STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of **R.S. BILLS, INC.** For Review of a Determination of the Division of Clean Water Programs, State Water Resources Control Board, Regarding Participation in the Underground Storage Tank Cleanup Fund. OCC File No. UST-73.	ORDER NO. WQ 95-6-UST

BY THE BOARD:

R.S. Bills, Inc. (petitioner) seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) which rejected a claim filed by the petitioner requesting reimbursement from the Underground Storage Tank Cleanup Fund (Fund). For the reasons hereafter stated, this Order determines that the Decision of the Division should be affirmed.

I. STATUTORY, REGULATORY, AND FACTUAL BACKGROUND

Chapter 6.75 of the California Health and Safety Code, commencing with Section 25299.10, authorizes the State Water Resources Control Board (SWRCB) to conduct a program to reimburse certain owners and operators of petroleum underground storage tanks (UST) for corrective action costs incurred by such owners

and operators.[1] Section 25299.77 of this chapter authorizes the SWRCB to adopt regulations to implement the program. On September 26, 1991, the SWRCB did adopt such regulations. The regulations, hereafter referred to as Cleanup Fund Regulations or Regulations, are contained in Chapter 18, Division 3, Title 23, of the California Code of Regulations, and became effective on December 2, 1991. Among other things, the Regulations provide for submittal of reimbursement claims to the SWRCB by owners and operators of petroleum USTs, for acceptance or rejection of these claims by staff of the SWRCB, and for appeal of any discretionary staff decisions to the SWRCB.

The Cleanup Fund Regulations provide that if the SWRCB does not act on a petition within 270 days after receipt, the petition shall be deemed to be denied. This time limit may be extended for a period not to exceed 60 calendar days by written agreement of the SWRCB and the petitioner. (Regulations, § 2814.3(d).) The SWRCB did not take action on this petition within either the 270-day period or 60-day extension period. The SWRCB has the discretion to waive any nonstatutory requirements pertaining to processing payment or approval of claims. (Regulations, § 2813(e).) The SWRCB hereby exercises its authority to hear the petition, notwithstanding expiration of the

[1] *Unless otherwise indicated, all statutory references in this Order are to the California Health and Safety Code.*

time limits set by the Regulations. (See also Regulations, § 2814.2(b) authorizing the SWRCB to hear petitions on its own motion.)

The following is a summary of the relevant facts.[2] The petitioner, R.S. Bills, Inc., is a corporation and Robert S. Bills (Bills) is the petitioner's sole shareholder and president. The petitioner was incorporated in the State of California on February 5, 1988.

The petitioner's claim involves a site which is located at 1943 Hill Street, Oceanside, California. Bills acquired the property in August of 1983. Bills conveyed the subject property to the petitioner on May 18, 1988.

On June 1, 1986, Bills leased the facility to Wright Oil Company dba Express Gas (Express Gas). On or about June 12, 1986, Express Gas replaced the product lines and modified the pumping system mechanism. On June 19, 1986, an inspector from the San Diego County Department of Health Services (County) inspected the site and issued an Official Notice to Express Gas. This Official Notice stated that contaminated soil was present and required that an Unauthorized Release Report be prepared within five days. The County later identified Bills as a responsible party. (Transcript at 196:7-11.)[3]

---

[2] *Counsel for the petitioner and the Division executed a Memorandum of Stipulated Facts (MSF) on May 9, 1995. The following facts are contained in the MSF unless otherwise noted.*

[3] *All references to the Hearing Transcript contain page and line numbers. The page number precedes the colon and the line number(s) follow the colon.*

On July 10, 1986, Kevin Heaton, a Hydrogeologist for the County, telephoned Bills and informed him that based on the County's field observations there was contaminated soil at the subject site and that it was necessary to evaluate the extent of the contamination. On July 11, 1986, Bills notified the County that he had hired Woodward-Clyde Consultants (Woodward-Clyde) to determine if an unauthorized release had occurred and the extent of any discovered contamination. Woodward-Clyde collected four soil samples collected from an on-site stockpile on July 15, 1986. Quality Assurance Laboratory analyzed the soil samples for total extractable hydrocarbons. Bills did not perform any further work at this site on or before June 30, 1988. (Exhibit No. Bills 22.)

The petitioner applied to the Fund on January 17, 1992 and its claim was assigned No. 3074. On April 16, 1992, the Division issued a Notice of Incomplete or Ineligible Claim stating that Claim No. 3074 could not be accepted for the current Priority List on the basis that the claimant knew of the unauthorized release prior to January 1, 1988 and failed to initiate corrective action before June 30, 1988. The petitioner requested a Final Staff Decision and on July 8, 1992, the Division issued a Final Staff Decision conditionally accepting the petitioner's claim.

On March 19, 1993, Division staff issued a Notice of Ineligibility Determination reversing the July 8, 1992 Final Staff Decision for the following reasons: (1) the petitioner failed to commence corrective action by June 30, 1988 and (2) the

petitioner had not incurred any corrective action costs. On August 5, 1993, the Chief of the Division issued the Decision upholding, in part, the Division's Notice of Ineligibility Determination dated March 19, 1993.[4] The petitioner submitted its petition for SWRCB review of the Decision on or about September 3, 1993.

This matter was first presented to the SWRCB at a workshop session held on January 4, 1995 and at a business meeting held on January 19, 1995. At the business meeting, the SWRCB requested a hearing to obtain evidence relating to the eligibility restrictions involved as well as the Division's review process of the petitioner's claim.

The SWRCB held a public hearing in San Diego, California on May 16, 1995 for the purpose of obtaining evidence relating to the following issues:

1. Did the petitioner have knowledge of the unauthorized release which is the subject of the claim prior to January 1, 1988?

2. Did the petitioner initiate corrective action on or before June 30, 1988?

---

[4] *The Notice of Ineligibility Determination dated March 19, 1993 issued by staff indicated that the claim was also rejected on the basis of Section 2810.1(a)(6) of the Cleanup Fund Regulations. Essentially, that section limits eligibility to tank owners and operators who have paid or will pay for the costs claimed. The claimant demonstrated, to the satisfaction of the Chief of the Division, that the claimant would be paying for future costs of remediation. Since that issue has been resolved, the SWRCB's review of that issue is not required.*

3. Was the petitioner corporation aware of the existence of the USTs located at the subject site at the time the corporation acquired the property?

4. Would Bills be eligible for reimbursement from the Fund?

5. Is the Division barred from rejecting the petitioner's claim as a result of earlier actions by the Division with respect to the petitioner's claim? Specifically, may the Division reject a claim after conditionally accepting a claim for placement on the Priority List?

II. CONTENTIONS AND FINDINGS

1. Contention: The petitioner contends that the regulatory definition of corrective action is void and unenforceable. Specifically, the petitioner argues that the regulatory definition limits the definition of corrective action in a manner that is not present in the statutory definition.

Finding: The petitioner's first argument, that the Cleanup Fund Program Regulation defining corrective action is void and unenforceable, is without merit.

This particular argument was raised for the first time in the petitioner's closing brief following the May 16, 1995 evidentiary hearing. Article 5 of the Regulations establishes a comprehensive appeal process. Generally, a claimant may appeal any discretionary action of Division staff by requesting a Final Staff Decision. If the claimant is not satisfied with the Final Staff Decision, the claimant may request a final Decision from

the Chief of the Division. A claimant may appeal the final Decision of the Division to the SWRCB. A petition for SWRCB review must contain the specific Decision of the Division that the SWRCB is requested to review. (See Regulations, § 2814.1(a)(3).) The petition filed by the petitioner did not contain an argument challenging the regulatory definition of corrective action. The SWRCB is, therefore, not required to consider this argument.

In response to a petition, however, the SWRCB may take any action that it deems appropriate. (See Regulations, § 2814.3(a)(4).) The SWRCB has authority to consider any arguments or issues that it deems appropriate, even if those arguments or issues were not raised at an earlier stage in the claim review process. In our opinion, it is appropriate to consider the validity of the challenged regulation. The issue is logically related to other arguments raised by the petitioner, the issue might be raised in later proceedings if not resolved now, and the petitioner's failure to raise the issue earlier does not prejudice any other party to the hearing.

The Health and Safety Code defines corrective action as follows:

> "'Corrective action' includes, but is not limited to, evaluation and investigation of an unauthorized release, initial corrective actions measures, as specified in the federal act, and any actions necessary to investigate and remedy any residual effects remaining after the initial corrective action. Except as provided in the federal act, 'corrective action' does not include actions to repair or replace an underground

storage tank or its associated equipment." (Health and Saf. Code § 25299.14.)

The Regulations define corrective action as follows:

> "'Corrective action' means any activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to adequately protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies). Corrective action does not include any of the following activities:
>
> "(a) Detection, confirmation, or reporting of the unauthorized release; or,
>
> "(b) Repair, upgrade, replacement, or removal of an underground storage tank or its associated equipment." (Regulations, § 2804.)

As shown above, the regulatory definition expressly excludes leak confirmation activities and tank repair and/or replacement activities from the definition of corrective action. The added qualifying language represents an SWRCB interpretation of the statutory definition of corrective action. The SWRCB, as the administrative agency charged with the implementation of the Fund, has authority to interpret the statutory language which controls the Fund where interpretation is appropriate or necessary to carry out the legislative intent involved in the creation of the Fund. The administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is

clearly erroneous or unauthorized. (General American Transp. Corp. v. State Board of Equalization (1987) 193 Cal.App.3d 1175, 1182, 238 Cal.Rptr. 865; Coca-Cola Co. v. State Bd. of Equalization (1945) 25 Cal.2d 918, 921, 156 P.2d 1.)

Although the statutory definition of corrective action does not expressly exclude detection, confirmation, or reporting of an unauthorized release, there are numerous indications that the Legislature intended to limit the term corrective action to certain activities that take place after the unauthorized release has been detected, confirmed, and reported. The statutory definition of corrective action includes the "evaluation and investigation of an unauthorized release". Each owner or operator of an UST or any other responsible party must take corrective action in response to an unauthorized release. (Health and Saf. Code § 25299.37(a).) This language implies that corrective action cannot be commenced until an unauthorized release has been detected and confirmed.

Also, the Federal Act or federal UST law distinguishes between confirmation activities, repair and upgrade activities, and corrective action.[5] The Federal Act is relevant because the state statutory definition of corrective action specifically refers to the Federal Act. Moreover, the Fund was established, partly, in response to federal financial responsibility

---

[5] *The Federal Act includes Subchapter IX (commencing with § 6991) of Chapter 82 of Title 42 of the United States Code, as added by the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616), or as it may subsequently be amended or supplemented, and the regulations adopted pursuant thereto. (Health and Saf. Code § 25299.16.)*

requirements, which are contained in the Federal Act. Federal UST law requires owners or operators of petroleum USTs to demonstrate financial responsibility for taking corrective action and third-party liability caused by releases from petroleum USTs. Since the Fund was intended to be and has been accepted as an acceptable mechanism for meeting federal financial responsibility requirements, it is appropriate to consider the federal UST law. Our review also includes the U.S. Environmental Protection Agency's (U.S. EPA) interpretations of the federal UST law.[6]

The federal regulations (40 C.F.R. Part 280) do not specifically define corrective action. Rather, 40 C.F.R. Part 280 is divided into the following eight subparts:

Subpart A -- Program Scope and Interim Prohibition

Subpart B -- UST Systems: Design, Construction, Installation and Notification

Subpart C -- General Operating Requirements

Subpart D -- Release Detection

Subpart E -- Release Reporting, Investigation, and Confirmation

Subpart F -- Release Response and Corrective Action for UST Systems Containing Petroleum or Hazardous Substances

---

[6] *In No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 86 n. 21, 118 Cal.Rptr. 34, 46 n. 21, the court indicated that where a California statute is modeled on a federal act, judicial and administrative interpretations of the federal act are persuasive authority in interpreting the California statute.*

Subpart G -- Out-of-Service UST Systems and Closure

Subpart F -- Financial Responsibility

As evidenced above, the federal regulations distinguish between release detection or confirmation activities and corrective action activities. UST owners and operators are required to comply with the requirements of Subpart F in response to a confirmed release. (40 C.F.R. § 280.60.) The federal regulations are analyzed and explained in the Federal Register. (53 Fed.Reg. 37082 et seq.) Release response and corrective action include activities to investigate, report, abate, and remedy releases of regulated substances into the environment. (53 Fed.Reg. 37173.) Corrective action cannot be started until the tank system and site are investigated and a release is confirmed. (53 Fed.Reg. 37169.) UST upgrading requirements and repair requirements are contained in Subpart B and Subpart C, respectively. Certainly, an unauthorized release may be discovered during the course of upgrading or repairing a UST and the owner or operator may be required to initiate corrective action as described in Subpart F. But all activities necessarily related to the upgrading or repairs of a UST do not constitute corrective action as described in Subpart F.

We find that the Legislature intended to limit the definition of corrective action to those remedial activities undertaken to respond to a confirmed release. We therefore find that the regulatory definition of corrective action is reasonable

and consistent with the legislative intent in establishing the Fund.

2. Contention: The petitioner argues that Section 25299.54(c) of the Health and Safety Code and Section 2810.1(b) of the Regulations do not preclude the petitioner from accessing the Fund because the petitioner neither knew of the unauthorized release prior to January 1, 1988, nor did it fail to begin corrective action on or before June 30, 1988.

Finding: Section 25299.54(c) of the Health and Safety Code provides that:

> "Any owner or operator of an underground storage tank containing petroleum is ineligible to file a claim pursuant to this section if the person meets both of the following conditions:
>
> "(1) The person knew, before January 1, 1988, of the unauthorized release of petroleum which is the subject of the claim.
>
> "(2) The person did not initiate, on or before June 30, 1988, any corrective action in accordance with Division 7 (commencing with Section 13000) of the Water Code concerning the release, or the person did not, on or before June 30, 1988, initiate corrective action in accordance with Chapter 6.7 (commencing with Section 25280) or the person did not initiate action on or before June 30, 1988, to come into compliance with waste discharge requirements or other orders issued pursuant to Division 7 (commencing with Section 13000) of the Water Code concerning the release."

Section 2810.1 of the Regulations provides in relevant part that:

> "(a) Only a current or former owner or operator of an underground storage tank or a residential tank may file a claim against the Fund. Only the following owners and operators may file claims: . . ."
>
> "(2) Any owner or operator of an underground storage tank for which a permit is or was required under Section 25284 of the California Health and Safety Code who undertook or undertakes corrective action after January 1, 1988, pursuant to a local agency order, directive or notification of cleanup responsibility, or pursuant to waste discharge requirements or other orders issued pursuant to Division 7 (commencing with Section 13000) of the California Water Code, provided, however, that if such owner or operator knew of the unauthorized release of petroleum which is the subject of the claim prior to January 1, 1988, and failed to initiate corrective action on or before June 30, 1988, such owner or operator may not file a claim against the Fund." (Emphasis added.)

The petitioner argues that its claim cannot be determined ineligible by virtue of the above-cited sections unless the petitioner was both aware of the release prior to January 1, 1988 and failed to initiate corrective action on or before June 30, 1988. The petitioner contends that neither of these conditions are present.

The petitioner's argument that it was unaware of the unauthorized release prior to January 1, 1988 is not persuasive. As stated earlier, Bills is the president and sole shareholder of the petitioner and has been since the corporation's inception in February of 1988. When considering whether the petitioner had

knowledge of the unauthorized release prior to January 1, 1988, the SWRCB must determine if Bills had knowledge of the release before January 1, 1988 and, if so, whether that knowledge should be imputed to the petitioner.

There is sufficient evidence that Bills had knowledge of the unauthorized release as early as July 10, 1986. Bills testified that he became aware of the unauthorized release when he received a telephone call on July 10, 1986 from Kevin Heaton, a County employee. (Transcript at 76:6.) He called Bills to inform him that based on the County's field observations, there had been an unauthorized release at the subject site. (Transcript at 196:12-15, 200:17-18, Exhibit No. CWP 22.) Although Bills' testimony did not reveal the year that he became aware of the unauthorized release, there are several references in the record that indicate that this telephone conversation transpired on July 10, 1986. (Exhibit No. CWP 22.) As a result of the July 10, 1986 conversation, Bills immediately hired Woodward-Clyde to perform work at the subject site and informed the County of this in a July 11, 1986 letter. (MSF p. 10, Exhibit No. CWP 7, Exhibit No. Bills 7.)

Generally, to impute knowledge from an agent to a principal, the knowledge must be acquired by the agent after the creation of the agency (2 Witkin Summary of California Law (9th Edition 1987) Agency and Employment § 103, p. 100). This rule has been extended, however, to include knowledge acquired by an

agent prior to the creation of the agency. Blue Diamond Plaster Co. v. Industrial Accident Commission (1922) 188 Cal. 403, 205 P. 678. In Blue Diamond, the court held that knowledge of a managing officer, gained while serving as a like officer of the predecessor of the corporation, is imputable. *Id.* at 409.

This principle was also applied in a case involving the transfer of patent rights from an individual to a corporation. C. H. Stevens v. Vincent A. Marco (1956) 147 Cal.App.2d 357, 305 P.2d 669. The plaintiff/inventor in C. H. Stevens retained interests in certain patent rights. The defendant/individual who transferred the patent rights was also the sole shareholder and president of the recipient corporation. The court held that the corporation was charged with "full notice" of the plaintiff's interest in the patents. *Id.* at 384. Similarly, because Bills is the only shareholder and president of petitioner, and because he was aware of the subject release as early as 1986, it is appropriate to impute the knowledge of Bills to the petitioner.

For purposes of the issue under consideration, the knowledge imputed to the petitioner includes not only the existence of the contamination, but the fact that the contamination was discovered in 1986. The eligibility restriction at issue operates to exclude from the Fund those persons who, although aware of the existence of the release and resulting contamination, were not diligent in taking meaningful corrective action in a timely manner. Given the circumstances of this case, failing to impute this knowledge in the manner stated

above would undermine the legislative intent in establishing this particular eligibility restriction.[7]

As discussed earlier, a claimant is not eligible to file a claim against the Fund if the claimant was both aware of the unauthorized release prior to January 1, 1988, and the claimant failed to initiate corrective action on or before June 30, 1988. The petitioner contends that it did commence corrective action on or before June 30, 1988 and points to the following activities:

1. Over-excavation and removal of contaminated soil from the pipeline trenches;

2. Retention of Woodward-Clyde to inspect the subject property, evaluate, and investigate the unauthorized release detected and reported by the County;

---

[7] *It is important to note that, because of our finding that the petitioner did not initiate corrective action on or before June 30, 1988, the petitioner's claim to the Fund would be ineligible regardless of whether knowledge of the release and the discovery date is imputed to the petitioner. The petitioner would be precluded from accessing the Fund by virtue of Section 2810.1(b) of the Regulations. Section 2810.1(b) reads as follows:*

> *"Purchasers of real property or persons who otherwise acquire real property, on which an underground storage tank is situated may not file a claim against the Fund if:*
>
> *"(1) The purchaser or acquirer knew or in the exercise of reasonable diligence would have discovered that an underground storage tank was located on the real property being acquired; and*
>
> *"(2) Any party from whom the real property was acquired would not have been eligible for reimbursement from the Fund." (Regulations, § 2810.1(b).)*

Bills, individually, would have been an ineligible claimant to the Fund because he was aware of the release prior to January 1, 1988 and failed to commence corrective action by June 30, 1988. (Health and Safety Code § 25299.54(c), Regulations, § 2810.1.) At the time the petitioner acquired the property, Bills, the sole shareholder and president of the petitioner was aware of the UST (Transcript at 76:9-21). Since the petitioner was aware of the tanks at the time of acquisition and Bills would have been ineligible to file a claim, the petitioner would be ineligible to file a claim to the Fund pursuant to Section 2810.1(b) of the Regulations.

3. Inspection of the subject property by Woodward-Clyde;

4. Collection of soil samples from a stockpile of soil excavated from a pipeline trench;

5. Submission of the soil samples to Quality Assurance Laboratory for analytical testing;

6. Analysis of the soil samples by Quality Assurance Laboratory for total extractable hydrocarbons;

7. Communications between Woodward-Clyde and the County regarding the site assessment activities being performed at the subject property;

8. Consultation and advice provided by Woodward-Clyde to Bills; and

9. Submission of a report issued by Quality Assurance Laboratory to the County.

All of the above-referenced activities took place in 1986, before petitioner was incorporated. Because of our earlier finding that knowledge of the unauthorized release, including the discovery date, shall be imputed to the petitioner, any work performed under the direction of Bills before February 5, 1988 (the date of incorporation) should likewise be attributed to the petitioner.

Certainly, the mere retention of an environmental consultant does not constitute the initiation of corrective action. The remaining previously-cited activities relate to

over-excavation[8] or stockpile sampling and analysis performed at the subject site during June and July of 1986. The petitioner contends that both the over-excavation activities and the stockpile sampling and analysis fall within the definition of corrective action. Again, the California Health and Safety Code and the Regulations define corrective action as follows:

> "'Corrective action' includes, but is not limited to, evaluation and investigation of an unauthorized release, initial corrective actions measures, as specified in the federal act, and any actions necessary to investigate and remedy any residual effects remaining after the initial corrective action. Except as provided in the federal act, 'corrective action' does not include actions to repair or replace an underground storage tank or its associated equipment." (Health and Saf. Code § 25299.14.)
>
> "'Corrective action' means any activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to adequately protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies). Corrective action does not include any of the following activities:
>
> "(a) Detection, confirmation, or reporting of the unauthorized release; or,
>
> "(b) Repair, upgrade, replacement or removal of an underground storage tank or its associated equipment." (Regulations, § 2804.)

Basically, corrective action is a process and it consists of an investigatory phase and an implementation or

---

[8] *Over-excavation refers to additional excavation performed due to the discovery of contamination.*

clean-up phase. The investigatory phase is intended to assess the environmental problem and provide a basis on which to develop a corrective action plan. The corrective action plan cannot be effectively implemented until the problem has been sufficiently assessed. The regulatory definition of corrective action specifically excludes actions performed to confirm a release. Hence, to constitute the initial or investigatory phase of the corrective action process, the activity must go beyond release confirmation and assess, or reasonably attempt to assess, the extent of the environmental problem. The clean-up phase includes those activities that actually implement the corrective action plan and mitigate the effects of the unauthorized release. With this in mind, the SWRCB must decide if Bills undertook any activities at the subject site on or before June 30, 1988 that can be characterized as the initiation of the corrective action process.

The record indicates that Express Gas directed the contractor to excavate the trenches. Because the issue before us is whether the petitioner commenced corrective action before the statutory deadline, it is not necessary to consider whether the excavation activities directed solely by Express Gas constitute corrective action. Although Robert S. Bill testified that he also directed the contractor to excavate the trenches on either July 10 or 11, 1986, we find that he did not.

Andy Fuchs, a maintenance and construction supervisor formerly employed by Express Gas, testified at the hearing held on May 16, 1995. He supervised the 1986 conversion of the piping

system. This project involved trenching, installing new piping, installing pressurized turbines on the top of the gasoline tanks, installing new gasoline dispensers, and installing a vapor recovery system. (Transcript at 19:12-18.) This project commenced on or about June 12, 1986. (Transcript at 23:20-24.) Fuchs did not specifically recall the number of trenches excavated. He stated, though, that if there were three tanks, that there would have been a line from each tank to the dispenser island and that therefore there could have been three trenches. (Transcript at 26:22-23, 36:2-4.) Fuchs said that approximately 15-20 yards of soil were removed from the trenches and that approximately 5-8 of those yards were contaminated. (Transcript at 21:8-17.) He estimated there was a total of 75 to 100 linear feet of trenches. (Transcript at 33:7-11.)

Fuchs further testified that the initial trenches near the dispenser island were one foot deep and that the contractor excavated an additional foot in depth. (Transcript at 37:4-6 and 10-15.) The contractor removed the contaminated soil that was visibly obvious. (Transcript at 21:21-25.) The trenches were then partially backfilled with sand and the line was placed at the bottom of the trench. (Transcript at 37:16-23.) The contractor backfilled the trench with approximately 10 yards of clean soil and sand. (Transcript at 25:2-5.) Fuchs was not at the subject site every day during the course of the project and he testified that he may not have observed all of the excavation work. (Transcript at 35:7-12.) He stated that to the best of his recollection, that any excavation at the subject site known

to him was completed during the month of June of 1986. (Transcript at 95:5-11.) Fuchs also said that Express Gas hired the excavation contractor and directed the contractor's work and that at no time was he told by Bills or anyone at Express Gas to delay the repiping project. (Transcript at 100:23-24, 98:7-17.)

Bills testified that he was not aware of the contamination or unauthorized release until July 10, 1986, when Kevin Heaton called him. (Transcript at 76:3-6, 44:6-8.) He stated that he visited the site twice when the trenches were open and when the excavation was being completed. (Transcript at 55:24-25, 56:1-3.) Bills visited the site once on either July 10 or 11 and again on July 15, 1986 with Sarah Batelle, a consultant employed by Woodward-Clyde. (Transcript at 66:23-25.) He testified that during this first visit, he "observed that the soil was giving off petroleum odors" and that he asked the contractors to excavate further. (Transcript at 56:4-10, 21-22.) He said that while he saw the contractor begin the directed excavation, he did not see the contractor complete it. (Transcript at 77:17-22.) He stated that the new pipes and plumbing had not been installed at that time. (Transcript at 78:5-8.) He also testified that when he visited the site on July 15, 1986, that the trenches had been refilled, paved over with concrete, and that the station was very close to being, if not already, back in operation. (Transcript at 65:18-25, 66:6-10.)

The testimony of these two witnesses is inconsistent. Andy Fuchs testified that the obvious contamination was removed,

yet Bills claims he was able to smell petroleum odors when he visited the site on either July 10 or 11, 1986. The excavation contractor was hired by and taking orders from Express Gas yet Bills claims that he also directed the contractor to over-excavate. Andy Fuchs was at the site during various stages of this project and he testified that the trenches were first excavated, then partially backfilled with sand, and then the new pipe was installed. While Fuchs could not verify excavation activities that took place in his absence, he did testify that he thought the excavation portion of the job was completed in June of 1986.

Information in the County file indicates that the excavation had been completed and the piping had been installed as early as July 3, 1986. Charles Pryatel, manager of the Site Assessment and Mitigation Division for the County of San Diego, testified that A. J. Wing from the County inspected and approved the piping system on July 3, 1986. At the time of the inspection, the piping was in the open trenches. (Transcript at 274:21-23.)

According to Bills' testimony, he visited the site on either July 10 or July 11 and neither the piping nor the plumbing had been placed into the trenches. That means that, according to the facts as understood by Bills, from the period between July 10 or July 11 to July 15, 1986, the contractor performed further excavation, the pipelines and plumbing were installed, the trenches were backfilled, and paved over with concrete. This does not seem likely given the fact that two of those days fell

on the weekend. The record indicates that the contractor completed the excavation phase before Bills visited the site on July 10 or 11, 1986. The record does not indicate that Bills directed any over-excavation at the subject site during July of 1986 or at any other time on or before June 30, 1988.

The record clearly indicates that Bills hired Woodward-Clyde to perform work at the subject site. (MSF p. 3.) On July 15, 1986, Sarah Battelle of Woodward-Clyde collected four soil samples from a stockpile of soil at the subject property. (MSF p. 3.) The stockpile was comprised of soil from the pipeline trenches. (Transcript at 21:18-20.) The contractor had placed both clean and contaminated soil into this stockpile. (Transcript at 28:1-2.) There is evidence that Battelle obtained samples from various locations in the stockpile. (Exhibit No. Bills 8, Transcript at 46:6.) Quality Assurance Laboratory analyzed three of the four samples for total extractable hydrocarbons using EPA Method 8015. (MSF at p. 4.) On July 25, 1986, Quality Assurance Laboratory issued a report to Woodward-Clyde revealing that total extractable hydrocarbons in the samples were detected ranging from .1 mg/kg to 14.2 mg/kg. (*Ibid.*) Woodward-Clyde provided no additional reports to the County in relation to the sampling activities conducted in July of 1986.

Stockpile sampling and analysis can constitute corrective action under certain circumstances. For example, during the course of implementing a corrective action plan, it may be necessary to characterize the stockpile prior to hauling

it to a waste disposal facility. Stockpile sampling may be necessary to comply with local regulations and to make appropriate disposal arrangements.

Although stockpile sampling and analysis may assist in making disposal arrangements, it is not generally accepted as a reliable method for investigating an unauthorized release. The stockpile sampling and analysis performed by Woodward-Clyde essentially confirmed that at least some of the soil removed from the trenches was contaminated. The sampling and analysis did not, however, reveal any information about the vertical or horizontal extent of the release or the concentration levels of the compounds involved.

The record indicates that there was only one stockpile on the site and that the stockpile was comprised of both clean and contaminated soil. There is no indication that Woodward-Clyde was able to associate the contaminated samples with any specific area of the excavation. Without the ability to trace the origin of the contaminated soil, it is impossible to make any determinations about the vertical and horizontal extent of the contamination. Additionally, the stockpile sampling and analysis provided no reliable information about the concentration of the contamination in the release area. Excavation commenced on or about June 12, 1986, and Woodward-Clyde collected the samples on July 15, 1986. The uncovered stockpile had been exposed for a period as long as a month before the samples were collected and analyzed.

At the May 16, 1995 hearing, James Schuck, a Hazardous Materials Specialist with the County's Division of Site Assessment and Mitigation, testified that laboratory results conducted on samples from an uncovered stockpile could misrepresent the concentration of contamination. (Transcript at 129:14-18.) He also stated that the magnitude of the effect is dependent on the length of time the stockpile is exposed, how deep the soil is stockpiled, how contaminated the stockpile was originally, the nature of the contamination, and the particular hydrocarbons that are present. (Transcript at 129:3-8.) John Menatti, a Senior Soil Scientist and a former County Supervising Hazardous Materials Specialist, also testified at the hearing. He stated that a consultant could not determine the extent of a release at a site by sampling a stockpile alone. (Transcript at 108:9-12.)

James Hartley, a former Senior Project Hazardous Waste Specialist for Woodward-Clyde, testified at the hearing. In 1986, he supervised and discussed the subject site with Sarah Battelle. Hartley testified that he spoke with Battelle after she visited the subject site on July 15, 1986. He said that Battelle informed him that the trenches were closed and that she obtained samples from the stockpile. According to his recollection, he and Battelle discussed that the sampling may not be very representative and that it cannot take the place of a site investigation but that the sampling could be helpful in making disposal arrangements. (Transcript at 144:17-23.)

The stockpile sampling and analysis did not satisfy the County either. The County repeatedly requested that Bills investigate the trench area itself. Bills did not comply with these requests and the petitioner did not perform any other work related to the unauthorized release until 1992 or 1993. (Exhibit No. CWP 24, Transcript at 120:21-24.) The County's dissatisfaction with the stockpile sampling and analysis is not determinative of the issue of whether this sampling and analysis constitutes corrective action. The County's dissatisfaction is relevant, though. It is relevant because the County was urging Bills to take action to investigate the release area. Bills did not comply with County requests on or before June 30, 1988. When considering if Bills commenced corrective action, the SWRCB must consider if Bills took any actions to investigate and analyze the effects of the unauthorized release. Bills' failure to meet the County requests suggests that the stockpile sampling and analysis performed in July of 1986 did not provide sufficient information to investigate the effects of the unauthorized release.

The stockpile sampling and analysis merely confirmed that an unauthorized release had occurred. The stockpile sampling and analysis performed at the subject site did not reveal any information about the vertical and horizontal extent of the unauthorized release and provided no reliable information about the concentration levels present in the release area. Furthermore, Bills did not, individually or in his capacity as the president or the petitioner, perform or direct any additional work at the site until 1992 or 1993. We therefore find that the

stockpile sampling and analysis performed by Woodward-Clyde in July of 1986 did not, nor was it intended to, constitute the beginning of the corrective action process.

Since this Order finds that the petitioner both knew of the unauthorized release prior to January 1, 1988 and failed to commence corrective action by June 30, 1988, the petitioner is not eligible to file a claim to the Fund.

3. Contention: The petitioner contends that the Division waived any objection to claim No. 3074 on the ground of failure to initiate corrective action by June 30, 1988 when it accepted the petitioner's claim for placement on the Priority List. The petitioner asserts that Section 2813.4 of the Regulations does not give the Division the unlimited authority to re-review issues that have already been resolved.

Finding: Section 25299.55 of the Health and Safety Code requires the SWRCB to prescribe forms and procedures for filing claims. The SWRCB adopted the Regulations which, among other things, establishes a procedure for reviewing and processing claims.[9] The Division is required to review all claims received within 90 calendar days of receipt of the claim. At this stage, the Division makes an eligibility determination based upon unverified information; and if the claim appears eligible, the claim will be placed on a Priority List. Once

---

[9] *The Regulations distinguish those claims that are eligible for placement on the Initial Priority List (claims received by the Division within the first 45 calendar days after December 2, 1991) and those claims that are eligible for placement on subsequent Priority Lists. The review process for both classes is essentially the same.*

placed on a Priority List, whether it be the Initial Priority List or a subsequent Priority List, the Division will determine which of the claims will likely be processed and paid within the following calendar year. Next, the Division conducts a detailed review of the claim. During this step in the process, claimants will be requested to supply additional information and documentation. The detailed review also involves reviewing the files of the oversight agency (local agency or Regional Water Quality Control Board) as well as consulting with appropriate staff of the oversight agency. If technical issues impacting eligibility are suspected, the Division's technical unit will review the claim. If the claim appears eligible after the detailed review is conducted, the Division will issue a Letter of Commitment to the claimant.

An analysis of the relevant sections of the Regulations indicates that the Division can reject a claim at any point in the review process. The Regulations both contemplate this two-step process and authorize the Division's rejection of a claim even though the claim has been placed on a Priority List. Once a claim is placed on a Priority List and the Division commences further processing, the Division may request additional documentation and information to "complete processing of, and payment or approval of, the claims involved". (See Regulations, § 2813(e).) Placement of a claim on a Priority List does not constitute a commitment to reimburse corrective action costs indicated in the claim. (See Regulations, § 2813.2(a).) Moreover, the Regulations expressly provide for situations where

questions of eligibility are not completely resolved until after the claim is placed on a Priority List. The Regulations offer the following:

> "A claim may be removed from a Priority List if:
>
> "(1) The claimant is not in compliance with any of the applicable requirements of this Chapter, Chapter 16 of Division 3 of Title 23 of the California Code of Regulations, Chapters 6.7 or 6.75, Division 20, of the California Health and Safety Code, or any provision of the California Water Code under which the claimant is required to take corrective action in response to unauthorized release of petroleum from an underground storage tank or a residential tank;
>
> "(2) The claimant fails to provide necessary documentation or information, or refuses access to any site which is the subject of the claim to the Division or any other local or regulatory agency;
>
> "(3) There has been a material error in the information presented on the claim." (Regulations, § 2813.4(a).)

Clearly, placement on a Priority List does not guarantee funding and the Division has the authority to remove a claim from the Priority List. This is true even if the basis for removal was raised earlier in the review process and resolved in favor of the claimant. Interpreting the Regulations in a manner that would bar the Division from changing its decision after a claim was placed on a Priority List could violate the legislative intent in establishing the Fund. That is because most eligibility restrictions are imposed by the implementing statutes. Quite often, eligibility problems are not discovered

or completely resolved until staff performs an independent, thorough review. If, during the course of the detailed review, the Division determines that a claim is ineligible, the Division must adhere to the statutory requirements and reject the claim. The Division cannot ignore statutory requirements even if a claim has already been placed on a Priority List.

The following is a summary of the facts surrounding the Division's review of claim No. 3074.[10] The petitioner submitted a claim application to the Division on or about January 17, 1992 and the application was assigned claim No. 3074. On April 16, 1992, the Division issued a Notice of Incomplete or Ineligible Claim stating that the claimant knew of the unauthorized release prior to January 1, 1988 and failed to initiate corrective action on or before June 30, 1988. On June 12, 1992, the petitioner requested a Final Staff Decision. When considering the petitioner's request, it appears that the Division reviewed information submitted with the request and discussed the case with County staff by telephone. (Transcript at 298:14-23 and Division file.) On July 8, 1992, the Division issued a Final Staff Decision conditionally accepting claim No. 3074 for placement on the Initial Priority List. One paragraph of this decision references a specific eligibility restriction and another paragraph references the conditional nature of the

---

[10] *The facts relating to the review process are contained in the Memorandum of Stipulated Facts (MSF) dated May 9, 1995, unless otherwise noted.*

decision in general.[11] The Division conducted a detailed review of claim No. 3074 on November 22, 1992. (Transcript at 283:22-25; 284:1.) On March 19, 1993, the Division issued a Notice of Ineligibility Determination which reversed the Final Staff Decision dated July 8, 1992. This Notice stated that the petitioner had not initiated corrective action by June 30, 1988 and that the petitioner had not personally incurred any corrective action costs as of that date. On May 12, 1993, the petitioner requested a Final Division Decision. On August 5, 1993, the Division issued the Final Division Decision upholding staff's decision that the petitioner was both aware of the release prior to January 1, 1988 yet failed to initiate corrective action on or before June 30, 1988.

As discussed earlier, a claim may be removed from the Priority List if the claimant is not in compliance with any of the requirements contained in the Regulations or Chapter 6.75 of the Health and Safety Code. The Division attempted to remove the petitioner's claim from the Priority List because the petitioner was aware of the unauthorized release prior to January 1, 1988, yet failed to commence corrective action on or before June 30, 1988. This particular eligibility requirement is contained in both Chapter 6.75 of the Health and Safety Code and the

---

[11] *The first paragraph refers to Section 2811.2(j)(6) of the Regulations which imposes as a condition of eligibility that all corrective action undertaken must be consistent with any directives or approvals given by a local or regulatory agency. The fourth paragraph informs the claimant that if the detailed review determines that the claim is unacceptable or ineligible, that the claimant will be notified of the Division's intent to remove the claim from the Priority List. This paragraph does not refer to any specific eligibility requirement.*

Regulations. Because the Division had determined that the petitioner had not complied with the requirements contained in Chapter 6.75 of the Health and Safety Code and the Regulations, the Division attempted to remove the petitioner's claim as authorized by Section 2813.4(a) of the Regulations.

In our opinion, the Division is not precluded from performing a detailed review of an issue simply because a claim was conditionally accepted after a cursory review at an earlier stage. Such a rule would not be consistent with the conditional nature of the initial approval, which clearly contemplates a later more detailed review. Furthermore, if the Division determines that a claim is ineligible, at any stage in the review process, the Division has no choice but to disallow the claim. We find that the Division's review of claim No. 3074 was consistent with the procedures set forth in the Regulations and that the Division, by conditionally accepting the petitioner's claim, did not waive any right to reject the claim if it later determined the claim was ineligible for the Fund.

III. SUMMARY AND CONCLUSION

1. The SWRCB has authority to interpret the statutory language which controls the Fund.

2. There are several indications that the Legislature intended to limit the definition of corrective action to those remedial activities performed to respond to a confirmed release.

3. The regulatory definition of corrective action is reasonable interpretation of the statutory definition and is consistent with the legislative intent in establishing the Fund.

4. A tank owner or operator is not eligible to file a claim to the Fund pursuant to Section 25299.54(c) of the Health and Safety Code and Section 2810.1 of the Regulations if that person both knew of the unauthorized release prior to January 1, 1988 and failed to commence corrective action on or before June 30, 1988.

5. For the purpose of determining whether a particular claimant had knowledge of a release prior to January 1, 1988, it is appropriate, under certain circumstances, to consider information that is actually known by that claimant and that which is imputed to the claimant.

6. Since Bills was aware of the unauthorized release in 1986 and since he was the sole shareholder and president of petitioner, information relating to the release, including the fact that the release was discovered in 1986, shall be imputed to the petitioner.

7. The initial phase of the corrective action process is investigatory in nature and is intended to assess the environmental damage and provide a basis on which to develop and implement a corrective action plan.

8. Bills, in either his individual capacity or on behalf of the petitioner, did not direct any excavation activities during July of 1986 or any time on or before June 30, 1988.

9. The stockpile sampling and analysis that was performed in 1986 does not constitute the initiation of corrective action because the analysis did not provide, nor could it reasonably be expected to provide, any useful information about the extent of the release or the concentration level of the contamination.

10. The Division is not prohibited from removing a claim from the Priority List even if the basis for removing the claim was reviewed previously and, based on the information available at that time, resulted in conditional approval of a claim.

11. The Division's review of the petitioner's claim was consistent with the procedures set out in the Regulations and there are no indications that the Division intended to waive its right to conduct a detailed review of the petitioner's claim.

///

///

///

///

///

///

///

///

///

///

///

///

IV. ORDER

IT IS THEREFORE ORDERED that the final Decision of the Division rejecting the present claim of the petitioner, claim No. 3074, is affirmed.

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 November 16, 1995.

AYE: John Caffrey
Mary Jane Forster
John W. Brown

NO: None

ABSENT: Marc Del Piero
James M. Stubchaer

ABSTAIN: None

Maureen Marché
Administrative Assistant
to the Board