STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 98 - 06 -UST

In the Matter of the Petition of
BRUCE DeMENNO
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-109

BY THE BOARD:

Mr. Bruce DeMenno (petitioner) seeks review of the Division of Clean Water Programs (Division) Final Division Decision (Decision) which disqualified and barred petitioner from further participation in the Underground Storage Tank Cleanup Fund (Fund) after finding that petitioner submitted documents containing a material error and that the error was a result of intentional misrepresentation on the part of petitioner. For the reasons hereafter stated, we affirm the Division's Decision.

I. STATUTORY, REGULATORY, PROCEDURAL, AND FACTUAL BACKGROUND

The Fund, administered by the State Water Resources Control Board (SWRCB), was created by the Barry-Keene Underground Storage Tank Cleanup Fund Trust Act of 1989. (Health & Saf. Code §§ 25299.10-25299.99.) The legislative findings made as part of the act include a 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 coverage is not available." (Health & Saf. Code § 25299.10, subd. (b)(6).) 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. (*Id.* §§ 25299.54, 25299.57.)

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 payment on account of any corrective action costs. (Cal. Code Regs., tit. 23, § 2812.2, subd. (b).) The regulation against double recovery is consistent with and not in conflict with the governing statutes; moreover, it is reasonably necessary considering (1) the Legislature's expressed desire to establish a fund to pay for corrective action where coverage is not available (Health & Saf. Code § 25299.10, subd. (b)(6)), (2) the SWRCB's legislative mandate to reimburse only reasonable and necessary expenses (*Id.* § 25299.57), 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, the cleanup of abandoned UST sites or UST-contaminated drinking water wells. (*Id.* §§ 25299.52, 25299.97-25299.99.)

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. (*Id.* § 2812.4; see Health & Saf. Code § 25299.55, subd. (a).) This includes all statements and documents submitted during the active life of the claim. (Cal. Code Regs., tit. 23, § 2812.4.) If a claimant submits documents containing material error and the error was the result of intentional misrepresentation on the part of the claimant, the claim may be disqualified and barred from

further participation in the Fund. (Cal. Code Regs., tit. 23, § 2812.6; see Health & Saf. Code § 25299.57, subd. (a)(2); e.g., Gov. Code § 12650 et seq. (False Claims Act).) This order addresses whether petitioner's claim should be disqualified from participation in the Fund pursuant to section 2812.6, Title 23, California Code of Regulations.

The following is a summary of the relevant facts.[1] The petitioner, Mr. Bruce DeMenno, is a real estate operator. (Division Exhibit A (Div. Exh. A) at 312.) Petitioner owns property located at 30815 Highway 18, Lucerne Valley, California (site), on which petitioner's tenants operated an automobile service station. (Div. Exh. A at 310, 320.) Petitioner supplied gasoline and diesel fuel to the service station located on the site as well as to about 25 other service stations. (Hearing Transcript (Transcript) at 70:1-3.) Including the site, petitioner owned three service stations and a wastewater treatment facility. (Transcript at 70:6-8; Div. Exh. E at Appendix 2.)[2]

Petitioner discovered an unauthorized release of petroleum at the site in February 1982. (Div. Exh. A at 310.) In April 1984 the Colorado River Basin Regional Water Quality Control Board (RWQCB) issued Cleanup and Abatement Order 84-71, requiring petitioner to investigate and remediate petroleum contamination of the soil and groundwater at the site. (Div. Exh. A at 310, 558; Div. Exh. G at 1-1.)

[1] References to the hearing transcript contain page and line numbers. The page number precedes the colon and the line number(s) follow the colon. References to exhibits are by party, exhibit letter, and page number.

[2] Division's Exhibits D through K were submitted by the Division with its Closing Brief in rebuttal of petitioner's arguments. Upon receipt of petitioner's motion to strike the Division's evidence, the hearing officer provided petitioner the opportunity to object, explain, and test the Division's evidence in a reply brief and to offer any evidence in rebuttal. Exhibits D through K were admitted into the record by order of the hearing officer dated May 20, 1998.

In June 1984 petitioner gave notice to his insurer (hereinafter referred to as Insurer A) of a potential claim and demanded coverage for the costs of cleaning up the site pursuant to the RWQCB's order. (Div. Exh. A at 558.) Petitioner and Insurer A subsequently entered into a reservation of rights agreement. (*Ibid.*) Corrective action was commenced in August 1984. (Div. Exh. A at 310, 327.) In October 1985 the RWQCB issued a second administrative cleanup order to petitioner, Cleanup and Abatement Order 85-97. (Div. Exh. A at 317.)

In July 1989 petitioner made a claim to a second insurer (hereinafter referred to as Insurer B) as an additional named insured under his tenants' insurance policy for the costs incurred to investigate and remediate the petroleum contamination of the soil and groundwater at the site. (Petitioner's Exhibit A (DeMenno Exh. A) at 2; Div. Exh. A at 197.) Pursuant to a reservation of rights agreement, executed by petitioner in April of 1991, Insurer B agreed to pay for the costs of investigating soil contamination at the site. (Div. Exh. A at 197.)[3] Under the agreement, Insurer B paid the sum of "$39,487.68 on behalf of DeMenno to the environmental engineering firm of Dames & Moore for investigation of soil contamination at the [site]." (*Ibid.*)

In January 1992 petitioner filed a claim application to the SWRCB for participation in the Fund, Claim 847, seeking reimbursement of corrective action costs incurred at the claim site. (Div. Exh. A at 308.) Staff notified petitioner in April 1992 that the claim could not be accepted because, among other things, petitioner failed to submit adequate documentation showing that petitioner initiated corrective action on or before June 30, 1988. (See Health & Saf. Code § 25299.54, subd. (c); Div. Exh. A at 445, 298, 294.)

[3] Petitioner has not submitted the actual reservation of rights agreement with Insurer B; consequently, this information is taken from the June 1994 settlement agreement between Insurer B and petitioner.

Petitioner, by and through his former counsel, submitted documentation in support of his eligibility in June 1992. (Div. Exh. A at 449.) In response, staff accepted petitioner's claim for conditional placement on the Priority List. (Div. Exh. A at 451, 308.) The SWRCB later issued a letter of commitment encumbering funds in October 1993. (Div. Exh. A at 500.)

In February 1994 petitioner entered into a settlement agreement with Insurer A resolving all claims arising out of petitioner's demand that Insurer A defend and indemnify him with respect to the RWQCB's administrative cleanup order. (Div. Exh. A at 183-194.) Insurer A had already paid $232,323 under petitioner's insurance policy directly to Dames & Moore. (Div. Exh. A at 187, 246-A; Transcript at 40:2-5.) In settlement of petitioner's claim, Insurer A agreed to pay an additional $267,677 to petitioner, for a total payment on petitioner's claim of $500,000. (Div. Exh. A at 107.)

The petitioner signed his first reimbursement request to the Fund on March 28, 1994. On March 29, 1994, petitioner signed a form entitled "CERTIFICATION OF NON-RECOVERY FROM OTHER SOURCES" (disclosure certification) [USTCF 007 (Rev. 6/93)] to be submitted with the reimbursement request. On the disclosure certification, petitioner denied the existence of any funds paid or expected to be paid by the insurers. (Div. Exh. A at 471.) Division staff processed the reimbursement request and paid petitioner $24,869 in May 1994. (Div. Exh. A at 745; see Transcript at 8:2-6.)

In June 1994 petitioner entered into a second settlement agreement, this time with Insurer B. (Div. Exh. A at 196.) In satisfaction of all disputes regarding the site and the insurance policy, Insurer B paid petitioner $260,512.32. (Div. Exh. A at 545, 567.) Including the amount previously paid on behalf of petitioner to Dames & Moore ($39,487.68), Insurer B paid

out a total of $300,000 on petitioner's claim. (Div. Exh. A at 197-198.) Thus, as of early June 1994, the two insurers paid a total of $800,000 on petitioner's claims for coverage.

In August 1994 the Division revised the disclosure certification and requested that petitioner sign and submit the new form with his next reimbursement request. (Div. Exh. A at 467-468.) Petitioner continued to submit reimbursement requests but did not submit the new form. The Division learned of petitioner's recovery after the Division refused to process any further reimbursement requests without the new disclosure certification. (Div. Exh. A at 469, 583.) The Division received a revised disclosure certification in November 1995, but did not receive the settlement agreements until January 1996. (Div. Exh. A at 469, 564.) In February 1996 staff determined on the basis of the documents provided that the entire amount of money petitioner received from the Fund to date, $464,109, constituted an overpayment. (*Id.* at 552-555.)

In response to staff's overpayment determination, petitioner requested review and reconsideration. Petitioner asserted that the settlement proceeds did not constitute a double recovery because they could be allocated to cover petitioner's other losses. (Div. Exh. A at 542-551.) Petitioner also claimed he had sent a disclosure certification over a year earlier, in October 1994. (*Ibid.*)

The Fund manager issued a decision in April 1996, finding as follows: (1) staff never received the letter and disclosure certification dated October 14, 1994, which was enclosed with petitioner's request for reconsideration; (2) petitioner received compensation from other sources; (3) a review of the agreements shows that the settlement moneys were paid to settle the dispute which arose as a result of petitioner's claims against his insurance companies in response to the RWQCB's administrative cleanup order; (4) of the $800,000 paid, $271,810.68 was in

payment of past remediation costs (i.e., $232,323 from Insurer A and $39,487.68 from Insurer B); (5) the Fund would offset that amount ($271,810.68) in addition to $5,000 for the deductible to reduce the amount of overpayment; and (6) petitioner submitted no documentation to support his contention that the remaining compensation received ($523,189.32) was in compensation of losses other than those eligible for reimbursement from the Fund. (Div. Exh. A at 526-527.) Therefore, the Fund manager concluded that the Fund had overpaid petitioner by $464,109. (*Ibid.*)

In response, petitioner filed a brief Request for Final Division Decision. (Div. Exh. A at 524.) The one-paragraph request merely stated that it was based on the entire file and the previous request for review. (*Ibid.*) The Division chief, finding that the request provided no new materials or argument, affirmed the Fund manager's decision in a Final Division Decision dated June 20, 1996. (Div. Exh. A at 521.) Although the Division sent petitioner three notices requesting reimbursement of the amount determined to be an overpayment, petitioner neither responded to the letters nor paid the money. (Div. Exh. A at 611-612, 607-608, 587-589.)

In March 1997 staff issued a "proposed" staff decision to disqualify petitioner's claim from further participation in the Fund. (Div. Exh. A at 516-519.) Petitioner requested review and reconsideration of the decision by the Fund manager. (Div. Exh. A at 509-515.) Instead, the Division issued a Final Division Decision in May 1997, concluding that: (1) because petitioner failed to petition the SWRCB for review of the June 20, 1996 Final Division Decision within 30 days, the Division's determination of the amount of overpayment was final and conclusive; (2) petitioner intentionally made material misrepresentations in various documents submitted to the Fund in order to conceal his receipt of money from other sources; (3) these

misrepresentations were intended to circumvent the Fund's prohibition against double payment; and (4) based on these intentional misrepresentations, the claim should be disqualified.

The instant petition, dated August 22, 1997, resulted.[4] The petition alleges that contrary to the May 1997 Final Division Decision, petitioner did file a petition for review of the June 1996 Final Division Decision in July 1996. The petition includes a copy of the 1996 petition and thereby seeks to reopen the issue of the amount of overpayment. The petition asserts the Division erred in concluding: (1) that petitioner intentionally misled the Division with respect to the settlement moneys and (2) that Fund reimbursements should be offset with the insurance proceeds without allocating the funds to other types of claims petitioner may have had against his insurers. The petition requests review and reversal of both the June 1996 and the May 1997 Division Decisions.

The SWRCB is directed to review a Division 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. (Cal. Code Regs., tit. 23, § 2814.3, subd. (d).) Upon expiration of the time limit, a petitioner may choose either to seek judicial review or to seek mandate to

[4] Petitioner filed a defective petition via facsimile on June 27, 1997, and the Division, by letter dated July 25, 1997, granted petitioner a reasonable amount of time to file an amended petition. (See Cal. Code Regs., tit. 23, § 2814.2, subd. (a).)

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 *California Correctional Peace Officers Ass'n* v. *State Personnel Bd.* (1995) 10 Cal.4th at 1150 [43 Cal.Rptr.2d. 693].) 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 holding a hearing to secure all relevant evidence. (*Id.* § 2814.3; see Gov. Code § 11410.10; Cal. Code Regs., tit. 23 § 648 et seq.; see also Civ. Code § 1574 (actual fraud, including intentional misrepresentation, is a question of fact); but see *Guido* v. *Koopman* (1991) 1 Cal.App.4th 837, 843-844 [2 Cal.Rptr.2d 437]) (if reasonable minds can come to only one conclusion based on the facts, the elements of fraud may be determined as a matter of law).)

On March 9, 1998, the SWRCB held an adjudicatory proceeding in the matter to secure all relevant evidence relating to the following issues:

1. Whether certain documents signed by petitioner and submitted to the Fund contained material error.

2. If the documents contained material error, was the error the result of intentional misrepresentation on the part of petitioner?

3. If the error was the result of intentional misrepresentation and the claim is disqualified, what is the amount of overpayment by the Fund?

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner seeks review of the Division's 1996 Decision, namely, the determination that all of the money petitioner received from the Fund ($464,109) constituted a double payment, and seeks to submit "[a]dditional information and testimony corroborating that the insurance money received by Mr. DeMenno compensated him for losses besides cleanup-related costs at the Site." (Petition, Aug. 22, 1997, at 3.) To that end, petitioner contends that he timely filed a separate petition for review of the Division's June 20, 1996 Decision by petition dated July 19, 1996. (See Petition, Aug. 22, 1997, Exhibit C.)

Findings: Petitioner's argument that he filed a timely petition for review of the Division's 1996 Decision and should be permitted thereby to reopen the issue of the amount of overpayment, is unpersuasive. Sufficient evidence supports a finding that petitioner did not send a petition to the SWRCB until August 1997.

The 1996 petition consists of a two-page letter signed by petitioner's former counsel and on the firm letterhead. The letter contains numerous typographical, grammatical, and spelling errors, making it appear to be an unreviewed draft. It was not copied to petitioner or to anyone else. Although the petition is addressed to John Caffrey, William Attwater, and Harry Schueller, neither the Executive Office, the Office of Chief Counsel, nor the Division have any record of ever receiving the petition. Petitioner provides no evidence to indicate that the letter was mailed.

Furthermore, this particular argument was raised for the first time in petitioner's 1997 petition for review of the Division's May 1997 Decision determining petitioner should be disqualified. Although petitioner had numerous opportunities to bring the existence of the 1996 petition to the SWRCB's attention before August 1997, he did not. For example, petitioner

failed to respond to any of the three letters requesting remittance of the amount determined by the Division to be an overpayment. (Div. Exh. A at 611, 607, 587.) The first letter, dated August 2, 1996, informed petitioner that the Division's June 20, 1996 Decision had become final and conclusive due to petitioner's failure to file a petition for review and requested reimbursement of $464,109 within 20 days. (*Id.* at 611-612.) The SWRCB sent a second notice of past due bill on August 29, 1996. (*Id.* at 607-608.) The third notice was sent certified mail, return receipt requested on November 4, 1996. (*Id.* at 587-589.) Petitioner's failure to repay the requested money within 20 days is a violation of law and petitioner was notified of that fact, as well as the possibility that legal action would be taken. (Cal. Code Regs., tit. 23, § 2812.3, subd. (d); Div. Exh. A at 611, 607, 587.) Yet no evidence in the record suggests that petitioner ever contacted the Division to inquire whether the 1996 petition was received, its status, or to request that the Division's attempt to collect the overpayment be held in abeyance pending the outcome of his petition. Finally, petitioner's April 23, 1997, request for review of the decision to disqualify petitioner failed to mention the alleged earlier petition, although the request makes many of the same arguments concerning the overpayment. (*Id.* at 509-515.)

Letters asserting a waiver of appeal rights and warning that legal action may be taken to recover substantial sums of money demanded a reply from petitioner. Petitioner's failure to reply to the letters or to raise the existence of the July 1996 petition until August 1997 supports a finding that petitioner never sent the 1996 petition. (See *Bowles* v. *State Bar of California* (1989) 48 Cal.3d 100, 108 [255 Cal.Rptr. 846] citing *Simpson* v. *Bergmann* (1932) 125 Cal.App. 1, 8 [13 P.2d 531].) Because sufficient evidence supports a finding that petitioner failed to exhaust his administrative remedies regarding the issue, the Division's June 20, 1996

decision is final and conclusive. (*South Coast Regional Comm'n* v. *Gordon* (1977) 18 Cal.3d 832, 836 [135 Cal.Rptr. 781].)

Although the SWRCB could take the matter up on its own motion, in light of this order's disposition we decline to do so. (Cal. Code Regs., tit. 23 § 2814.2, subd. (b).) Even if the SWRCB were to reopen the matter, petitioner's argument that some of the settlement proceeds could have been allocated to other losses related to the unauthorized release would not be persuasive. The SWRCB is entitled to review the evidentiary basis of a claimant's allocation of funds received from other sources to prevent the claimant's receipt of a double recovery. (Health & Saf. Code § 25299.78, subd. (b); Cal. Code Regs., tit. 23, § 2812.2, subd. (b); 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].) The only evidence petitioner has provided in support of his contention that the money the insurers paid was to reimburse only those costs not paid by the Fund is the testimony of petitioner's prior counsel. (Div. Exh. A at 530; Transcript at 98:15-20.) The settlement agreements. however, made no allocation of the settlement proceeds. (Div. Exh. A at 566-567, 574-575.) Rather, the agreements state that the money was paid in settlement of all claims made by petitioner against the insurers arising out of or related to the UST release. (*Ibid.*) Petitioner's prior counsel admitted that the insurers and petitioner placed no valuation on the losses to which petitioner now seeks to allocate the settlement proceeds. (Transcript at 108:9-25.) The statements of petitioner's attorneys regarding how they believe the settlement proceeds should have been allocated, absent any other relevant evidence, are insufficient to substantiate his claims regarding the allocation of the settlement proceeds that petitioner received after the March 29, 1994 disclosure certification. (Div. Exh. A at 467, 521, 524, 527; see, e.g., *Dillingham Construction N.A., Inc.* v. *Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264 [75

Cal.Rptr.2d. 207, 219] (attorney cannot testify, after the fact, as to how he believes settlement proceeds would have been allocated had the parties negotiated and resolved the issue).)[5]

2. Contention: Petitioner contends that he did not intentionally mislead the Division with respect to settlement proceeds received from insurers in connection with the site and that, consequently, the SWRCB may not disqualify his claim from participation in the Fund pursuant to section 2812.6, Title 23 of the California Code of Regulations.

Findings: Section 2812.6 provides that:

> "A claim may be disqualified and barred from further participation in the fund at any time during the active life of the claim if it is found that the documents contain a material error and the error was a result of intentional misrepresentation on the part of the claimant."

Accordingly, petitioner's claim may be disqualified under the regulation if: (1) petitioner made a false representation of fact in pursuit of his claim to the Fund, (2) petitioner knew that his representation was false or believed it to be false, and (3) the misrepresentation was material. (See Civ. Code § 1572; *id.* § 1710.)[6] The SWRCB's findings must be supported by a preponderance of the evidence. (See Evid. Code § 115; *Liodas* v. *Sahadi* (1977) 19 Cal.3d 278, 289 [562 P.2d 316, 322-323] (the burden of proof in a civil fraud case is proof by a preponderance of the evidence); 5 Witkin, Summary of Cal. Law (9th ed. 1988), Torts, § 674, p. 776-777.) The admission of evidence is governed by the provisions of section 25299.59 of the Health and Safety Code.

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[5] Petitioner never submitted bills to substantiate legal fees incurred to collect the settlement recoveries, the lease he held with the former tenants, or any other relevant documents to support his allocation, although he was informed of this deficiency. (Div. Exh. A at 526-527, 521; see Petition, Aug. 22, 1997, at 7.)

[6] If petitioner had a good faith belief in the truth of his representations, but lacked reasonable grounds for the belief, his misrepresentation would be merely negligent, and no grounds would exist for disqualification. (5 Witkin, Summary of Cal. Law (9th ed. 1988), Torts § 704, p. 806.)

Petitioner argues that his claim cannot be determined ineligible by virtue of the above-cited regulation because petitioner lacked the requisite intent, having acted in good faith and with an honest belief in the truth of his representations. The record does not support petitioner's contention. Rather, the preponderance of the evidence supports a finding that petitioner, motivated first by a desire to circumvent the Fund's rules regarding double recovery and later by a desire to avoid disqualification, intentionally made material misrepresentations to the Division in pursuit of his claim to the Fund.

Petitioner Knew That the Insurers Paid Substantial Sums on His Claims for Coverage Arising from the UST Release But He Failed to Disclose the Recovery on His First Certification

Petitioner made his first intentional misrepresentation when, on March 29, 1994, petitioner signed and submitted a disclosure certification form [USTCF 007 (Rev. 6/93)] to the Division in conjunction with his first reimbursement request in pursuit of his claim to the Fund. (Div. Exh. A at 471.) The form is entitled in large, bold, upper-case letters: "CERTIFICATION OF NON-RECOVERY FROM OTHER SOURCES." The very first sentence of the disclosure certification provides: "The purpose of this certification is to identify all funds received, or to be received, from any source in consideration of the unauthorized underground tank release which is the subject of this claim." (*Ibid.*)

Immediately following that statement of purpose, two regulations are set forth. The first states that only claimants who have paid or will pay the costs claimed are eligible. (Cal. Code Regs., tit. 23, § 2810.1, subd. (a).) The second, the regulation against double recovery, is set forth as follows:

> "Only corrective action and third party compensation claim costs incurred by or on behalf of a claimant shall be reimbursable from the Fund. No claimant shall be entitled to double payment on account of any corrective action or third party compensation claim cost. Where a claimant receives reimbursement on account

of any cost 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 cost . . . ." (Cal. Code Regs., tit. 23, § 2812.2, subd. (b).)

The Division requires claimants to submit the disclosure certification so that the Division may ensure claimants' compliance with the above-referenced regulations. Below the regulations, set off from the top portion of the form, is the word "CERTIFICATION," centered and in upper-case, underlined letters. Immediately thereafter is set forth the following question:

"*Have you, or anyone acting on your behalf, received funds from any source* (*including* lawsuits, *settlements*, judgments, contributions from other potentially responsible parties, *insurance claims*, lending institutions or any other source *no matter how the funds were characterized*) which *were related to or paid in consideration of the underground storage tank release* which is the subject of this claim?" (Div. Exh. A at 471 (emphasis added).)

Petitioner answered "NO." (Div. Exh. A at 471; Transcript at 55:13-24.) Claimants who answer "YES" are requested to list each source of funds, attach a copy of the insurance agreement or court settlement, and submit the form and attachments with the reimbursement request. (Div. Exh. A at 471.) The form sets forth various headings requesting information concerning the funding sources, if any, including a request for a description of the purpose of the funds.

Beneath the lines provided for additional information, the form also required petitioner to make two declarations: (1) all facts and statements set forth are true and correct to the best of petitioner's knowledge and belief and (2) "[i]f funds are received after completion of this certification, [petitioner] will notify the Division promptly. If funds are received from the Fund and also received from other sources, [he] will remit to the Division funds *determined by the Division* to be on account of any cost reimbursed from the Fund." (Emphasis added.)

Petitioner argues that he relied on his prior counsel's advice, honestly believing that the law only required the disclosure of funds *received* at the time of his certification, March 29, 1994. The record shows that petitioner had not yet actually received the funds paid directly to him when he signed the March disclosure certification, but that he knew he would be receiving the funds shortly and did receive the funds within a week.

Pursuant to the settlement agreement signed by petitioner in February 1994, Insurer A issued two checks dated March 14, 1994, totaling $267,677 in settlement of petitioner's claims against the insurer. These checks were hand-delivered to petitioner's prior counsel on April 4, 1994. (Div. Exh. A at 22-23, 575; DeMenno Exh. B at 3; Div. Draft Memorandum of Stipulated Facts, Item 4; Transcript at 8:2-4.) Insurer B issued a check dated May 24, 1994, although the settlement agreement was effective June 1, 1994. (Div. Exh. A at 196.) Because petitioner himself had not actually received any money to offset the expenses for which he sought reimbursement from the Fund at the time he signed the disclosure certification, he argues that his certification was truthful.

Petitioner's argument is sophistic. First, the purpose of the form is plainly stated: to identify all funds received, *or to be received.* Petitioner must have known he was required to disclose all funds he knew he would be receiving. As of March 29, 1994, petitioner knew he would be receiving funds shortly as a result of the first settlement agreement, signed more than a month prior to his certification. (Transcript 40:20-25, 41:1-2.) Despite his knowledge that he would be receiving the funds, petitioner signed the disclosure certification without disclosing them.

The insurers already paid $271,810.68 directly to Dames & Moore as a result of petitioner's demands for coverage. (Div. Exh. A at 107, 187, 197-198, 246-A; Transcript at

40:2-5.) Petitioner claims, however, that he did not intend to seek reimbursement for the $271,810.68 and, consequently, he believed he did not have to disclose these funds. (Transcript at 40:12-17.)

The Division found he had not received a double recovery with regard to the $271,810.68 received by Dames & Moore because he had not sought recovery for this amount. (Div. Exh. A at 527.) But petitioner's certification that neither he nor anyone acting on his behalf had received funds related to the UST release is no less false because he did not seek reimbursement for the $271,810.68 that Dames & Moore received.[7]

While petitioner himself had not actually received any funds from his insurers relating to cleanup costs at the site, the record shows that Dames & Moore, the environmental engineering firm performing corrective action at his site, received $232,323 from Insurer A and $39,487.68 from Insurer B pursuant to reservations of rights agreements entered into by petitioner with insurers. (Div. Exh. A at 575, 558, 566.) Petitioner must have known of these facts and, indeed, he admits he knew about the money paid by Insurer A at the time he signed the disclosure certification. (Div. Exh. A at 575, 558, 566, 314; DeMenno Exh. A at 2; Transcript at 40:2-8.)

[7] Merely because petitioner never sought recovery for these funds is not evidence that petitioner never intended to do so. Petitioner testified that he was unable to commence corrective action until after he was accepted into the Fund due to financial constraints, yet petitioner's claim application asserted that as of 1992 he had expended over $200,000 in eligible corrective action expenses for which he sought reimbursement. (Div. Exh. A at 308; Transcript at 87:3-4, 90:6-12.) In fact, petitioner was prevented from seeking recovery for the funds that the insurers paid directly to Dames & Moore because he would have been unable to submit the documentation necessary to substantiate his claim. (See Cal. Code Regs., tit. 23, § 2810.1, subd. (a) (claimants may claim only costs they have paid or will pay).) Claimants must submit invoices and auxiliary materials to document that an invoice is for necessary corrective action work. (Cal. Code Regs., tit. 23, § 2812, subd. (d).) Claimants submit canceled checks to show that they paid the costs claimed to the Fund. (*Id.* § 2812.2, subd. (b).)

The settlement agreement signed by petitioner on February 10, 1994, states that petitioner fully released all claims arising out of or in any way connected with the pollution or contamination of the site in consideration of the settlement amount. (Div. Exh. A at 575.) The settlement amount, totaling $500,000, included the money previously paid to Dames & Moore. (*Ibid.*) The agreement states that the entire settlement amount represents payment for damages arising out of the coverage dispute. (*Ibid.*) Thus, the language of the settlement agreement clearly provides that petitioner accepted the entire settlement amount, including the money previously paid to Dames & Moore, in settlement of claims related to or paid in consideration of the UST release.

Petitioner's former counsel stated that "at some point in time" the consideration paid by the insurer to "conduct their investigation" becomes "considerations paid to Mr. DeMenno by [the insurer]." (Transcript at 114:18-25; 115:1-6.) That "point in time" must have been, at the very latest, at the time of settlement and prior to the date petitioner signed the first disclosure certification. Petitioner admitted that by signing the settlement agreement he understood he was accepting the funds in exchange for giving up *all* claims related to the UST release on his property. (Transcript at 37:11-22.) Consequently, the evidence supports a finding that petitioner knew when he signed the March disclosure certification that he, or someone acting on his behalf, had received funds from another source (no matter how the funds may have been characterized), related to or paid in consideration of the UST release which is the subject of his claim.

Petitioner Knew Dames & Moore Had Received Significant Funds From His Insurers to Perform Corrective Action on His Behalf in Response to the Cleanup and Abatement Order

Petitioner next argues that because it was never his belief that Dames & Moore was acting on his behalf, he cannot be disqualified for failing to disclose the money received by Dames & Moore in the March 29, 1994 certification. (Transcript at 35:3-5.) He argues that the record shows that Dames & Moore acted completely independently of petitioner and solely on behalf of the insurers and points to his, as well as his former counsel's sworn testimony in support of this argument. (Transcript at 33-34, 40, 66, 86-87, 91-92, 108.)

For example, petitioner states in his written testimony: "I did not contract with, supervise, or even influence Dames & Moore. As far as I was concerned, Dames & Moore was working with and for the insurance company." (DeMenno Exh. A at 2.) Petitioner repeats numerous times that Dames & Moore was not conducting "cleanup" activities at his site; rather, they were "characterizing the site to define the extent of the pollution." (Transcript at 87:23-24, 66:14-18, 86:17-21.)

Petitioner also stated that "I don't think [corrective action] actually commenced until the claim was received into the Fund when we put out the bids and Bio-Environmental was the successful bidder for the job." (Transcript at 90:6-12.) According to petitioner's testimony, he did not commence corrective action until sometime in 1992 or thereafter, when he hired Bio-Environmental. (*Ibid.*; see Div. Exh. A at 743 (the earliest invoices from Bio-Environmental are dated in 1994).)

After it was pointed out to petitioner during the hearing that the failure to commence corrective action by June 1988 for a leak that was discovered in February 1982 would have resulted in the disqualification of his claim pursuant to section 25299.54, subdivision (c) of

the Health & Safety Code, petitioner attempted to qualify his earlier statements by testifying that his understanding of corrective action would include "[w]hen the work actually commenced on correcting the problem." (Transcript at 117:19-20.) He then asserted that he himself took some action when the leak first occurred, and supposed that corrective action could include the investigation conducted by Dames & Moore, although he had not interpreted it that way. (Transcript at 117:21-23, 118:1-5.)

Corroborating petitioner's argument, his prior counsel testified that Dames & Moore were "essentially investigators acting on behalf of the insurance companies so they could ascertain the cause of the release on the property." (Transcript at 91:24-25, 92:1-2.) Prior counsel testified that the insurers hired Dames & Moore to act solely on their behalf to investigate whether they had a duty to provide coverage. (Transcript at 92:11-24, 93:4-7.) In written testimony, prior counsel stated neither his law firm nor petitioner "had any control or authority over the activities of Dames & Moore on the property." (DeMenno Exh. B at 2.)

In addition to the testimony of petitioner and his prior counsel, petitioner points to one report submitted by Dames & Moore in July 1990 to the insurer in support of his contention. (Div. Exh. A at 322.) The report was addressed to Insurer A's agent and states: "We hope that this report suits your need with respect to assisting [the insurer] in reaching a settlement with Mr. Bruce DeMenno regarding cleanup of the [site]." (Transcript at 34:1-16; Div. Exh. A at 322.)

If petitioner knew or believed that Dames & Moore was performing cleanup or corrective action at his site, rather than merely investigating liability solely on behalf of the insurers, his contention that he did not believe Dames & Moore received money for work done on his behalf would be fatally undermined. As shown below, the record supports a finding that

not only did petitioner know Dames & Moore was performing corrective action as he defined it at the site, but he also worked with them to carry out that action. Consequently, petitioner's argument that he believed Dames & Moore was acting solely on behalf of the insurers is without merit.

A review of petitioner's claim application reveals serious contradictions between the statements made therein in pursuit of Fund eligibility and petitioner's subsequent testimony seeking to avoid disqualification.[8] Petitioner's claim application states that he had incurred $214,000 in eligible corrective action costs as of January 1992, prior to receipt of funds from the SWRCB. (Div. Exh. A at 308.) He estimated it would cost $25,000 to complete work currently underway in Phase II, and a total of $1.3 million to complete Phases III and IV.[9] (*Ibid.*) Petitioner entered the estimated total sum of $1,529,000 in eligible costs onto the line asking for total costs being claimed to the Fund. (*Ibid.*) The claim application states that "the claimant is currently in the process of obtaining bids from contractors . . . ." (Div. Exh. A at 310.) Although petitioner had not yet hired Bio-Environmental, petitioner asserted on his claim application that he had incurred and was seeking reimbursement for significant eligible corrective action costs as defined by Fund regulations in 1992.

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[8] Petitioner's former counsel assisted petitioner in the preparation of his claim application and was named as the "contact" person to receive all communications regarding the claim. (Transcript at 35:6-19; Div. Exh. A at 308; Transcript at 93:12-18 (prior counsel testifies he filled out the claim form on petitioner's behalf).) While serving as petitioner's counsel, former counsel was petitioner's agent for matters regarding his claim to the Fund. (See *Nelson* v. *Nelson* (1933) 131 Cal.App. 126, 133-134 [20 P.2d 995]; see also *Nissel* v. *Subscribing Underwriters at Lloyds of London* (1998) 62 Cal.App.4th 1103, 1108 n. 7 [73 Cal.Rptr.2d 174, 177 n. 7] (statements made by party's counsel constitute an admission authorized by principal within the meaning of section 1222 of the Evidence Code).)

[9] Phase I is the preliminary site assessment; Phase II is the detailed soil and groundwater investigation to determine the horizontal and vertical extent of the contamination and also to develop a corrective action workplan for the cleanup effort; Phase III is the implementation of the corrective action plan; Phase IV constitutes post-remedial monitoring to assess the effectiveness of Phase III's cleanup effort. (Cal. Code Regs., tit. 23, § 2722, subd. (a); see *id.* §§ 2723-2727.)

These prior statements contradict the written and oral testimony that he did not believe corrective action was commenced until after he hired Bio-Environmental. The prior statements also contradict his testimony that he lacked the funds necessary to perform corrective action.

Moreover, when petitioner applied to the Fund in 1992, Division staff initially determined his claim ineligible due to the lack of documentation showing that he commenced corrective action on or before June 30, 1988. (Health & Saf. Code § 25299.54, subd. (c).) (Div. Exh. A at 445.) Petitioner, by and through his former counsel, submitted documentation to support petitioner's eligibility in June 1992. (Div. Exh. A at 449.) Petitioner asserted that the documentation he submitted provided evidence of "extensive corrective action" commenced prior to June 30, 1988. (*Ibid.*)

The documentation petitioner submitted as evidence of extensive corrective action commenced prior to June 1988 consisted of reports of work performed by Dames & Moore. (*Ibid.*)[10] A 1990 report by Dames & Moore submitted by petitioner states that the firm was contracted in August 1984 by Insurer A's agent "to assess the extent of subsurface gasoline contamination and implement cleanup operations at the site." (Div. Exh. A at 327.) Consistent with this statement, petitioner's own claim application states that corrective action commenced in August 1984. (*Id.* at 310, 449.) After a review of the documents, Division staff accepted petitioner's claim for placement on the priority list. (*Id.* at 451.)

Petitioner knew Dames & Moore was performing corrective action activities at his site and relied on those activities to assert his eligibility to the Fund. The documents and

[10] The Dames & Moore reports submitted by petitioner in pursuit of his claim to the Fund constitute adoptive admissions. (See Evid. Code § 1222; Cal. Code Regs., tit. 23 § 2812.4.)

petitioner's reliance on those documents support a finding that petitioner knew Dames & Moore's activities could not be characterized as mere investigation on behalf of the insurers to determine liability under the insurance policies; rather, petitioner must have known that Dames & Moore performed both investigative and cleanup activities on behalf of petitioner as well as the insurers.

For example, Dames & Moore's November 1984 report on the results of their Phase I investigation states unequivocally: "This investigation was conducted in response to the [RWQCB's] Cleanup Order 84-71 *on behalf of the station owner, Mr. B. DeMenno and his insurance representative* . . . ." (Emphasis added.) (Div. Exh. G.) A February 1985 Dames & Moore report provides the proposed plan for recovery operations and states that it was prepared for petitioner and the insurer's agent. (Div. Exh. F.) It also discusses the Phase I investigation performed by Dames & Moore in 1984 and sets forth the plan for recovery of the contamination.

Furthermore, the documents show that petitioner was a major participant in Dames & Moore's cleanup activities. Petitioner was to supply the tanks to store all water and gasoline discharged during Dames & Moore's well development and pump testing; these tanks would be used to temporarily store the recovered liquids on-site. (Div. Exh. F.) Petitioner was to be responsible for the transport, treatment, and disposal of the recovered liquids at his licensed recycling, treatment, and disposal facility in Compton. (*Ibid.*) Dames & Moore's August 1985 report discusses the results of test well installation and pumping, repeating that their investigations have been conducted "in response to the [RWQCB's] Cleanup Order 84-17 on behalf of the station owner, Mr. B. DeMenno and his insurance representative . . . ." (Div. Exh. H.) A subsequent Dames & Moore report, dated August 1986, is addressed to the RWQCB and notes that it is prepared "For Bruce DeMenno, Owner." (Div. Exh. E.) The report "presents

an update on the ongoing *cleanup activities* at the subject site . . . ." (*Ibid.* (emphasis added).) The report states that "recovery operations are continuing" to reduce the contaminant levels. (*Ibid.*) As of the date of the report, the recovery operation was over a year old and involved pumping the site wells containing gasoline. (Div. Exh. E.) Every other week, a vacuum truck pumped liquid from the wells and hauled it "to the DeMenno-Kerdoon [petitioner's] wastewater treatment facility in Compton, California." (*Ibid.*; see also Div. Exh. A at 301 (letter from RWQCB addressed to "Mr. Bruce DeMenno, DeMenno-Kerdoon").) These recovery operations, in which petitioner played a major role, can in no way be characterized as mere investigation to determine liability on behalf of the insurers.

Petitioner admitted that he knew the insurance companies would have ceased to fund the cleanup activities of Dames & Moore at his request. (Transcript at 65:21-25, 66:1-4.) Petitioner admitted that neither the insurers nor Dames & Moore held any interest in his property. (Transcript at 66:5-13, 67:1-5.) Petitioner admitted that he granted Dames & Moore access to his site. (Transcript at 66:22-25.) Moreover. an August 1988 proposal from Dames & Moore is addressed to petitioner and requests petitioner's approval to conduct additional on-site and off-site work to finalize the Phase II groundwater remediation plan. (Div. Exh. I.) The proposal included a request for a written access agreement between the station owner (petitioner) and the adjacent property owner. (*Ibid.*) The proposal referred to petitioner as the "Client" and provided that the "Client" would allow Dames & Moore a right of entry to fulfill the scope of services described therein. (*Ibid.*)

Subsequently, in 1992. Dames & Moore requested petitioner's authorization to cover costs associated with out-of-scope work not defined in an earlier proposal. (Div. Exh. J.) The document provides: "Dames & Moore is authorized the additional $25,422 for conducting

the tasks described herein. This work was conducted in accordance with the terms and conditions of the *existing contract* between DeMenno/Kerdoon, [Insurer B] and Dames & Moore." (*Ibid.* (emphasis added).) The letter was copied to petitioner's former counsel.

The last report submitted by petitioner is dated May 1993. (Div. Exh. K.) It is addressed to petitioner and states that it was prepared for petitioner in response to his request that Dames & Moore conduct additional soils investigation at the site as required by the RWQCB in 1990. (*Ibid.*) The report references petitioner's prior written approval modifying the scope of work performed at the site. (*Ibid.*)

Consistent with Dames & Moore's reports and letters, the settlement agreement petitioner entered into with Insurer B and effective June 1, 1994, expressly states that the insurer paid Dames & Moore $39,487.68 prior to the settlement *on behalf of* petitioner. (Div. Exh. A at 566.) Likewise, and as discussed above, petitioner's settlement agreement with Insurer A states that the insurer paid Dames & Moore the $232,323 under petitioner's policy. (Div. Exh. A at 575.) When petitioner finally did disclose his recoveries, petitioner himself characterized all of the $271,810.68 paid by the insurers to Dames & Moore as payment for *remediation* costs, not as payment for investigation of liability. (Compare Div. Exh. A at 550, 512 with *id.* at 730 (petitioner describes the activities for which he sought reimbursement from the Fund as "remedial action").)

The above-discussed evidence, including the claim application, supporting documentation, and correspondence from petitioner's former counsel, evidence a longstanding working relationship between petitioner and Dames & Moore. The record contradicts petitioner's contentions that he did not control the scope of Dames & Moore's activities. Petitioner not only contracted with Dames & Moore but also provided services in support of the

Dames & Moore recovery operation at his site. Most importantly, the overwhelming weight of the evidence supports a finding that petitioner knew Dames & Moore was not merely investigating on behalf of the insurers to determine liability, but was also performing corrective action on petitioner's behalf in response to the RWQCB's order. Thus, the sworn testimony of petitioner and petitioner's prior counsel to the contrary is fatally undermined by their prior assertions and the supporting documentation submitted in pursuit of acceptance into the Fund.

In addition to the irreconcilable contradictions between earlier statements made in pursuit of eligibility and later statements made in defense of petitioner's failure to disclose, petitioner and his prior counsel gave internally inconsistent testimony during the hearing itself. (Compare Transcript at 75:6-25; 76:1-17, 80:15-16, 86:17-25, 87:1-9 (petitioner claims to have done nothing at the site due to financial reasons; he states that the only work done was Dames & Moore's investigation on behalf of the insurers to determine the insurers' liability) with *id.* at 117:16-25, 118:1-8 (when it is pointed out that the failure to commence corrective action would result in petitioner's ineligibility to make a claim to the Fund, petitioner asserts that he expended his own money to perform corrective action at the site when the leak initially occurred, including the drilling of a well); compare Transcript at 64:25, 65:1-4 (admitting that he made several phone calls to a payments analyst regarding documentation of his reimbursement claims) with *id.* at 110:21-25, 111:1 (asserting that another staff member, an engineer, was essentially his only contact with staff); see also *id.* at 125:23-25, 126:1-5 (payment analyst states that she remembers the claim particularly because petitioner called her several times regarding his claim documentation); compare Transcript at 96:7-10 (prior counsel claims the settlement money was earmarked for economic losses, such as lost profits and diminution in value, not for corrective action) with *id.* at 108:9-25 (prior counsel admits that the insurance company did not earmark the

money to any particular loss and placed no value on loss of rent or diminution of value; rather, the insurers simply paid the policy limits to settle all claims).) Finally, petitioner and petitioner's prior counsel were evasive when questioned by counsel for the Division, the hearing officer, and the hearing officer's attorney advisor. (See, e.g., Transcript at 56:3-25, 57:1-25, 58:1-15, 60:12-24, 66:14-18, 80:1-21, 95:9-20, 114:1-25, 115:1-17, 119:3-22.) In summary, neither petitioner nor his prior counsel were credible witnesses.

Other than the self-serving testimony of petitioner and his prior counsel, petitioner proffered only one report in support of his contention that he believed Dames & Moore was acting solely on behalf of the insurers. The report does not contradict, but is consistent with, a finding that Dames & Moore was performing cleanup activities in an effort to resolve petitioner's claims for coverage and that this work was performed on behalf of both the insurers and petitioner. (Div. Exh. A at 322.)

The record contains sufficient evidence to support a finding that when petitioner signed the March 29, 1994 disclosure certification, he knew that Dames & Moore had received large amounts of money from his insurers to perform corrective action on his behalf in response to the UST release which is the subject of his claim. Petitioner knew, therefore, that his certification was false.

Petitioner's Failure to Disclose His Recovery Was a Material Error

Petitioner next argues his failure to disclose the $271,810.68 paid to Dames & Moore was not material because none of the money received prior to the certification was the subject of his reimbursement requests to the Fund. Petitioner's argument is without merit. Had petitioner disclosed the payments received by Dames & Moore on his behalf as a result of his claim against Insurer A, Division staff would have requested any agreements documenting those

payments, as they did once the funds were finally disclosed. (Div. Exh. A at 583.) Upon review of the settlement agreement with Insurer A, Division staff would have learned that the insurer agreed to pay petitioner an additional $267,677. Staff would not have made any further payments on the claim until they determined whether and to what extent petitioner would be in receipt of a double recovery. (Transcript at 123:14-18.) Petitioner's failure to disclose prevented the Division from carrying out its regulatory duty to ensure that claimants do not receive a double recovery. (Cal. Code Regs., tit. 23, § 2812.2, subd. (b)-(c).) As a result, petitioner received $464,109 from the Fund to which he was not entitled. (Div. Exh. A at 526-527, 521.) Therefore, petitioner's failure to disclose his recovery was a material error.

Petitioner's Disclosure of Pending Negotiations with the Insurers on His Claim Application Does Not Absolve Him From the Duty to Disclose His Subsequent Recovery

Petitioner next contends that misrepresentation cannot be established where the information at issue was readily discoverable by the Division. He argues that the duty to disclose arises only if petitioner alone has knowledge of material facts otherwise inaccessible to the Division. Because petitioner disclosed on his claim application reservation of rights agreements that indicated pending negotiations with the insurers, the Division should have further investigated. (See Div. Exh. A at 314.)

Petitioner's argument is unpersuasive. The Division did investigate. It is true the Division staff did not request any further information from petitioner concerning his pending claim application during the months the claim awaited funding on the Priority List. (Div. Exh. A at 451.) But when the Division reached petitioner's claim on the Priority List, the Division performed a detailed review of the claim and requested petitioner to submit, along with his first

reimbursement request, the very disclosure certification at issue before it began paying his claim. (Div. Exh. A at 451, 454, 471.)

Petitioner had an obligation to disclose the funds. The regulation disqualifying claimants for intentional misrepresentation imposes a duty upon petitioner to truthfully disclose the information requested on the disclosure certification. (*Id.* § 2812.6; see also Gov. Code § 12651 (subjecting persons to treble damages, costs, and civil penalties who knowingly make a false statement to get a false claim paid or approved).) In addition, all documents submitted by petitioner during the active life of the claim are subject to the provisions of section 2812.4, Title 23, California Code of Regulations, requiring petitioner to verify under penalty of perjury that all statements, documents, and certifications contained in or accompanying the claim are true and correct to the best of petitioner's knowledge.

Because petitioner had a duty imposed by law to disclose the funds on the disclosure certification, whether the SWRCB could have discovered the facts had it chosen to independently investigate or audit the claim is irrelevant.[11] The latter question only becomes an issue where there is some question of the party's duty to disclose. (See *LaJolla Village Homeowners' Ass'n., Inc.* v. *Superior Court* (1989) 212 Cal.App.3d 1131, 1150 [261 Cal.Rptr. 146, 157-158].) The petitioner's duty to disclose the information requested on the disclosure certification is not abolished merely because petitioner's receipt of funds may have been readily discoverable had the SWRCB carried out an independent investigation.

[11] The SWRCB has received over 13,000 claims and encumbered over $600 million to pay those claims. Although claims are subject to random audits, the SWRCB relies to a large extent on a claimant's honest self-reporting.

Petitioner argues that his disclosure of the pending negotiations with his insurers on his initial claim application in January 1992 is evidence that petitioner did not intend to conceal his insurance settlements from the Fund. (See Transcript at 36:13-16.) Whatever evidence of petitioner's intent may be provided by petitioner's earlier disclosure of pending settlement agreements, it is negated by petitioner's failure to disclose his subsequent receipt of funds when explicitly asked to do so. As established above, petitioner's subsequent certification was false, and petitioner knew it was false. Moreover, petitioner would have had a motive to disclose the pending negotiations on his claim application because they could have resulted in a lawsuit, the documentation of which would have been a matter of public record. Settlement agreements, on the other hand, are usually confidential and may not be disclosed without the permission of the parties involved.

Petitioner Knew He Had an Obligation to Disclose All Funds Related to or Paid in Consideration of the UST Release Regardless of Whether He Believed the Funds Constituted a "Double Recovery"

Next petitioner argues that. on advice of prior counsel, he believed that he did not have an obligation to disclose his receipt of the funds at issue on the disclosure certification because he believed the funds did not constitute a "double recovery." Petitioner argues that this explains the delay between the receipt of the insurance settlement money and his ultimate disclosure.

Petitioner's argument is unpersuasive. No ambiguity exists in the form with regard to what petitioner was asked to disclose. The form does not provide conflicting directions that could have led petitioner to believe he was required to disclose only funds that constitute double recovery. (See, e.g., *United States* v. *Murphy* (9th Cir. 1987) 809 F.2d 1427, 1430-1431

(to find an intentional failure to disclose, the request must unambiguously impose a duty to disclose the particular information at issue); Transcript at 44:4-23, 46:6-13.)

The crucial sections of the form are comprised of the question to which petitioner was required to certify his answer and the two declarations, as set forth above. (See *id.* at 1430.) The question and the declarations were clear: petitioner was required to disclose whether he, or anyone acting on his behalf, received funds from any source, including insurance claims, *no matter how the funds were characterized*, related to, or paid in consideration of the UST release which is the subject of his claim to the Fund. Upon petitioner's disclosure of *all* funds, no matter how petitioner characterized them, the *Division* would determine whether he had received funds on account of any cost reimbursed by the Fund.

Petitioner certified that neither he nor anyone else acting on his behalf received any funds which were related to or paid in consideration of the release that was the subject of his claim "*no matter how the funds were characterized.*" (Emphasis added.) (Div. Exh. A at 471.) Nowhere on the disclosure certification does it suggest that *petitioner* was entitled to determine how the money should be characterized and then decide, based on that determination, whether he should disclose it. In fact, the form provides space in which a claimant may describe the other purposes for which he believes the funds were allocated, clearly indicating that *all* funds related to or paid in consideration of the release must be disclosed.

The Division requires the certification so that the *Division* can determine whether a claimant has received a double recovery. (Cal. Code Regs., tit. 23, § 2812.2, subd. (b)-(c).) Petitioner knew that the Division required the certification to determine whether a claimant received a double recovery because he attested, under penalty of perjury, that he would remit any funds *determined by the Division* to be a double recovery. (Div. Exh. A at 471.) Yet, petitioner

testified that, after consultation with his attorney, *he* made the determination that the funds were for his other losses. (Transcript at 68:1-4.)

As discussed above, the record contains no evidence to support the belief of petitioner or his former counsel that all of the money could be allocated to costs other than those reimbursed by the Fund. (See *supra* at 12-13.) Moreover, petitioner had a strong motive not to disclose his recoveries: as was made clear to him by the disclosure certification, Fund regulations prohibited his receipt of a double recovery. Because the settlement agreements clearly disposed of *all* claims, including claims for remediation costs, petitioner knew that some of the money could be considered a double recovery by the Division, thus reducing his recovery from the Fund. Indeed, petitioner admits he understood that not all of the funds could be allocated to offset other losses. (Petition, Aug. 22, 1997 at 4; but see Div. Exh. A at 530; Transcript at 98:15-20.)

Petitioner is a sophisticated businessman who had the advice of legal counsel. Petitioner was familiar with the staff persons working on his claim and telephoned Division staff on numerous occasions regarding his claim documentation. (Transcript at 64:10-18 (petitioner admits he made several telephone calls to the payment analyst concerning his claim documentation); *id.* at 125:23-25, 126:1-5 (payment analyst states that she remembers the claim particularly because petitioner called her several times regarding claim documentation).) Neither petitioner nor his prior counsel ever asked Division staff whether the funds should be disclosed.

In summary, it is simply not credible that petitioner and his former counsel believed, after reading the question and declarations on the form, that petitioner was not required to disclose the receipt of funds merely because he thought he could characterize them as payment

for losses other than those reimbursed by the Fund. Therefore, petitioner knew he was making a false representation when he failed to disclose the funds on the March disclosure certification.

Petitioner Made an Intentional Misrepresentation to the Division Each Time He Submitted a Reimbursement Request Knowing He Had Failed to Disclose the Insurance Recoveries

Petitioner also argues that he did not intend to mislead the Division when he submitted reimbursement requests between March 29, 1994 and October 14, 1994. He argues that the reimbursement requests themselves did not require petitioner to submit an updated disclosure certification. Rather, they required only reimbursement of any double payment petitioner may have received. Petitioner argues he had a good faith belief that none of the money he had received was subject to disclosure, and the Division made no proof establishing that he knew his belief was false.

Petitioner's argument is without merit. As shown above, sufficient evidence in the record supports a finding that petitioner knew the funds he received were subject to disclosure, regardless of how he wished to characterize their purpose.

Each time petitioner submitted a signed request for reimbursement accompanied by the appropriate documentation of expenses, he warranted that he read and agreed to certain conditions of payment, which include that he has complied and will comply with Fund regulations and the terms and conditions stated in the documents submitted in support of his payment requests (e.g., the disclosure certification). (See, e.g., Div. Exh. A at 471, 745-746.) Accordingly, each time petitioner signed one of the reimbursement requests, petitioner warranted that he had complied with the commitment he made when he signed the March 29, 1994, disclosure certification to notify the Division promptly if he received funds after completion of the form. (Div. Exh. A at 471.)

Petitioner admitted that he read the conditions of payment on the reverse of the reimbursement request form. (Transcript at 60:5-24.) Petitioner also admitted that the agreement he made to disclose funds promptly contained nothing in its express language that limited his duty to those occasions when the Division happened to request a new disclosure certification. (Transcript at 56:18-25, 57:1-7.)

Petitioner stipulated that, as of October 3, 1994, he had not disclosed to the Division his receipt of funds from the two insurers. (Div. Draft Memorandum of Stipulated Facts, Items 5, 7; Transcript at 8:2-4.) Yet petitioner himself had received $267,677 on April 4, 1994. (Div. Draft Memorandum of Stipulated Facts, Item 4, Transcript at 8:2-4.) Petitioner received an additional $260,512.32 in the beginning of June 1994. (Div. Exh. A at 196-198, 532, 545, 567.)

Although petitioner knew his insurers had paid out a total of $800,000 in consideration of petitioner's claims for coverage related to or arising out of his leaking USTs, petitioner continued to submit requests for reimbursement and accept Fund money without making the required disclosure during the six months between March 1994 and October 1994, when petitioner claims to have disclosed his recoveries.[12] As will be shown below, petitioner failed to make the required disclosure until November 1995, after the Division refused to process his requests for reimbursement.

[12] Reimbursement request Nos. 2 through 8 are dated respectively May 5, 1994; June 11, 1994 and July 18, 1994 (combined); August 9, 1994; September 7, 1994 (resubmitted October 3, 1994); December 19, 1994; March 21, 1995 (resubmitted March 31, 1995 and May 25, 1995); and July 29, 1995. (Div. Exh. A at 734, 716, 724, 695, 689, 680, 655, 649, 643, 632, 623.) The July 29, 1995 reimbursement request, denominated number eight, was never paid.

Therefore, the record contains sufficient evidence to support a finding that each time petitioner submitted a reimbursement request and failed to disclose his recovery, petitioner was making an intentional misrepresentation to the SWRCB. By October 1994, petitioner had submitted reimbursement requests for costs totaling $424,294.95 and received reimbursement to which he was not entitled in the amount of $325,872. (Div. Exh. A at 680, 695; see *id.* at 745, 734, 716, 724, 695, 689, 680.)

Petitioner Intentionally Failed to Disclose His Recoveries Until November 1995, After the Division Refused to Process His Requests for Reimbursement

Next petitioner argues that he submitted a revised disclosure certification, dated October 14, 1994, voluntarily disclosing the receipt of $800,000 from his insurers. (See DeMenno Exh. A at 5.) Petitioner argues that he disclosed the funds in response to the Division's request for a new disclosure certification because at that time it appeared that at least some portion of the settlement proceeds would apply to Fund-reimbursable expenses. (Petition, Aug. 22, 1997, at 4.)

Petitioner submits that the Division's sole evidence rebutting petitioner's proof was the Division witness's statement that because she wrote asking for another certification after that date, the October 1994 certification must not have been on file. Petitioner argues her testimony is contradicted by two documents in the file and by prior counsel's testimony, as well as a copy of a letter dated October 14, 1994 and prior counsel's billing records reflecting his preparation of the letter.

Petitioner's argument is simply not credible in light of the entire record.[13] The Division revised the disclosure certification form in August 1994. (Div. Exh. A at 467-468.) The disclosure certification in petitioner's claim file, dated March 29, 1994, was form "USTCF 007," revised June 1993. (Div. Ex. A at 471.) In seven separate "pay" letters[14] dated from August 30, 1994 through July 27, 1995,[15] Division staff requested that petitioner complete one of the newly revised disclosure certifications specifically designated in each letter as "form USTCF019.NON" to distinguish it from the older form. (Div. Exh. A at 718, 690, 697, 657, 470, 645, 634.) The revised two-page form itself is noticeably different in format from the earlier one-page version of the disclosure certification. All of the above-referenced pay letters enclosed the revised disclosure certification.

The payment analyst who prepared five pay letters sent to petitioner (dated August 30, 1994; September 12, 1994; November 1, 1994; January 11, 1995; and February 28, 1995) testified that it is standard procedure to check a claim file for supporting documentation before preparing the letters. (Transcript at 121:16-25, 122:1-17; Div. Exh. C at 1-2.) The payment analyst stated that if the revised disclosure certification had been in petitioner's claim file, she would not have requested it in the pay letters. (Div. Exh. C at 2-3.)

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[13] Moreover, petitioner's disclosure in October 1994 would not cure the misrepresentations contained in petitioner's March disclosure certification and his numerous reimbursement requests, as discussed above. Petitioner knew that at least some of the funds could constitute a double recovery in March 1994, six months before he claims to have decided to disclose the funds. He also knew he had agreed to make a prompt disclosure and that his agreement was not contingent on the Division's request for a new certification. Petitioner's proffered explanation of the delay is inadequate.

[14] A pay letter is prepared after staff review of a reimbursement request and its accompanying documentation to determine whether costs claimed are eligible. (Div. Exh. C at 2.)

[15] The letters are dated August 30, 1994; September 12, 1994; November 1, 1994; February 28, 1995; April 6, 1995; May 12, 1995; and July 27, 1995.

Petitioner argues that his prior counsel, despite receiving the Division's numerous requests for a revised disclosure certification, did not respond to the requests because he believed he had already sent the form in October 1994 in response to the first request. (Transcript at 103:15-20, see also *id.* at 50:5-25, 51:1-8 (petitioner states he authorized his attorney to disclose the recoveries in October 1994).) Petitioner's former counsel characterized the numerous requests contained in the pay letters (i.e., for petitioner to submit a new disclosure certification on the enclosed form) as boilerplate requests to which he paid no attention "to the extent it required additional forms." (Transcript at 103:24-25, 104:1-4.) Former counsel states he merely forwarded the letters to petitioner's environmental consultant, assuming there was no new information required. (Transcript 104:1-3.)

Each of the pay letters is customized to respond to the issues raised by the particular reimbursement request to which they correspond. (Transcript at 124:7-14; see Div. Exh. A at 718, 690, 697, 657, 470, 645, 634.) Each one provides specific information, such as how much of petitioner's particular request for reimbursement would be paid or deficiencies in his request that resulted in it being returned unpaid. They vary in length. (Compare Div. Exh. A at 634 with *id.* at 697, 718.) All but one of the seven, a pay letter sent in April 1995, are in letter format. (See Div. Exh. A at 470.) The April pay letter is more of a form letter, containing boxes that the staff person checked to indicate which information was lacking and requested. (*Ibid.*) However, even the April form letter is customized: it refers in its text to reimbursement request number seven and the text following the checked boxes is in bold letters. (*Ibid.*)[16]

[16] The highlighted text of the April letter requests (1) the revised certification form at issue and any applicable settlement or insurance documentation and (2) a reimbursement request form with the "Conditions of Payment" on the reverse side, rather than the one-sided photocopy submitted. (Div. Exh. A at 470.)

The evidence shows that petitioner was selectively responsive to the requests in the pay letters. Some of the pay letters addressed the need for petitioner to use the enclosed reimbursement request forms that were revised to reflect the obligation of a higher amount of funding to his claim. (See, e.g., Div. Exh. A at 682, 718.) These requests were not repeated. Evidently, the directions to use the revised reimbursement request forms were noted and followed, unlike the directions to submit the revised disclosure certification. (Compare Div. Exh. A at 682 (Jan. 11, 1995 letter directing petitioner to use the new, revised reimbursement request form that reflected a higher amount of funds obligated to his claim) with *id.* at 657 (Feb. 28, 1995, no request); compare *id.* at 718 (Aug. 30, 1994 request for revised form) with *id.* at 690 (Sept. 12, 1994, no request).)

The letters also required petitioner to submit copies of canceled checks to receive reimbursement. (See, e.g., Div. Exh. A at 690 (pay letter dated Sept. 12, 1994 returning his reimbursement request for failure to submit canceled checks showing payment of previous costs claimed).) The Division would not pay reimbursement requests absent documentation that petitioner paid funds previously claimed. (See, e.g., Div. Exh. A at 689 (returned reimbursement request requiring certification that the costs claimed therein have been paid or will be paid within 30 days of receipt of the funds requested).) Petitioner responded to these requests. (See, e.g., Div. Exh. A at 661-674; Transcript at 64:10-18 (petitioner made several telephone calls to payments analyst concerning canceled checks).)

In support of petitioner's argument that he believed he had sent, and did in fact send, the disclosure certification, petitioner raises the fact that the Division engineer who reviewed the work performed at the site never mentioned the missing disclosure certification to him. (Transcript at 109:23-25, 110:1-25, 111:1-12.) He points specifically to a May 1995 letter

in which the engineer did not mention the disclosure certification. (Transcript at 111:2-12; see Div. Exh. A at 302-303.) The letter addresses tank eligibility and remediation activities determined to be conducted outside the scope of the remedial action plan. (*Ibid.*.)

The engineer's failure to question petitioner about the disclosure certification does not support petitioner's contention. As is made clear by the pay letters, it was not the engineer's job to review whether the disclosure certification was in the file. (See, e.g., Div. Exh. A at 736.) Rather, the engineer determined whether costs submitted were eligible for reimbursement based on a technical review of the work performed. (*Ibid.*)

Petitioner also points to a single pay letter, sent in January 1995, that fails to mention the need for a revised disclosure certification to contradict testimony that the Division did not have the disclosure certification on file. (Transcript at 135:11-25; see Div. Exh. A at 682.) The payment analyst denied that this letter was evidence that the disclosure certification had been received. (Transcript at 136:1-8.) She referred to her checklist, which indicated that the document was missing. (*Ibid.*) The very next pay letter, sent in February, is one of only two that state "[n]o further payment will be made without the revised "Non-Recovery From Other Sources Disclosure Certification (form USTCF019.NON)." (Div. Exh. A at 657; see *id.* at 470 (April 1995 pay letter stating that petitioner's claim will not be processed further without the disclosure certification).)

Petitioner also calls attention to the fact that one of the payments checklists, prepared by the payment analyst's supervisor and dated September 19, 1995, had a line drawn through the "Certification of Non-Recovery from Other Sources" box and wrote "none" next to the "See Documentation Request" box. (Transcript at 136:23-25, 137:1-25, 138:1-25, 139:1-20;

see Div. Exh. A at 628.) Petitioner suggests that this document supports his contention that the Division had petitioner's disclosure certification on file.

Two later notes on a reimbursement request route slip contradict petitioner's evidence. The first note, dated October 6, 1995, states: "HOLD!! Telecon w/ Bruce need new cert." (Div. Exh. A at 622 (emphasis in original).) The initials on the note appear to be those of the supervisor who prepared the checklist dated September 19. (*Ibid.*) The second note reads: "Nick Tonsich [petitioner's prior counsel] -- talked w/ Nick; advised him a new cert. is req'd on the new form." (*Ibid.*) The second note, dated November 2, 1995, is unsigned. (*Ibid.*)

Petitioner had no incentive to submit the revised form. Unlike the Division's treatment of petitioner's failure to provide canceled checks, the Division did not refuse to process petitioner's reimbursement requests between September 1994 and July 1995 because of his failure to provide the revised disclosure certification. Unlike the request for canceled checks, the request for the newly revised form was to some degree a formality. As stated above, petitioner's obligation to disclose any recovery was not contingent on the Division's request that he fill out a new version of the disclosure certification already on file. Evidently, Division staff did not (and had no reason to) suspect the possibility of petitioner's fraud. (See Transcript at 104:23-25 (prior counsel testifies payment analyst was pleasant and not threatening; the analyst merely stated that she needed the revised form).)

By July 26, 1995, Division staff had approved payments to petitioner in the amount of $464,109 in corrective action costs. (Div. Exh. A at 632.)[17] After numerous requests

[17] Petitioner received reimbursement on or around the following dates and in the following amounts: June 6, 1994, $24,869; July 29, 1994, $51,762; September 30, 1994, $249,241; December 1, 1994, $17,910; February 11, 1995, $54,681; March 28, 1995, $14,602; August 27, 1995, $51,044 (approved for payment on July 26, 1995). (Div. Exh. A at 745, 734, 716, 695, 680, 655, 632; see Div. Draft Memorandum of Stipulated Facts, Item 8; Transcript at 8:2-6.)

failed to obtain the revised form, staff refused to process any further reimbursement requests, and did not process reimbursement request No. 8, dated July 29, 1995. (Div. Exh. A at 622.)

After the Division refused to process any further reimbursement requests, the Division received a completed certification on the revised form from petitioner's former counsel on November 20, 1995. (Div. Exh. A at 469; Transcript at 125:11-14, 104:13-25.) The disclosure certification notified the Division of the insurers' payments totaling $800,000. (Div. Exh. A at 467.) Petitioner signed the disclosure certification on November 9, 1995. (*Id.* at 468.) Petitioner did not attach the settlement agreements to the November 1995 disclosure certification; instead, he referred to settlement agreements he claimed were attached to a disclosure certification dated October 14, 1994. (*Id.* at 467, 535.) Petitioner did not enclose a copy of the October 1994 disclosure certification. The Division has no record of ever receiving notification of petitioner's recoveries prior to November 1995. (Transcript at 125:11-18.)

Two days after receiving the November 1995 certification, by letter dated November 22. 1995, staff responded to the certification by requesting copies of the settlement agreements to determine whether petitioner received an overpayment due to his receipt of $800,000 from his insurers. (Div. Exh. A at 469, 583.) Staff's letter noted that the record contained only two certifications dated March 1994 and November 1995, and no settlement agreements. (*Ibid.*)

Petitioner's former counsel sent the above-referenced settlement agreements by letter dated December 26, 1995, stating that the agreements had been previously forwarded to the Fund and "referenced in all prior Certifications." (Div. Exh. A at 564.) Prior counsel's letter stated: "As you can see from the text of the enclosed Agreements, large sums of money were

designated and expended for remediation efforts." (*Ibid.*) However, "[t]he balance of the proceeds were paid in reimbursement to [petitioner] for diminution in value to the subject property as well as lost rents which continue to accrue." (*Ibid.*) On the disclosure certification he designated all of the money paid directly to Dames & Moore ($271,810.68), and for which petitioner could not claim reimbursement, as payment for "remediation costs." The entire balance ($528,189.32), paid directly to petitioner, was designated for all losses other than those reimbursed by the Fund. As discussed above, the text of the settlement agreements does not support this allocation.

Staff received the settlement agreements on January 2, 1996. (*Ibid.*) After reviewing the settlement agreements, Division staff determined that of the $800,000 paid in settlement by the insurers, $523,189 was paid to petitioner for corrective action in response to the cleanup and abatement order.[18] (Div. Exh. A at 552-555.) Therefore, staff determined that the total amount petitioner received from the Fund to date, $464,109, constituted an overpayment.

Staff also, for the first time, raised the issue of petitioner's failure to report his recovery on the March 1994 certification, stating: "I am very concerned with the fact that you had executed an agreement with [your insurer] in February 1994, which paid you $500,000 and in March 1994 you certified to the Fund that you had not received any other funding." (Div. Exh. A at 554.) Staff's strong reaction to the disclosure supports a finding that the certification was not received before November 1995.

[18] The Division did not consider the amounts previously paid by Insurer A and Insurer B ($232,323 and $39,487.68) as "double recovery" because staff found that petitioner did not claim reimbursement from the Fund for these expenses. (Div. Exh. A at 7, 553.) Therefore, staff offset the two amounts previously paid by the insurers and the "deductible" of $5,000 against the recoveries. (See Cal. Code Regs., tit. 23, § 2808.1 (petitioner must demonstrate financial responsibility in the amount of $5,000 exclusive of the Fund).)

Petitioner, by and through his former counsel, responded by letter dated March 26 and delivered by facsimile March 27, 1996[19] requesting review and reconsideration of the staff decision. (Div. Exh. A at 542-551.) For the first time, in response to the "strong insinuation" of misrepresentation contained in staff's letter, petitioner included a copy of a letter purportedly sent from his prior counsel dated October 14, 1994 and a revised disclosure certification, signed and dated by petitioner on October 14, 1994. (Div. Exh. A at 546, 536.) The October letter stated that it enclosed the certification "in response to [staff's] August 30, 1994 request [the first pay letter]."

Petitioner argues that he would have had no incentive to fabricate a story about the October 1994 certification in November 1995 in order to avoid the disqualification of his claim. (Transcript at 54:10-18, 148:8-13.) Contrary to petitioner's contention, petitioner had a strong motive in November 1995 to fabricate a story that he had disclosed his recovery in response to Division's first request for the revised disclosure certification. The Division had been requesting the revised disclosure certification for over a year, petitioner had failed to disclose his recovery on the initial disclosure certification in March 1994, and petitioner continued to submit reimbursement requests. Petitioner had received $464,109 in Fund money, knowing that at least some of that money constituted a double recovery. Petitioner and his former counsel must have known that the penalty for failing to fully and accurately disclose "funds received or which may possibly be received in the future, WILL result in the disqualification of the claim." (See, e.g., Div. Exh. A at 177.) This fact is stated directly above the signature line in the section entitled

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[19] The copy sent by facsimile was missing the first page; after staff called petitioner's former counsel and requested the first page on April 3, 1996, former counsel sent the first page by facsimile on April 4, 1996. (Div. Exh. A at 540-542.)

"Declaration Statement" on each and every one of the numerous revised disclosure certification forms sent to petitioner. (*Ibid.*) According to petitioner, his site required further remediation amounting to as much as $300,000 or more; thus, the potential disqualification of the claim provided a strong motive indeed. (Div. Exh. A at 515.)

In support of his argument that he had decided to disclose the recovery, and did so in October 1994, petitioner submitted a copy of a two-sentence letter marked "Confidential Attorney-Client Privilege." (Div. Exh. A at 179.) The letter, dated September 2, 1994, is from petitioner's prior counsel and addressed to petitioner. (*Ibid.*; Transcript at 97:23-25; 98:1-10.) Petitioner also submitted a copy of his prior counsel's billing records for the month of October 1994. (Div. Exh. A at 181.) The billing record indicates that petitioner's prior counsel met with petitioner early in the month to discuss the matter and then spent some time preparing the letter and the disclosure certification on the day before they are dated. (Transcript at 101:15-25, 102:1-15.)

Petitioner's argument is unpersuasive. At best, the September 2 letter and October billing records show only that petitioner "addressed the need for a revised certification," not that the decision was made to send the documents or that they were sent. (Transcript at 148:4-7.)[20] Petitioner provided no evidence suggesting that the materials were actually mailed on October 14, 1994 other than the testimony of his former counsel (Transcript at 101:12-14.)

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[20] Petitioner requests that these documents be treated as attorney-client privileged or else returned. (Petition, Aug. 22, 1997 at 5.) To the extent petitioner relies on these documents to support his contention that the letter and certification form were prepared and sent, petitioner has waived his attorney-client privilege. (See *Wellpoint Health Networks, Inc.* v. *Superior Court* (1997) 59 Cal.App.4th 110, 128 [68 Cal.Rptr.2d 844, 856]; Evid. Code § 912, subd. (a) (the holder of an evidentiary privilege waives it by voluntarily disclosing the privileged communication to a third party): *Tennebaum* v. *DeLoitte & Touche* (9th Cir. 1996) 77 F.3d 337, 340-341 (the privilege holder may not selectively disclose only those communications that support his cause).)

Petitioner has claimed that not one, but three items crucial to his claim were mailed but either never received or misplaced by the Division: his July 1996 petition (discussed under the first contention), the October 1994 certification, and the settlement agreements that he claims to have enclosed with all copies of the disclosure certification. Yet, petitioner mailed, and the Division received, numerous reimbursement requests and their accompanying documentation of costs incurred. No reimbursement requests were lost and the Division promptly reimbursed petitioner's eligible, documented costs. Under the circumstances, the SWRCB finds the testimony of petitioner and his former counsel regarding the October disclosure certification to be untrustworthy.

The numerous pay letters requesting the form combined with petitioner's failure to respond, the notes to file by staff, petitioner's great incentive to conceal his failure to disclose his recovery, staff's strong reaction to the November disclosure, and petitioner's self-serving claims regarding the mailing of more than one piece of crucial documentation all support a finding that petitioner intentionally withheld the disclosure of his insurance recovery until November 1995, after staff refused to pay any further reimbursement requests.

Petitioner Must Repay All of the Money He Received from the Fund with Interest

The appropriate remedy for petitioner's intentional misrepresentation is disqualification from the Fund. (Cal. Code Regs., tit. 23 § 2812.6.) Claimants who fail to disclose the receipt of funds from other sources should not, once the receipt is discovered, be treated as though they had timely disclosed, and allowed to reduce the amount of any overpayment by allocating funds from other sources to costs other than the cleanup costs for which they received reimbursement. Otherwise, claimants would have no incentive to timely disclose because the only consequence of their failure to do so would be the same treatment that

they otherwise would have received. Nor should claimants who fail to disclose receipt of funds from other sources benefit as a result of the time it takes the SWRCB to discover the misrepresentation.

Therefore, petitioner must reimburse the SWRCB the entire amount of money petitioner received, $464,109. In addition, petitioner must pay interest on that amount at the highest legal rate for the period between the date when the money was due and the date petitioner repays the SWRCB. (See Div. Exh. A at 746 (as a condition of payment, petitioner agreed to these terms).)

Finally, the SWRCB finds this case appropriate for referral to the Office of the Attorney General for prosecution under the False Claims Act. The Fund is a limited public benefit intended to ensure funding for prompt remedial action to protect the public health and safety, and the environment. The SWRCB, as its administrator, must safeguard the Fund for its intended uses and prevent its abuse.

III. SUMMARY AND CONCLUSION

1. Petitioner failed to file a timely petition for review of the Division's 1996 Decision determining petitioner's insurance recoveries resulted in an overpayment ("double recovery") to petitioner of Fund money in the amount of $464,109.

2. Although the SWRCB could take the matter up on its own motion, it declines to do so. Consequently, the Division's 1996 Decision is final and conclusive.

3. Petitioner made false representations of fact in pursuit of his claim to the Fund when he failed to disclose insurance recoveries on his March 29, 1994 certification.

4. Petitioner made false representations of fact in pursuit of his claim to the Fund each time he submitted a reimbursement request form without disclosing his insurance recoveries.

5. Petitioner made false representations of fact in pursuit of his claim to the Fund when he asserted that he had submitted a disclosure certification in October 1994.

6. When petitioner signed the March 29, 1994 disclosure certification denying the receipt of funds, petitioner knew Dames & Moore had received significant funds from petitioner's insurers to perform corrective action on his behalf in response to the cleanup and abatement order. Petitioner also knew he would shortly be receiving funds related to or paid in consideration of the UST release. Therefore, petitioner knew his certification contained a false representation.

7. Each time petitioner submitted a reimbursement request, knowing he had failed to disclose his recoveries, petitioner knew he made a false representation.

8. Petitioner knew he had failed to disclose his insurance recoveries until November 1995, after the Division refused to process any further requests for reimbursement.

9. Petitioner had a duty to disclose his receipt of the funds.

10. Petitioner's disclosure on his claim application in 1992 of pending negotiations with the insurers does not absolve him from his duty to disclose the subsequent recoveries from the insurers.

11. Petitioner's failure to disclose the recoveries was a material error that resulted in petitioner receiving an overpayment to which he was not entitled of $464,109 from the Fund.

12. Petitioner made false representations of fact in documents he submitted to the Division, knowing these representations were false. These misrepresentations constitute material error. Therefore, petitioner is disqualified and barred from further participation in the Fund.

13. Petitioner must reimburse the SWRCB the sum of $464,109 plus interest on that amount at the highest legal rate for the period between the date when the money was due and the date petitioner repays the SWRCB.

14. Petitioner's case shall be referred to the California Office of the Attorney General for prosecution under the False Claims Act.

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IV. ORDER

IT IS THEREFORE ORDERED that the Division Decision disqualifying and barring petitioner, Claim 847, from participation in the Fund is affirmed.

CERTIFICATION

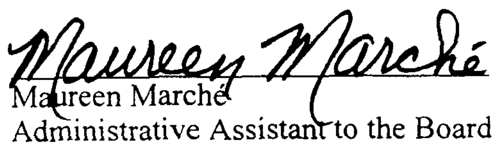
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 17, 1998.

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