industrial and domestic supply. The beneficial uses of the Sutter Bypass include agricultural supply, recreation, and fish and wildlife habitat.

The Executive Officer issued Cleanup and Abatement Order No. 88-701 on February 5, 1988 requiring De Kellis to: (1) provide information regarding its business ownership history; (2) provide a sampling and analysis work plan; (3) implement the approved work plan; (4) provide a site mitigation plan; and (5) implement the approved mitigation plan. Deadlines were imposed for each required task.

In addition to the tasks required of De Kellis, the Regional Board ordered that within 60 days of notice to the Schmidls that De Kellis has failed to perform under the Order,

the Schmidls shall commence performance of all tasks. It is this part of the Order to which the Schmidls object.

II. CONTENTIONS AND FINDINGS

Contention: Petitioner's sole contention is that, as the landowner, it had no involvement with causing the pollution on the land, and, therefore, should not be held responsible. In support, Petitioner cites Assembly Bill 924 and Senate Bill 245.

Finding: The Board has in the past upheld Regional Board findings of responsibility on the part of landowners. In Vallco Park, Ltd, Order No. WQ 86-18, the Board pointed out that "[t]he ultimate responsibility for the condition of the land is with its owner". The initial responsibility for cleanup is with the operator, but according to Vallco, it is appropriate to look to the owner to assure cleanup in the event the operator fails in its obligations. See also, Stinnis-Western Chemical Corp. (1986) Order No. WQ 86-16; J.N.J. Sales and Services, Inc. (1988) Order No. WQ 88-8. Similarly, the Board has found it appropriate to name landowners as responsible parties -- subject to the lessee/discharger's primary duty -- to comply with waste discharge requirements. Southern California Edison Co (1986) Order No. WQ 86-11; U.S. Forest Service (1987) Order No. WQ 87-5. Again, in the latter two cases, the Board pointed out that while the user/discharger bears primary responsibility for compliance with the Regional Board orders, the landowner must assume ultimate responsibility. These recent orders are consistent with

longstanding interpretations as to who is a discharger under tne Porter-Cologne Water Quality Control Act and its predecessors. 26 Ops. Cal. Atty. Gen. 88.

In the instant case, the Regional Board's order places primary cleanup and abatement responsibility on De Kellis's shoulders and specifically requires the Schmidls to assume the burden only upon his failure to perform. This is in accord with the State Board's prior decisions.

In this Petition, the Schmidls assert that AB-924 and SB-245 support its position. Assembly Bill 924 was enacted as an urgency statute on February 18, 1988 (Chapter 12, Statutes of 1988) and made part of the State Hazardous Substance Account provisions known as the "State Superfund" statute which is contained in Chapter 6.8 of the Health and Safety Code. It establishes a presumption under Health and Safety Code Section 25360.2 that the owner of a single-family residence is not liable under the Superfund law for recovery of expenditures from the account. Among other things, the amended language provides:

> "(b) Notwithstanding any other provision of this chapter, an owner of property which is the site of a hazardous substance release is presumed to have no liability pursuant to this chapter. The presumption may be rebutted as provided in subdivision (d).
>
> "(c) An action for recovery of costs or expenditures incurred from the state account or the Hazardous Substance Cleanup Fund pursuant to this chapter in response to a hazardous substance release shall not be brought against an owner of property unless

the department first certifies that, in the opinion of the department, one of the following applies:

"(1) The hazardous substance release occurred after the owner acquired the property.

"(2) The hazardous substance release occurred before the owner acquired the property and at the time of acquisition the owner knew or had reason to know of the hazardous substance release.

"(d) In an action brought against an owner of property to recover costs or expenditures incurred from the state account or the hazardous Substance Cleanup Fund pursuant to this chapter in response to a hazardous substance release, the presumption established in subdivision (b) may be rebutted if it is established by a preponderance of the evidence that the facts upon which the department made the certification pursuant to paragraph (1) or paragraph (2) of subdivision (c) are true.

"(e) Notwithstanding any other provision of this chapter, this section governs liability pursuant to this chapter for an owner of property, as defined in subdivision (a)."

(Health and Safety Code Section 25360.2(b). Emphasis supplied)

Petitioner fails to state specifically how the AB-924 amendments support its position. By its own terms, the amended provision is restricted in its application to recoveries from owners of single-family residences under the Hazardous Substance Account and the Hazardous Substance Cleanup Fund provisions. AB-924 does not support Petitioner's position because the site which is the subject of this petition is not a single-family

residential property and because the amendment has no discernible effect on our interpretation of the Porter-Cologne Act.

Senate Bill 245 was approved by the Governor on September 28, 1987, and became effective January 1, 1988. (Chapter 1302, statutes of 1988.) It also amends portions of the State Superfund law, and similarly does not appear to have relevance to the Regional Board's order. Again, Petitioner has failed to make specific its argument as to how SB-245 supports its position. Among other things, the SB-245 amendments provide that no punitive damages can be imposed upon the landowner by the Department of Health Services. In part, the amended section provides that:

> "No punitive damages shall be imposed under this section against an owner of real property who did not generate, treat, transport, store, or dispose of any hazardous substances on, in, or at the facility located on that real property . . . ."
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> (Emphasis supplied. Health and Safety Code Section 25359(b).)

The SB-245 amendments do not affect the Regional Board's determination for two reasons. First, this matter does not involve punitive damages. Second, the SB-245 amendments are specifically limited in their application to Health and Safety Code Section 25359.

III. CONCLUSIONS

The Regional Board appropriately named the Schmidls as secondarily responsible parties in the Cleanup and Abatement Order.

IV. ORDER

The Petition is hereby dismissed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 19, 1989.

AYE: W. Don Maughan, Darlene E. Ruiz, Eliseo M. Samaniego, Danny Walsh

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None

Maureen Marché
Administrative Assistant
to the Board