STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 98 - 05 -UST

In the Matter of the Petition of
CUPERTINO ELECTRIC, 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

SWRCB/OCC File UST-106

BY THE BOARD:

Cupertino Electric, Inc. (petitioner) seeks review of the Division of Clean Water Programs (Division) Final Division Decision (Decision) which reduced petitioner's reimbursement eligibility from the Underground Storage Tank Cleanup Fund (Fund). The issues presented by this petition are whether reimbursement by the Fund would result in petitioner receiving an improper "double recovery" given petitioner's receipt of $1,040,736 from its insurance carriers; and if so, to what extent should petitioner's eligibility for reimbursement from the Fund be reduced to prevent petitioner's receipt of a double recovery.

This order determines that the Division's Decision is affirmed as modified in accordance with the findings herein and pursuant to precedent established in the State Water Resources Control Board (SWRCB) Order WQ 96-04-UST, *In the Matter of the Petition of Champion/LBS Associates*. This order concludes that, if petitioner's eligible costs meet or exceed the amount determined by the Division to be the benefit to the Fund, the petitioner's

eligibility for reimbursement was correctly determined in the Division Decision. If, on the other hand, petitioner's eligible costs fail to meet or exceed the amount determined by the Division to be the benefit to the Fund, the petitioner is eligible for reimbursement consistent with the findings herein.

I. STATUTORY, REGULATORY, PROCEDURAL, AND FACTUAL BACKGROUND

The Fund, administered by the SWRCB, was created by the Barry-Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Act). (Health & Saf. Code §§ 25299.10-25299.99.) Owners and operators of petroleum underground storage tanks (USTs) who meet certain statutory requirements may request reimbursement from the Fund for costs that they incur cleaning up contamination from petroleum USTs. (Health & Saf. Code §§ 25299.54, 25299.57.)

The Legislature created the Fund after making numerous findings, including the finding that "[i]t is in the best interest of the health and safety of the people of the state to establish a fund to pay for corrective action where [insurance] coverage is not available." (Health & Saf. Code § 25299.10, subd. (b)(6).) The SWRCB pays only the actual costs of corrective action it finds to be reasonable and necessary. (*Id.* § 25299.57.) Fund moneys are limited and are inadequate to meet the claims of all UST owners and operators in the state at once; therefore, the Legislature established a priority system whereby claimants least able to pay the costs of remediation, such as residential UST owners or small businesses, receive reimbursement before larger owners and operators. (*Id.* § 25299.52.)

Pursuant to the authority granted by statute, the SWRCB promulgated regulations governing the Fund. (Health & Saf. Code § 25299.77.) Fund regulations provide that no claimant is entitled to double recovery on account of any corrective action costs:

> "Where a claimant receives reimbursement on account of any costs from the Fund and also receives reimbursement on account of such costs from another source, the claimant shall remit to the Fund an amount equal to the sum disbursed from the Fund on account of such costs." (Cal. Code Regs., tit. 23, § 2812.2, subd. (b).)

This order concerns the proper application of the regulation against double recovery.

The SWRCB is directed to review the Division's Decision within 90 days after receipt of a proper petition. (Health & Saf. Code § 25299.37, subd. (c)(8)(B); Cal. Code Regs., tit. 23, § 2814.3, subd. (d); see Health & Saf. Code § 25299.37, subd. (e).) Fund regulations provide that the time limit may be extended for a period not to exceed 60 calendar days by written agreement of the SWRCB and petitioner. (Cal. Code Regs., tit. 23 § 2814.3, subd. (d).) The SWRCB did not take action on this petition within either the 90-day period or the 60-day extension period. If the SWRCB fails to take action within the regulatory time period, the petition is deemed to be denied. (*Id.*) Upon expiration of the time limit, a petitioner may choose either to seek judicial review or to seek mandate to compel the agency's compliance with the time limit. (Health & Saf. Code. § 25299.56; see *California Correctional Peace Officers Ass'n* v. *State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148 [43 Cal.Rptr.2d. 693].)

Petitioner elected to await agency action; therefore, the SWRCB is not divested of jurisdiction to hear the petition after expiration of the time limit. (See *id.*, 1133, 1150.) The SWRCB has the discretion to consider the petition on its own motion. (Cal. Code Regs., tit. 23, § 2814.2, subd. (b).) In response to a petition, the SWRCB may take such action as the SWRCB deems appropriate, including setting aside or modifying the Division's decision. (*Id.* § 2814.3,

subd.(a)(3)-(4).) Petitioner did not request an evidentiary hearing and did not seek to submit additional documentation. Petitioner requested only the opportunity to present oral argument.

Turning to the facts of this case, petitioner is an electrical contracting corporation that employs 436 persons.[1] In 1984 petitioner detected a leaking UST on its property, located at 712 Evelyn Avenue, Sunnyvale, California. In 1988 petitioner received an administrative order requiring it to remediate the site.

The contamination from petitioner's UST(s) migrated to adjacent property located at 722 East Evelyn Avenue, owned by John M. Saich (Saich property). Mr. Saich sued petitioner in September 1990, alleging numerous claims, including trespass, negligence, and nuisance, all arising from the presence of petroleum contamination that allegedly migrated from petitioner's property (Saich action). Mr. Saich demanded damages amounting to $1 million.

Petitioner's insurers denied any obligation to defend or indemnify petitioner with respect to the cleanup order or the Saich action. In June 1991 petitioner sued five of its insurers, referenced here as Insurers A, B, C, D, and E.

Petitioner settled with Insurer A in April 1992 and with the remaining insurers in February 1993. Including defense costs that were paid out separately, the insurers paid petitioner at least $1,040,736. The two agreements settled any and all claims against the insurers.

On February 17, 1993, petitioner settled the Saich lawsuit by purchasing the Saich property for the purchase price $987,500. Petitioner also obtained a release of any and all claims

[1] The facts stated herein are taken from petitioner's claim file, which contains all documents submitted by petitioner to the SWRCB. Claimants verify under penalty of perjury that all statements contained in or accompanying a claim are true and correct to the best of the claimant's knowledge. This includes all statements and documents submitted during the active life of the claim. (Cal. Code Regs., tit. 23, § 2812.4.)

arising out of the contamination, and agreed to indemnify Saich for any liability arising from the petroleum contamination.

Petitioner filed a claim to the Fund as a Class "C" claimant on January 17, 1992, the day the SWRCB first began accepting claims for placement on the priority list. Petitioner sought reimbursement for corrective action costs incurred at both its own and at the Saich property. Petitioner did not receive a letter of commitment until October 1995.

Petitioner submitted its first reimbursement request on January 11, 1996, seeking $608,000 from the Fund for expenses incurred at both 712 Evelyn Avenue and at the former Saich property. For reasons unrelated to issues raised by this petition, technical staff determined that of the $608,000 requested, $524,784 was eligible for reimbursement.

On appeal, the Division upheld Division staff's determination regarding the settlement proceeds. The Division determined that the underlying claims against the insurers sought to recover petitioner's costs arising out of the unauthorized release of petroleum from petitioner's USTs. Based on this analysis, the Division determined that some of the money paid in settlement was paid for corrective action costs.

The Division reduced the amount of money petitioner was eligible to receive from the Fund due to its settlement recoveries in the following manner. The Division determined that petitioner received at least $1,040,736[2] from its insurers in settlement of all claims. The Division allowed an offset for the entire $384,745, the amount petitioner claimed to have incurred in legal defense costs, based on copies of petitioner's bills. The Division also allowed an offset for the

[2] Based on petitioner's certification of nonrecovery from other sources and the Buyer's (petitioner) Closing Statement for the purchase of the Saich property (as opposed to the settlement agreements or petitioner's Request for Final Division Decision), this amount should be $349,497 plus $691,258.62, or $1,040,755.62.

$5,000 "deductible." The "deductible" refers to the amount of financial responsibility claimants must pay exclusive of the Fund. (Cal. Code Regs., tit. 23 § 2808.1, subd. (a)(1).)

Finally, the Division offset 30 percent of the remaining amount ($650,991) as a contribution toward the costs petitioner incurred in collecting the settlement ($195,297). (See SWRCB Order WQ 96-04-UST, *In the Matter of the Petition of Champion/LBS Associates* [*Champion*].) In doing so, the Division followed the holding in *Champion*. In *Champion*, the SWRCB determined that although it could not pay for attorney's fees it would be equitable to recognize the benefit a claimant obtained for the Fund by recovering money from other sources. Petitioner submitted no other documentation of hard costs to which the settlement recovery could be attributed.

Based on the above information, the Division determined that of the $1,040,736 known to be recovered by petitioner, $455,694 was paid in consideration of corrective action expenses otherwise reimbursable by the Fund ($1,040,736 - $384,745 - $5,000 - $195,297 = $455,694). Due to petitioner's settlement recovery, the Division reduced petitioner's eligibility for reimbursement by $455,694 to prevent an improper double recovery. (See appendix 1.)

The Division determined petitioner was eligible to receive reimbursement from the Fund in the amount of $64,090, the amount remaining after subtracting the $5,000 deductible and the $455,694 from the $524,784 in eligible costs. In making the above determinations, the Division relied solely on the documentary material submitted by petitioner. Petitioner disagrees with that determination and, without providing any additional documentation, seeks reimbursement from the Fund of the entire $524,784.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner argues that the SWRCB is statutorily required to make it whole for its total costs of corrective action. Petitioner contends that Fund reimbursement would not result in a double recovery to petitioner and that, consequently, it is entitled to reimbursement of all of its remaining eligible costs in the amount of $455,694. To substantiate its argument that Fund reimbursement would not result in a double recovery to petitioner, petitioner suggests other costs to which the settlement money should be attributed. (See appendix 2.) Petitioner argues that the Division Decision failed to take into consideration attorney's fees incurred to collect recovery both by petitioner and by Saich, as well as petitioner's estimated future defense costs.

Specifically, petitioner claims that the Division failed to recognize that it spent legal fees to collect the settlement proceeds from the insurers. Petitioner alleges that even after allowing an offset against the total settlement proceeds of the entire amount that it incurred to collect the settlement ($304,804) and the amount attributed to defense costs ($384,745), petitioner is left with $351,187 to cover its total costs of corrective action, amounting to $608,000.[3] Petitioner asserts that in actuality its net receipt from the settlements was only $351,187. Petitioner also complains that the Division overlooked petitioner's payment of the Saich legal fees, which petitioner states approached $200,000.

Finally, petitioner contends that the gravamen of its complaint against the insurance carriers was that its comprehensive general liability (CGL) policies obligated the

[3] Petitioner dropped its earlier arguments concerning the value of the property received in settlement and focused instead on the cash amounts received.

insurers to provide petitioner with defense costs for any suit brought against petitioner seeking damages covered by the CGL policies. Based on this contention, petitioner asserts that the insurers first contributed money to petitioner to cover both past and future defense obligations because the insurers' duty to defend was a certainty, as opposed to any other claims. Petitioner argues that based on SWRCB precedent, the Division should have recognized that the insurers were paying to cover their defense obligations, both present and future. Petitioner asserts that it valued its future discounted defense costs at $200,000 in determining the amount for which it was willing to settle with its carriers.

Petitioner argues that if the SWRCB takes the above amounts into consideration, the SWRCB must find that there is no possibility of double recovery with regard to petitioner's request for reimbursement. Therefore, petitioner contends that it is entitled to full reimbursement of its otherwise eligible corrective action costs.

Findings: Petitioner's arguments are without merit. Petitioner received at least $1,040,736 in settlement, an amount that exceeds the total remediation costs and other hard costs to which the settlement may be attributed. Essentially, petitioner argues for the SWRCB to disregard both precedent and the law in order to allow it to allocate settlement proceeds paid in compensation of corrective action costs to any and all other unsubstantiated costs, whether actual or uncertain. Contrary to petitioner's contention however, the SWRCB must determine both that the settlement proceeds may reasonably be allocated to costs other than corrective action and that those costs are substantiated.

By law, the SWRCB may reimburse only eligible corrective action costs where the claimant supplies appropriate documentation, and only to the extent costs are reasonable and necessary. (Health & Saf. Code § 25299.57(a), (b), (d).) Double recovery by a claimant is

prohibited. (Cal. Code Regs., tit. 23, § 2812.2, subd. (b).) The regulation against double recovery by claimants is consistent and not in conflict with the statutes; moreover, it is reasonably necessary to effectuate the purposes of the statutes considering (1) the Legislature's expressed desire to establish a fund to pay for corrective action where coverage is not available, (2) the SWRCB's legislative mandate to reimburse only reasonable and necessary expenses, and (3) the limited nature of the public funding available to cover not only the claims of UST owners and operators but also to cover other public costs, such as emergency cleanups or the cleanup of abandoned UST sites. Clearly, it is neither reasonable nor necessary to pay claimants who have received funds from their insurers or potentially responsible parties to cover costs that would otherwise be reimbursed by the Fund.

The SWRCB may not disregard a claimant's receipt of funds from other sources as a result of litigation or an insurance claim that seeks recovery for corrective action costs. To prevent double recovery, the SWRCB requires documentation that the funds received from other sources were not for corrective action. (See Health & Saf. Code § 25299.78, subd. (b).) The SWRCB may review the evidentiary basis of the claimant's allocation of the funds received. (See, e.g., *Dillingham Construction N.A., Inc.* v. *Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 75 Cal.Rptr.2d 207, 220 n. 11 (discussing the types of information required to support a good faith allocation in light of the need for adverse negotiations to ensure a noncollusive, good faith settlement agreement).) In determining whether a claimant to the Fund has been compensated for corrective action costs in a settlement payment, it is appropriate to review the settlement language and causes of action in the underlying lawsuit. (*Champion.*)

Petitioner's Claims Regarding the Allocation of the Settlement Proceeds Are Unsubstantiated

A review of the documents provided shows that petitioner has failed to substantiate its claims regarding the purposes of the settlement proceeds.

In order to ensure compliance with the regulation against double recovery, a claimant to the Fund must submit a form entitled *Non-Recovery From Other Sources Disclosure Certification* identifying all claim-related compensation that it has received, or expects to receive, from any source. (See, e.g., *Non-Recovery From Other Sources Disclosure Certification* [USTCF019.NON (Rev 8/94)], Jan. 11, 1996, Claim No. 4205.) The certification form requires the claimant "to submit documentation (settlement agreement, pleading, judgments, or any other document that identifies the purpose(s) for which the money was received)" if the claimant contends the disclosed funds were for purposes other than the costs of cleanup covered by the Fund.[4]

The certification provides a claimant with the opportunity to explain that money received from other sources was paid for purposes other than corrective action. Claimants must demonstrate actual, ascertainable costs to which the settlement money reasonably may be attributed based on the complaint or other demand. To the extent claimants demonstrate such costs, claimants may allocate the settlement proceeds to those costs.

[4] The SWRCB relies on a claimant's honest self-reporting although claims are subject to random audits. To date, less than ten percent of claimants have disclosed compensation from other sources, and the total amount disclosed exceeds $85 million. Of that amount, about $25 million, or an average of about $21,500 per reporting claimant, is allocated to corrective action and deducted from eligible costs. To date, the SWRCB has received over 13,000 claims and over $600 million has been encumbered to pay claims.

Petitioner's certification simply asserted that none of the money received from the insurers was for costs of cleanup and that the insurers "paid approximately $349,480[5] in cost of defense in the Saich action." Although the certification form requested supporting documentation, such as the complaints and the relevant insurance policies, petitioner has never supplied the underlying complaint(s) (or if there were no complaints, then any claims or demands) that it filed against its insurance carriers, the relevant insurance policies, the complaint filed against it by Saich, or other relevant evidence to support its characterization of the settlement proceeds. (See Cal. Code Regs., tit. 23 § 2814.1, subd. (c).)

Petitioner submitted copies of two settlement agreements with the insurers, bills for attorney's fees incurred by petitioner, an escrow statement setting forth the amounts of money directly deposited into escrow by Insurers B, C, D, and E (Insurer A was not among them), and by petitioner to purchase the Saich property, as well as a copy of the agreement settling the Saich action. Petitioner also submitted other documents, none of which bear on petitioner's assertions regarding the liquidated value of future defense costs or the Saich legal fees.[6]

Petitioner has failed to establish any "hard costs" other than its defense costs to which the settlement money may be attributed. Petitioner's unsupported assertions characterizing the money as "not for corrective action" fall far short of the minimal requirement

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[5] The certification states that Insurer B paid $12,409, Insurer F paid $13,613, and Insurer A paid $323,457 for defense costs as of January 1993, totaling $349,497. The sums listed in the accompanying Insurer A settlement agreement, dated April 1992, do not equal the amount reported on the certification form. No sums matching the other two amounts are referenced in the settlement agreement with the remaining insurers.

[6] Petitioner did submit its own bills to substantiate attorney's fees incurred to collect its settlement recoveries, but other reasons preclude the allocation of the settlement proceeds to cover all of these costs, as discussed below.

that a claimant produce some documentation to enable staff to make a decision regarding the purposes of the settlement funds. As discussed below, the documentation supports and does not contradict the Division's allocations.

The Insurance Settlement Agreements Support the Division's Findings That the Insurers Were Paying for a Release of All Claims, Both for Defense and for Indemnity

As stated in *Champion*, it is appropriate to review the settlement language to determine whether a claimant to the Fund has been compensated for corrective action costs in a settlement payment. Petitioner held CGL policies with numerous insurers and entered into a total of two settlements with its insurers, one with Insurer A and one with its remaining insurers.

As reflected in the settlement agreements, the nature of petitioner's grievance against the insurers, or the gravamen of its complaint, was the insurers' failure both to defend and to indemnify petitioner under its CGL policies against claims arising from the UST contamination. Standard CGL policies:

> ". . . provide, in pertinent part, that the insurer has a duty to indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for any covered claim. They also provide that the insurer has a duty to defend the insured in any action brought against the insured seeking damages for any covered claim." (*Buss* v. *Superior Court* (1997) 16 Cal.4th 35, 45 [65 Cal.Rptr.2d 366].)

Indeed, petitioner's Request for Final Division Decision admitted that the insurers paid for both defense and indemnification, but in the absence of any substantiation in the express written language of the settlement agreements, attempted to deny that any of the money paid to indemnify petitioner was for corrective action costs. (Request for Final Division Decision at 7.) Accordingly, the gravamen of petitioner's claims against its insurers was petitioner's demand for both defense and indemnity as a result of the administrative cleanup order and the Saich action, both arising out of the contamination from petitioner's leaking USTs.

The language of the Insurer A settlement agreement indicates that the insurers had been paying petitioner's defense costs on an ongoing basis. Paragraph 20 is entitled *Payment of Accrued Defense Costs* and states, in relevant part, that "[Insurer A] has paid [petitioner] $35,393.33 to date representing approximately a 66% share of those costs agreed upon between" three of the insurers, A, B, and E.

Pursuant to paragraph 19 of the agreement, entitled "Payment," Insurer A paid petitioner the sum of $250,000 sometime in April or May of 1992. The settlement agreement provided that the sum of $250,000, together with the payment to be made pursuant to Paragraph 20 of the agreement (entitled *Payment of Accrued Defense Costs* and stating amounts totaling $45,804.57), were to be paid

> ". . . in complete and full satisfaction of each and every of [Insurer A's] defense and indemnity obligations to [petitioner], if any, pursuant to the Policies with respect to all of [petitioner's] liabilities and duties in connection with the Saich action, the Administrative Order [the regulatory agency's cleanup directive], the Claim [the claim against the insurer for coverage], and any and all claims resulting or arising from Defined Pollution Events [including the petroleum contamination]." (Petitioner's Request for Final Division Decision, Exhibit A, Insurer A settlement agreement, at 4.)

Petitioner represented that Insurer A paid all of the $250,000 for defense costs. (Petitioner's Request for Final Division Decision, at 6 n.4; *Non-Recovery From Other Sources Disclosure Certification* [USTCF019.NON (Rev 8/94)], Jan. 11, 1996, Claim No. 4205.) The terms of the settlement agreement do not support petitioner's contention. The settlement agreement settled all claims, both for defense and indemnity, including claims arising from the petroleum contamination. It may be inferred from the terms of the Insurer A settlement agreement that some, if not all, of the $250,000 was paid for costs other than the defense costs,

(i.e., indemnification costs), which were referenced separately in the following paragraph of the settlement agreement.

The Insurer A settlement agreement implies that there may be a separate agreement between the insurers regarding coverage of the Saich action defense costs or their payment of such costs to petitioner. The Insurer A settlement agreement makes reference to "costs agreed upon between the insurers," Insurer A's "share" of the costs, and the separate, ongoing payment by the several insurers of defense costs. Yet the Division accepted petitioner's unsupported contention that it received no more than the disclosed $349,497 from the insurers for said defense costs. (See *supra*, note 5.)

In fact, the Division permitted petitioner to allocate $384,745 of the total settlement recovery to defense costs. The Division did not find that $384,745 was "earmarked" by the settlement agreements for defense costs as implied by petitioner. The settlement agreements make no reference to that amount. Indeed, of the $349,497 disclosed on the certification form and characterized by petitioner as "defense costs," a strong inference may be drawn that $250,000 of that amount was "earmarked" by the Insurer A settlement agreement to cover at least some (if not all) claims other than the defense costs for which separate provisions were made.

Rather, the Division, as provided by the disclosure certification, accepted petitioner's documentation of attorney's fees incurred defending the Saich action as hard costs to which the total settlement amounts could reasonably be attributed pursuant to the language of the settlement agreements. (*Champion.*) Petitioner's bills, totaling $384,745, were treated as "defense costs" within the meaning of the settlement agreements.

Like the Insurer A agreement, the February 1993 settlement agreement between petitioner and Insurers B, C, D, and E makes reference to petitioner's claim against the insurers as a result of the administrative cleanup order and the Saich action. Also like the Insurer A agreement, the settlement payments are made in complete and full satisfaction of each and every of the insurers' defense and indemnity obligations to petitioner pursuant to the policies with respect to all of petitioner's liabilities and duties in connection with the Saich action, the administrative cleanup order, and any and all claims resulting or arising from the UST contamination.[7] The agreement does not reference the separate payments made by Insurers B and E that petitioner listed on the certification form as paid for "defense costs." (See *supra*, note 5.) Pursuant to the settlement agreement, the insurers paid $691,258.62.

In summary, petitioner sought relief for claims based on both defense and indemnification. The plain language of the settlement agreements supports a finding that the insurers were paying for any and all claims arising out of the administrative order and the Saich action, both based on the UST contamination.

Reimbursement by the Fund of All of Petitioner's Eligible Corrective Action Costs Would Result in Petitioner's Receipt of a Double Recovery Because the Insurers Necessarily Contributed Money for a Release of Claims for Damages Measured by Petitioner's Corrective Action Expenses

As established above, the insurers were paying to settle all claims. As shown below, those claims necessarily included petitioner's corrective action costs, the same costs for

[7] The dates of the relevant insurance policies, some of which were listed in the settlement agreement, extend back prior to the advent of the "absolute pollution exclusion" in 1986. (See, e.g., Comment, *The 1970 Pollution Exclusion in Comprehensive General Liability Policies: Reasons for Interpretations in Favor of Coverage in 1996 and Beyond* (1996) 34 Duq.L.Rev. 1083, 1106.)

which petitioner seeks reimbursement from the Fund. (See Health & Saf. Code § 25299.57 (providing for reimbursement of a UST owner or operator's required corrective action costs).)

The settlement agreements indicate that the migrating pollution from the leaking USTs was the gravamen of the Saich action. All three settlement agreements state that the Saich action sought damages and other relief pursuant to causes of action arising out of soil and groundwater conditions allegedly resulting from the presence of petroleum leaking from petitioner's USTs. A proximate result of petitioner's alleged wrongdoing in permitting the contamination to migrate onto the Saich property would be Saich's incurrence of damages in an amount necessary to complete cleanup and to abate the contamination. (See *Santa Fe Partnership, et al. v. ARCO Products Co.* (1996) 46 Cal.App.4th 967, 973-978 [54 Cal.Rptr.2d 214] (a plaintiff may recover damages for either the costs of remediation or the decrease in property value, but not both).)

Although petitioner has not provided a copy of the Saich complaint, the majority of complaints reviewed by the Division seek injunctive relief (defendant's performance of corrective action) and, in the alternative, damages (in the amount of the cost to perform the corrective action).[8] Petitioner claims that Saich no longer sought corrective action costs at the time of settlement. If Saich did not seek reimbursement for corrective action costs, it is because petitioner was already performing corrective action at the site and petitioner agreed to purchase Saich's property for a price that did not reflect the fact that it was contaminated. (See

[8] In complaints reviewed by the Division, damages for nuisance, trespass, personal injury, etc., have all been measured by the costs of corrective action to abate the contamination.

Petitioner's Request for Final Division Decision, Exhibit C, Saich Settlement Agreement at 2, Recital F (stating that the value of the property has been destroyed).)[9]

Because the insurers were paying to settle all claims which may have existed between the insurers and the insured, the settled claims necessarily included claims measured by petitioner's actual expenses incurred in performing corrective action pursuant to the administrative cleanup order as well as claims for defense and indemnity arising from the third party Saich action.[10] The latter claims necessarily would have included the expenses petitioner incurred as a result of performing corrective action at the Saich property. The data provided by petitioner in conjunction with its reimbursement claim indicate that: (1) the groundwater flows directly from the UST site to the adjacent property; (2) the majority of the plume area lies within the adjacent property; and (3) 41 vapor extraction probes are located on the adjacent property while only 19 are located at the site address. It may be inferred from the data provided, as well as from petitioner's own statements regarding its performance of corrective action on the Saich property, that a large proportion of petitioner's claimed expenses for corrective action were

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[9] Petitioner elected to use the settlement money to buy the Saich property to settle the Saich action rather than pay Saich for the costs of corrective action, or perform corrective action on Saich's behalf. For the purpose of this analysis, the money petitioner spent acquiring the property must be treated as the equivalent of money spent performing corrective action, and petitioner should not be permitted to allocate any of its settlement proceeds toward the cost of acquiring the property as though it were a cost distinct from corrective action costs. Were petitioner permitted to allocate its settlement proceeds toward the cost of acquiring the property and reimbursed in full for its corrective action costs, petitioner would receive a double recovery in the form of a clean piece of property that it did not own before the release from its UST occurred. (See, e.g., *Santa Fe Partnership* v. *ARCO Products Co.* (1996) 46 Cal.App.4th 967, 977 [54 Cal.Rptr.2d 214] (unjust enrichment to award both the cost of remediation and the lost property value).) Consistent with this rationale, petitioner does not argue that it should be permitted to allocate its settlement proceeds toward the cost of acquiring the Saich property.

[10] It is important to note that we are not interpreting the insurance policies and their potential coverage; rather, we are interpreting the settlement agreements. The settlement agreements expressly state that they are not to be used as

incurred on the adjacent property. These measurable costs would have been considered by the parties in settling all claims.

When petitioner entered into the settlement agreements, petitioner had not received assurance that its corrective action costs would be paid by the Fund, and could not know whether or to what extent its corrective action costs would be covered by the Fund. Petitioner was incurring actual, ascertainable costs in responding to the administrative cleanup order at both its own property and at the Saich property. From this perspective, petitioner must have negotiated for corrective action costs and the defendant insurers must have considered the corrective action costs in their tender of settlement. (*Champion.*) It can be inferred from the lack of reference to the Fund in the express language of the settlement agreements that the parties did not take the availability of Fund moneys into consideration in settling the actions. (*Champion.*)[11]

It is reasonable to conclude that in negotiating the settlements, the defendant insurers and petitioner gave great weight to the clearly established and quantifiable costs of corrective action and gave much less weight to other, merely potential costs. (*Champion.*) The express language of the settlement agreements provides that the insurers were paying to settle all of the insurers' obligations to petitioner, if any, with respect to all of petitioner's liabilities and duties arising out of the Saich action, the administrative cleanup order, and any and all claims arising as a result of the leaking tank. As the insurers were paying to settle all claims, those claims necessarily included corrective action expenses otherwise reimbursable by the Fund. It is reasonable to infer, in the absence of any evidence to the contrary other than petitioner's

[11] Both agreements contain clauses stating that they embody the entire agreement between the parties.

unsupported statements, that reimbursement by the Fund of all of petitioner's corrective action costs would result in petitioner's receipt of a double recovery.

Petitioner May Not Allocate Settlement Proceeds to Cover All of Its Legal Fees Incurred to Collect the Insurance Settlements or the Alleged Saich Legal Fees

For the following reasons, the SWRCB rejects petitioner's arguments that it is entitled to allocate settlement proceeds to cover all of its legal fees incurred collecting the insurance settlements or the alleged Saich legal fees. The paramount and controlling reason that neither one of these suggested allocations ($304,000 in collection costs and $200,000 to cover Saich's legal fees) should be permitted is because the express language of the settlement agreements does not support petitioner's allocations. All three settlement agreements at issue provide for each party to bear its own attorneys' fees and costs with regard to the settled actions.

Morever, the figure attributed to Saich's legal fees ($200,000) lacks substantiation.[12] This reason alone would have been sufficient to reject petitioner's allocation of the settlement proceeds to Saich's legal fees. Petitioner can only estimate the amount Saich incurred in legal fees, and its estimate has ranged from $384,000 to $200,000.

Attorney's fees are not necessarily costs to which settlement proceeds may reasonably be attributed. (See Civ. Code § 1717, subd. (b)(2) (where an action has been dismissed pursuant to settlement, there is no prevailing party to whom attorney's fees may be awarded in an action on a contract).) Attorney's fees are not "damages" that are ordinarily recoverable by the prevailing litigant in the absence of statutory authorization. (*Alyeska Pipeline*

[12] The figure attributed to Saich's legal fees first appeared, without substantiation, in the petition. (See Petition for Review of Final Division Decision at 3, n. 5; see Cal. Code Regs., tit. 23, § 2814, subd. (b).)

Service Co. v. *Wilderness Society* (1975) 421 U.S. 240, 247 [95 S.Ct. 1612].) Under the "American Rule," the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser. (*Id.*) California follows the American Rule: except as provided by statute, compensation for attorney's fees is left to the agreement of the parties (Civ. Proc. § 1021; *Hoya* v. *Slim's Gun Shop* (1978) 80 Cal.App.3d Supp. 6, 8 [146 Ca.Rptr. 68].)

Petitioner has not provided any evidence of an agreement between the parties or a statute that provided for the payment of reasonable attorney's fees incurred in either its actions against the insurers or the Saich action. Petitioner is free to use the settlement proceeds in any manner it chooses. But it is unreasonable to characterize the purpose of the settlement proceeds as payment in consideration of attorney's fees in the face of the express language of the settlement agreements to the contrary.

Nonetheless, the Division did not ignore the legal fees incurred by petitioner to collect the settlement recovery. The Division allowed an offset of 30 percent of the amount it calculated to be the benefit to the Fund pursuant to *Champion*. The SWRCB does not allow offset of the entire amount incurred in collecting a recovery because the SWRCB would be bearing more than its fair share of the costs incurred. Instead, *Champion* directs staff to reimburse claimants for eligible corrective action costs in an amount that equals a reasonable share of attorney's fees based on the benefit claimant's efforts have obtained for the Fund.[13]

[13] A claimant must substantiate its legal fees in order to be paid the full amount. The SWRCB will take into consideration a claimant's legal fees where the claimant has not otherwise been compensated for such costs. For example, if a claimant incurred $500,000 in corrective action costs, $200,000 in defense costs, $100,000 in attorney's fees to pursue its claims against insurers, and recovered $1 million, all of the claimant's costs, including his attorney's fees, would be met by the settlement or judgment. In such cases, it would be inappropriate to use limited public funds, intended only to reimburse eligible corrective action costs, to supplement the claimant's recovery.

Petitioner May Not Allocate Settlement Proceeds to Speculative and Uncertain Future Defense Costs to the Exclusion of Petitioner's Actual Corrective Action Costs

Petitioner's argument that the parties gave greater consideration to petitioner's defense obligations, both past and future, than to its claims for indemnification is without merit. Petitioner sought both defense *and* indemnity from its insurers with regard to the administrative cleanup order and the Saich action. Petitioner's argument is self-serving in its post-settlement focus on one grievance--the alleged breach of duty to defend--and its legal merits to the exclusion of the other. (See, e.g., *Dillingham Construction N.A., Inc.* v. *Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 75 Cal.Rptr.2d 207, 219 (an attorney cannot be permitted to testify, after the fact, as to how he believes settlement proceeds would have been allocated had the parties negotiated and resolved the issue).)

The Division agreed, and the settlement agreements support, that the insurers allocated *some* of the money to cover petitioner's defense costs. Accordingly, the Division permitted petitioner to allocate the settlement funds to *all* actual expenses incurred for attorney's fees in defense.

But petitioner raises for the first time the argument that the insurance settlements embraced a future defense cost component. Without any substantiation, petitioner asserts that it valued its future discounted defense costs at $200,000. *Champion* directed staff to consider those actual, hard costs that a settling party would take into consideration in its negotiations. It would not be in accordance with the *Champion* decision to permit petitioner to allocate its remaining settlement recovery to speculative and uncertain "future defense costs" to the exclusion of petitioner's actual corrective action costs. (See *Champion* ("[I]t is reasonable to conclude that the defendants would have first contributed moneys to settle these certain costs [corrective action

expenses] as opposed to damages which were more open to dispute").)[14] Moreover, there is no independent way to evaluate these asserted costs. Petitioner may not allocate settlement proceeds to speculative and uncertain future defense costs to the exclusion of actual corrective action costs.

Determination of Petitioner's Eligibility for Reimbursement

It remains to review the methodology used in the Division's Decision to reduce petitioner's eligibility for reimbursement. Applying the SWRCB's holding in *Champion,* the Division granted petitioner a "credit" against petitioner's settlement recovery as a contribution toward its attorney's fees. (*Champion.*)

In the experience of Division staff, the facts that provided the basis for the decision in *Champion* are extremely unusual in two respects. In *Champion*, petitioner received more money in settlement than was necessary to cover all of its "hard" costs, with the exception of its attorney's fees. In addition, the total amount of eligible costs incurred and otherwise payable from the Fund was known at the time of the SWRCB's decision.

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[14] Even if the settlement agreements supported petitioner's argument that all funds received were in payment of defense costs alone, which they do not, the latter costs could include corrective action expenses otherwise reimbursable by the Fund. The duty to defend includes undertaking reasonable and necessary efforts to avoid or at least minimize liability. (See *Aerojet-General Corporation* v. *Transport Indemnity Co.* (1997) 17 Cal.4th 38, 70 Cal.Rptr.2d 118, 129-130 (citing numerous cases dating back to the 1960s for the proposition).) If the insured did not obey the administrative order to perform corrective action, the regulatory agency could have undertaken the corrective action and brought an action to recover its costs. (Health & Saf. Code § 25299.37, subd. (g).) Courts and commentators have recognized that government cleanup efforts are generally considerably more expensive than cleanups performed by the insured. (See *AIU Insurance Co. et al.* v. *Superior Court*, (1990) 51 Cal.3d 807, 837 [274 Cal.Rptr. 820].) By conducting the work itself, the insured may be able to avoid or at least minimize liability, both for the costs of the investigation and any subsequent costs. Thus, defense costs would include more than mere attorney's fees. Defense costs could include the insured's reasonable and necessary costs incurred for site investigation, monitoring of the spread of petroleum from the site, and other remedial action necessary to minimize the insured's potential liability, including its liability to adjoining third party landowners. Such costs are corrective action expenses otherwise reimbursable by the Fund, and were requested by petitioner.

Unlike petitioner in *Champion*, most claimants to the Fund receive settlements that are inadequate to cover all of the claimant's demonstrated costs. Also unlike the facts of *Champion*, a claimant's total amount of eligible corrective action costs are generally unknown when staff review the settlement recovery because the review is usually carried out prior to the issuance of a letter of commitment and sometimes prior to the completion of corrective action.

In reviewing settlement agreements and calculating the "credit" against a claimant's settlement recovery, the Division has appropriately adapted *Champion* to recognize any benefit a claimant obtains for the Fund, whether or not the claimant succeeds in recovering more than enough money to cover all corrective action costs. Thus, where the gravamen of the complaint seeks damages for corrective action costs, the Division allows a claimant to demonstrate all other hard costs to which the settlement recovery reasonably may be attributed. The amount remaining after deducting those hard costs is attributed to corrective action costs. Some percentage (usually 30 percent) of the amount of the settlement attributed to corrective action costs (rather than petitioner's total eligible costs, which are as yet unknown) may be determined to be the Fund's share of attorney's fees incurred to collect the settlement or judgment. The amount of the settlement attributed to corrective action is then further reduced by the amount determined to be the Fund's share of attorney's fees.

Until the claimant spends more in reimbursable corrective action than the amount received in settlement and attributed to corrective action (which already has been reduced by the credit for attorney's fees), the Division does not reimburse the claimant's costs. Instead, the Division applies a credit against the settlement amount attributed to corrective action. In the vast majority of claims, the method achieves the same result as that in *Champion* and avoids overpayment because petitioner's total eligible corrective action costs will meet or exceed the

settlement amount determined by the Division to represent the benefit to the Fund. Only in the rare case where petitioner's actual eligible costs are less than the amount predetermined to represent the benefit to the Fund does the method fail to achieve the result obtained in *Champion*. *Champion* directs a case-by-case determination of the percentage of attorney's fees to be contributed based on a review of the underlying facts and causes of action.[15] Following the method described above, the Division allowed a credit to petitioner amounting to 30 percent of the benefit to the Fund; i.e., the amount recovered from the insurers and attributed to corrective action ($1,040,736 (total amount received in settlement) - $384,745 (offset for defense costs) - $5,000 (offset for deductible) = $650,991).[16] The Division determined that an offset of $195,297, or 30 percent of $650,991, was appropriate. (See Division Decision at 3.)

Based on the information provided, 30 percent is reasonable.[17] The percentage allowed happens to reflect the ratio of petitioner's total legal fees ($304,804) to the amount of its settlement recovery ($1,040,736), or 29 percent. (Petition for Review of Final Division Decision at 5 n. 8.) In *Champion*, the petitioner incurred attorney's fees amounting to 50 percent of his

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[15] *Champion* does not require staff to second-guess a claimant's legal strategies or price the quality of the claimant's legal representation. The SWRCB declined to comment on the reasonableness of the overall attorney's fees incurred in *Champion*; instead, it focused on what would be an appropriate contribution by the Fund in light of the Fund's benefit. But *Champion* does ask staff to evaluate on a case-by-case basis the facts and complexities of the legal theories involved in the underlying lawsuits. Staff have found *Champion* extremely difficult to apply. The SWRCB directs the Division to consider proposing a regulation that would provide for an across-the-board method of allocating the proceeds of a settlement or judgment to recognize a fair share of claimant's legal costs so that a case-by-case analysis is no longer required. While the underlying facts will vary, the causes of action stated in suits seeking damages based on leaking petroleum USTs against responsible parties may not vary greatly. The same may be true with regard to suits seeking damages against insurers for the failure to cover costs arising out of leaking petroleum USTs.

[16] The $5,000 deductible is applied as an offset to reduce the amount of settlement funds applicable to corrective action in determining the benefit to the Fund. This computation is separate from and does not constitute payment of the deductible.

[17] Staff were unable to review the complaints because petitioner never submitted them.

settlement recovery. The SWRCB declined to apply a strict apportionment method that might be used under a more traditional application of the common fund doctrine, and limited the SWRCB's contribution to a proportionate share of the eligible corrective action costs.

The methodology the Division used to calculate the claimant's eligibility for reimbursement would be correct if the Division's determination of the benefit to the Fund (i.e., the amount recovered and attributable to eligible corrective action costs, $650,991) is correct. However, petitioner, like petitioner in *Champion*, may have received more money in settlement than was necessary to cover all of its hard costs, excluding its attorney's fees ($1,040,736 - $608,000 (total corrective action costs claimed) - $384,745 (defense costs) = $47,991). In addition, petitioner's total eligible corrective action costs appear to be known ($524,784)[18] and less than the amount ($650,991) the Division determined to be the benefit to the Fund.

Assuming the above (i.e., that petitioner received more in settlement than necessary to cover all hard costs and that total eligible costs are below $650,991), the situation is analogous to *Champion* and the Division should have determined petitioner's reimbursement eligibility in the following manner. The Division should have subtracted the deductible from petitioner's known eligible corrective action costs to determine the benefit to the Fund ($524,784 - $5,000 = $519,784).[19] The Division should have paid petitioner's corrective action costs in an

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[18] This figure represents the eligible costs incurred as of the date of petitioner's first reimbursement request; no other reimbursement requests have been submitted since petitioner's initial request over two and a half years ago.

[19] *Champion* improperly applied the $10,000 deductible. In *Champion*, the claimant's total reimbursable costs were determined to be $120,907. The benefit to the Fund obtained by the claimant, however, was not $120,907. The benefit to the Fund was the amount the SWRCB would have reimbursed had the claimant not obtained the settlement recovery; i.e., the claimant's total reimbursable costs minus the deductible ($110,907). Consequently, the amount of corrective action costs paid under *Champion* should have been 30 percent of $110,907 ($33,272).

amount equaling 30 percent of the benefit to the Fund ($519,784 x .30 = $155,935). Petitioner has already received $64,090 in reimbursement. Given the above, petitioner should be reimbursed the difference ($155,935 - $64,090 = $91,845). (See appendix 3.)

2. Contention: Petitioner argues that the Division's Decision will discourage future claimants from seeking recovery from third parties (such as insurers) "even though such recoveries do not constitute a 'double benefit' to the claimant and simultaneously reduce the Fund's obligations." (Petition for Review of Final Division Decision at 2.) In the alternative, petitioner believes that future claimants will pursue recovery of eligible costs from the Fund first, and then seek all other costs from its insurers or other potentially responsible parties.

Findings: It may be true that the SWRCB's refusal to permit claimants to allocate settlement proceeds to cover all of their attorney's fees and other uncertain costs may fail to provide sufficient incentive for a party to recover corrective action costs from other sources and, instead, a party may decide to recover those costs directly from the Fund. It is not the role of the SWRCB, however, either to encourage or discourage litigation.

The governing statutes do not contemplate recovery against insurers by the large majority of claimants. The Legislature made specific findings that (1) owners or operators of USTs have been unable to obtain affordable insurance coverage and (2) it is in the best interest of the health and safety of the people of the state to establish a fund to pay for corrective action where coverage is not available. (Health & Saf. Code § 25299.10, subds. (4), (6).)

Moreover, the statutes do not require claimants to pursue other possible sources of recovery before making a claim to the Fund. The primary purpose of the Fund is the rapid distribution of funds in order to protect the public health and safety. (*Id.* § 25299.10, subd. (b)(1).) The Fund is meant to encourage responsible parties to take corrective action in the

first instance. (Health & Saf. Code § 25299.10, subd. (b)(8).)

Parties undertake litigation for a number of reasons and there has been no evidence that the SWRCB's application of the regulation against double recovery has had a chilling effect on litigation related to contamination from USTs. If a claimant believes that it paid for insurance coverage and seeks to enforce its contractual rights, as petitioner did here, it may receive reimbursement for costs otherwise payable from the Fund.[20] Future claimants who seek reimbursement for costs other than those covered by the Fund and who contemplate Fund recovery, are free to indicate those considerations in a good faith settlement agreement that the SWRCB may review. If a claimant does recover funds related to or paid in consideration of the unauthorized release that was the subject of the Fund claim, the claimant must disclose the recovery to the SWRCB.

Petitioner appears to misconstrue the purposes of the Fund. The Legislature did not create the Fund to make a party whole by reimbursing the party for all of the costs it has suffered as a result of the unauthorized release from the UST; to the contrary, the Fund is limited to reimbursing only certain, specified costs.

The Fund may not be used to finance, directly or indirectly, the costs of litigation or other costs incurred by claimants, such as lost profits. The *Champion* order employed the common fund doctrine as a basis for granting a credit to which a claimant otherwise would not

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[20] The Legislature did not create the Fund to subsidize insurance carriers who have accepted premiums in exchange for the assumption of a calculated business risk; rather, the Fund was created as a temporary "stop gap" measure to meet a perceived emergency. (Health & Saf. Code § 25299.10, subd. (b)(4), (6); *id.* § 25299.81.) The Fund was intended to provide the breathing room necessary to develop expertise and collect a pool of environmental actuarial data to enable private commercial insurers to expand the availability and affordability of insurance coverage. (See *id.* § 25299.10, subd. (b)(7).)

be entitled. For equitable reasons, the SWRCB chose to adapt and extend the common fund doctrine to allow a credit equal to a percentage of a claimant's recovery of otherwise reimbursable corrective action costs. Given the Fund's limited endowment and its purpose of reimbursing reasonable and necessary corrective action costs, it is reasonable to limit the amount of the credit to ensure the availability of funding for other claimants.

III. SUMMARY AND CONCLUSION

1. The regulation against double recovery requires a claimant to disclose, under penalty of perjury, all funds received from other sources which are related to or paid in consideration of the unauthorized release which is the subject of the claim.

2. In order to evaluate a claimant's characterization of the funds, the SWRCB may require supporting documentation.

3. A review of the settlement agreements indicates that the insurers were settling all claims, and that in settling those claims the insurers contributed a portion of the settlement proceeds to cover claims for corrective action costs. Therefore, reimbursement by the Fund of all of petitioner's eligible costs would result in petitioner receiving an improper "double recovery."

4. In general, settlement proceeds may not be allocated to cover all attorney's fees incurred to collect the settlement.

5. Claimants may not allocate settlement proceeds to costs that are unsubstantiated or incapable of independent evaluation.

6. Under the facts provided, it is fair and reasonable to allocate $384,745 of the settlement proceeds to cover the costs petitioner incurred in defending against the Saich action.

These costs are 'defense costs' to which the settlement proceeds reasonably may be attributed; in addition, petitioner provided documentation to substantiate these costs.

7. Under the facts provided, it is fair and reasonable for the Fund to bear corrective action costs equal to 30 percent of the amount obtained through petitioner's efforts and determined to be a benefit to the Fund.

8. If petitioner has no more reimbursement requests to submit, then the amount determined to be the benefit to the Fund is $519,784, and petitioner is entitled to an additional reimbursement of $91,845.

9. If petitioner's eligible costs meet or exceed the amount determined by the Division to be the benefit to the Fund ($650,991), the Division's methodology is correct.

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IV. ORDER

IT IS THEREFORE ORDERED that the Division Decision reducing the eligibility of petitioner, claim No. 4205, is affirmed unless petitioner's eligible costs fail to meet or exceed the amount determined by the Division to be the benefit to the Fund. If petitioner's eligible costs fail to meet or exceed that amount, the Division Decision is modified in accordance with the findings herein.

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 September 17, 1998.

AYE: John Caffrey
James M. Stubchaer
Marc Del Piero
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board

APPENDIX 1

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 98- -UST

In the Matter of the Petition of
CUPERTINO ELECTRIC, 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

SWRCB/OCC File UST-106

DIVISION DECISION METHODOLOGY	
Total Settlement Funds Received	$1,040,736
Less Other Costs	
Fund Deductible	(5,000)
Defense Costs, Saich Litigation	(384,745)
Champion "common fund" allocation [($1,040,736 - $5,000 - $384,745)* x .30]	(195,297)
Total amount of proceeds considered to be a "double recovery"	$ 455,694

Once petitioner pays the first $5,000 in corrective action expenses (the required amount of financial responsibility, or "deductible"), if petitioner spends $650,991 in otherwise eligible corrective action costs, the Fund will reimburse petitioner in the amount of $195,297. Eligible corrective action expenses over $460,694 are reimbursed dollar for dollar.

* The result, $650,991, is the "benefit to the Fund" or the amount of the settlement proceeds the Division attributed to corrective action expenses that would have been paid from the Fund if the petitioner had not obtained the settlement proceeds. The method is usually appropriate to determine the "benefit to the Fund" because the amount of settlement proceeds attributable to corrective action rarely equals or exceeds the amount of eligible corrective action costs incurred.

APPENDIX 2

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 98- -UST

In the Matter of the Petition of
CUPERTINO ELECTRIC, 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

SWRCB/OCC File UST-106

PETITIONER'S METHODOLOGY	
Total Settlement Funds Received:	$1,040,736
Less Other Costs:	
Defense Costs, Saich Litigation	(384,745)
Collection Costs, Insurance Litigation	(304,804)
Amount Remaining:	$ 351,187
Offset for Fund Deductible	(5,000)
Amount Remaining:	$ 346,187
Less Other Costs Requested in Petition:	
Future Discounted Defense Costs	(200,000)
Saich's Legal Costs	(200,000)
Total remaining available to Cupertino:	$ (53,813)

APPENDIX 3

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 98- -UST

In the Matter of the Petition of
CUPERTINO ELECTRIC, 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

SWRCB/OCC File UST-106

ANALYSIS PURSUANT TO *CHAMPION* METHODOLOGY	
I. Determination Whether *Champion* Methodology Should be Applied	
Total Settlement Funds Received:	$1,040,736
Less Other Costs:	
Defense Costs, Saich Litigation	(384,745)
Total Corrective Action Expenses	(608,000)
Amount remaining:	$ 47,000
Because petitioner has enough money to cover the costs to which the settlement proceeds are reasonably attributable, petitioner would receive a "double recovery" if the Fund reimbursed all of his eligible corrective action expenses. Petitioner has obtained a benefit for the Fund by recovering expenses that would otherwise have been paid by the Fund from another source. The *Champion* "credit" recognizes this benefit.	
II. Application of *Champion* Methodology	
Eligible Corrective Action Expenses	$ 524,784
Less "Deductible"	(5,000)
Benefit to the Fund (costs otherwise paid by Fund)	$ 519,784
Petitioner will receive:	
Champion "common fund" allocation ($519,784 x .30)	**$155,935**