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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 99 - 02 - UST

In the Matter of the Petitions of
HOLLIS RODGERS
And
EMILY VAN NUYS TRUST, J. BENTON VAN NUYS TRUST, AND KATE VAN NUYS PAGE TRUST
for Review of Determinations
of the Division of Clean Water Programs,
State Water Resources Control Board,
Regarding Participation in the
Underground Storage Tank Cleanup Fund

SWRCB/OCC Files UST-116 and UST-130

BY THE BOARD:

This order addresses two petitions filed concerning final division decisions issued by the Division of Clean Water Programs (Division). The State Water Resources Control Board (Board) has consolidated the two petitions for consideration because the petitions raise similar legal issues.[1]

Hollis Rodgers and the Emily Van Nuys Trust, J. Benton Van Nuys Trust, and Kate Van Nuys Page Trust (petitioners) petition the Board to review the Division's final division decisions which denied petitioners' reimbursement claims with the Underground Storage Tank Cleanup Fund (Fund). For the reasons stated below, the Board reverses the Division's decisions.

[1] The Board's regulations enable the Board to take whatever action it deems appropriate in response to these petitions. (Cal. Code Regs., tit. 23, § 2814.3, subd. (a)(4).) In prior matters, the Board has consolidated petitions for review under the explicit authority of California Code of Regulations, title 23, section 2054. (See, *In the Matter of the Petitions of County of San Diego, City of National City, and City of National City Community Development (Continued)*

Petitioners are eligible to file claims against the Fund. Further, petitioners may receive reimbursement for their reasonable and necessary, eligible corrective action costs advanced by other parties.

These petitions present the issue of whether Chevron Products Company and Texaco Refining and Marketing, Inc. (oil companies) advanced Fund-reimbursable corrective action costs on behalf of petitioners pursuant to written agreements between the oil companies and petitioners. The Board finds that the cost-sharing and cost-advancing agreements presented in these petitions comport with Fund regulations and Board Order WQ 97-06-UST, *In the Matter of the Petition of Quaker State Corporation.* Moreover, the Board finds that the agreements are not impermissible attempts to circumvent the Fund's legislatively created priority scheme. Therefore, the Board reverses the Division's decisions and directs the Fund to honor the on behalf of arrangements between the petitioners and the oil companies.

I. STATUTORY, REGULATORY, PROCEDURAL AND FACTUAL BACKGROUND

The Board administers the Fund pursuant to the Barry-Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Act). (Health & Saf. Code, §§ 25299.10-25299.99.) Subject to statutory requirements, owners and operators of petroleum underground storage tanks (USTs) may request reimbursement from the Fund for their corrective action costs incurred cleaning up contamination from petroleum USTs. (*Id.*, §§ 25299.54, 25299.57.)

The Legislature established the Fund to assist eligible owners and operators of USTs to remediate the adverse environmental impacts of UST petroleum contamination. The

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Commission, Order WQ 96-2.) The petitions reviewed in this order are legally related. As such, the Board deems it *(Continued)*

Act includes several findings about the intent of the Fund. "There are long-term threats to public health and water quality if a comprehensive, uniform, and efficient corrective action program is not established." (Health & Saf. Code, § 25299.10, subd. (b)(5).) "It is in the best interest of the health and safety of the people of the state to establish a fund to pay for corrective action where coverage is not available." (*Id.*, § 25299.10, subd. (b)(6).) Moreover, the Legislature counseled that small businesses should be an important focus of the Fund's corrective action reimbursements. (*Id.*, § 25299.10, subd. (b)(11) ("It is in the public interest for the state to provide financial assistance to small businesses and farms which have limited financial resources, to ensure timely compliance with the law governing underground storage tanks, and to ensure the adequate protection of groundwater.").)

The Board only pays the actual costs of corrective action it finds to be reasonable and necessary. (Health & Saf. Code, § 25299.57.) Fund monies are limited and are inadequate to meet the claims of all tank owners and operators in the state at once. As a result, the Legislature established a priority system allowing claimants least able to pay the costs of remediation, such as residential tank owners or small businesses, to receive reimbursement before larger owners and operators. (*Id.*, § 25299.52, subd. (b)(2).)

To effect the Act and the Legislature's findings, the Legislature empowered the Board to adopt regulations governing access to and priority under the Fund. (Health & Saf. Code, § 25299.77.) Regulations governing the Fund are codified in title 23, division 3, chapter 18, section 2803 et seq., of the California Code of Regulations. Section 2812.2[2] details "allowable reimbursable costs" permitted in a claim against the Fund. Specifically, section

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appropriate to consolidate the petitions and consider them together.

2812.2 recognizes allowable reimbursable costs "[w]here corrective action . . . costs are advanced to the claimant, or incurred on behalf of the claimant, under circumstances where the claimant is obligated to repay such advances from any reimbursement received from the Fund." (Cal. Code Regs., tit. 23, § 2812.2, subd. (b).)

The Board addressed the requirements of section 2812.2 in Order WQ 97-06-UST, *In the Matter of the Petition of Quaker State Corporation* (*Quaker State*). In *Quaker State*, the Board declined to reimburse costs paid by a responsible third party where the claimant and responsible third party had failed to execute an express agreement prior to incurring corrective action costs. The Board observed that although it "only contemplated advances by insurance companies when it drafted section 2812.2, subdivision (b), the Fund has, in past decisions and in this case, permitted persons other than insurance companies to advance money to claimants for cleanup." (*Quaker State*, *supra*, p. 7.) The order continues: "[w]here the person advancing the funds is not an insurance company, however, the Fund has required that an express agreement be in place before the costs are incurred." (*Ibid.*)[3]

In *Quaker State*, the Board noted with approval the Fund's practice not to reimburse "other responsible parties [who] advance money to claimants when doing so would have constituted a clear circumvention of eligibility requirements or the priority scheme." (*Quaker State*, *supra*, p. 7, fn. 3.) *Quaker State* strikes a pragmatic balance between allowing cost-advancing and cost-sharing arrangements when multiple responsible parties collectively take corrective action at a site. On one hand, *Quaker State* recognizes that the Fund does not and

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[2] Unless otherwise noted, all references are to title 23 of the California Code of Regulations.

[3] Drawing from the language of section 2812.2, Fund staff and claimants typically refer to these arrangements as "on behalf of" agreements.

should not attempt to resolve "difficult determinations of paramount responsibility in complex cases that typically involve multiple parties and tangled site histories." (*Id.*, p. 8.) On the other hand, *Quaker State* recognizes that the Fund cannot turn a blind eye to clear attempts to circumvent the statutory priority scheme or eligibility requirements. (*Id.*, p. 7, fn. 3.)

The Act provides for the Board to review the Division's final decisions within 90 days. (Health & Saf. Code, § 25299.37, subd. (c)(8)(B); Cal. Code Regs., tit. 23, § 2814.3, subd. (d).) Fund regulations allow the Board and petitioner, by written agreement, to extend the 90-day time limit for a period not to exceed 60 calendar days. (Cal. Code Regs., tit. 23 § 2814.3, subd. (d).) If the Board does not take action on a petition within either the 90-day period or the 60-day extension period, the Board has continuing jurisdiction to review the petition on its own motion.[4]

Site History for Petitioner Hollis Rodgers' Claim

Petitioner Hollis Rodgers (Rodgers) previously operated a gasoline service station at 800 Center Street in Oakland, California (Rodgers service station).[5] Before Rodgers operated the Rodgers service station, Chevron Product Company's (Chevron) predecessor Standard Oil of California (Standard) operated at the site. Standard operated a service station at the site between 1947 and 1965. Rodgers maintained a sole proprietorship that operated the service station between 1965 and 1970.

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[4] See, *In the Matter of the Petition of Cupertino Electric, Inc.*, Order WQ 98-05-UST, at pp. 3-4 (discussing an agency's continuing jurisdiction pursuant to *California Correctional Peace Officers Ass'n* v. *State Personnel Bd.* (1995) 10 Cal.4th 1133 [43 Cal.Rptr.2d 693, 899 P.2d 79], and the Board's discretion to consider a petition on its own motion as authorized by California Code of Regulations, title 23, section 2814.2, subdivision (b)).

[5] The facts contained in this order are taken from petitioners' claim files. 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

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Rodgers was the last person to operate the USTs located at the Rodgers service station. In 1970 Rodgers ceased operating at the site. The L.B. Hoge Trust (Hoge Trust) owned the property from 1970 until 1979.[6] On June 22, 1973, four 1000-gallon USTs were removed from the service station. The present owners, Terrell A. Sadler and Oliana Sadler (Sadlers) acquired the property in 1979.

The City of Oakland (City) contemplated purchasing the nonoperating service station in 1989. As part of the City's due diligence, the City retained a consultant to prepare a Preliminary Hydrocarbon Contamination Assessment. The City's preliminary assessment identified elevated hydrocarbons in soil underlying the service station. There is no evidence in the record concerning the Rodgers service station's history between 1989 and 1995.

In 1995, Chevron retained consultants to prepare a Work Plan for Additional Site Assessment. Chevron coordinated its work with the Alameda County Department of Environmental Health (County). The County has local oversight responsibilities for UST programs in Alameda County. On November 30, 1995, Chevron submitted an Additional Site Assessment Report to the County. Chevron's November 30, 1995 submittal recognized that additional site assessment would probably be necessary and recommended the development of feasible remedial alternatives. By letter dated December 13, 1995, the County requested preparation of a work plan for additional investigation and assessment of feasible remedial alternatives.

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knowledge. This includes all statements and documents submitted during the active life of the claim. (Cal. Code Regs., tit. 23, § 2812.4.)

[6] There is some discrepancy in the record as to whether Rodgers owned the property or simply operated the service station. Rodgers' Claim Application indicates that he owned the property between 1965 and 1970. In contrast, the agreement between Rodgers, Chevron, and the Sadlers indicates that Rodgers simply operated the service station. If Rodgers only operated the service station, then the Hoge Trust owned the property from 1947 to 1979.

On January 18, 1996, the County issued a Notice of Pre-Enforcement Review for the service station. The notice identified Rodgers, Chevron, the Hoge Trust, the Sadlers, and various banks as potentially responsible parties for corrective action at the service station. Subsequent notices and directives from the County indicate that the County regarded Rodgers, Chevron, and the Sadlers as responsible parties for the service station.

In early 1996, Rodgers, Chevron, the Sadlers, the Hoge Trust, and the Hoge Trust's trustee entered into a settlement agreement resolving claims amongst the parties (Rodgers Settlement Agreement). An operative part of the Rodgers Settlement Agreement was an Agreement Relating to Site Remediation (Rodgers Remediation Agreement). Rodgers, Chevron, and the Sadlers executed the Rodgers Remediation Agreement in May 1996.[7]

The Rodgers Remediation Agreement outlines the framework by which Chevron and Rodgers will incur corrective action costs for the service station. After reciting the parties' relation to and history at the Rodgers service station, the Rodgers Remediation Agreement observes that "the Parties disagree as to who, if anyone, is legally responsible for the Contamination." (Rodgers Remediation Agreement, p. 1.) Pursuant to the Rodgers Remediation Agreement, Chevron assumed the lead responsibility for corrective action at the Rodgers service station. (*Id.*, ¶ 1.) Rodgers and Chevron would "approve[ ] and employ[ ] jointly" the consultant responsible for corrective action activities. (*Ibid.*)

The Rodgers Remediation Agreement requires Chevron to advance the costs of corrective action to Rodgers. Paragraph 4 provides that Chevron "agrees to advance any and all

[7] The Rodgers Remediation Agreement provides that it "shall be effective on the date of execution by all parties." (Rodgers Remediation Agreement, p. 6, ¶ 17.) Chevron executed the Rodgers Remediation Agreement on May 1, 1996, followed by the Sadlers on May 14, 1996, and Petitioner on May 16, 1996.

funds necessary to[ ] the performance of the [corrective action] Activities" subject to certain limitations. The limitations include that: Chevron and Rodgers "shall jointly enter into a contract with the consultant(s) and/or contractor(s) selected to perform the [corrective action] activities." (Rodgers Remediation Agreement, ¶ 4(a).) Further, the Rodgers Remediation Agreement requires any consultant or contractor to invoice both Rodgers and Chevron. (*Ibid.*)

To pay any consultant or contractor, Chevron must prepare a check payable to Rodgers, along with the consultant or contractor. (Rodgers Remediation Agreement, ¶ 4(b).) The Rodgers Remediation Agreement obligates Rodgers to endorse the check for payment to the consultant or contractor. (*Ibid.*)

The parties recognized that Rodgers might seek reimbursement of eligible corrective action costs from the Fund. In the event the Fund reimburses Rodgers, the Rodgers Remediation Agreement requires Rodgers to endorse the Fund's reimbursement to Chevron. (Rodgers Remediation Agreement, ¶ 4(c).)

On March 19, 1997, the Fund received Rodgers' Claim Application. Rodgers filed his claim with the Fund purporting to be eligible as a Class "B" priority claimant. After receiving the materials submitted in support of Rodgers' claim, Fund staff issued a staff decision to deny the claim on September 5, 1997. Fund staff concluded that Chevron was incurring corrective action costs on its own behalf.[8] Further, staff believed that the Rodgers Remediation Agreement constituted an attempt to circumvent the legislatively established priority scheme. By letter dated December 15, 1997, the Chief of the Division upheld the staff decision.

[8] Fund regulations would permit Chevron to submit a claim on its own behalf for its costs incurred at the Rodgers service station. Any claim submitted by Chevron, however, would have a lower priority pursuant to the Act. (Health & Saf. Code, § 25299.52, subd. (b).)

Rodgers challenges the Division's determination. Rodgers maintains (1) that Chevron incurred costs on behalf of Rodgers pursuant to a valid cost-advancing agreement and (2) that the Rodgers Remediation Agreement does not represent an attempt to circumvent the Fund's priority scheme.

Site History for Petitioner Van Nuys Trusts' Claim

The Emily Van Nuys Trust, J. Benton Van Nuys Trust, and Kate Van Nuys Page Trust (Van Nuys Trusts) own real property located at 4180 Wilshire Boulevard, Los Angeles, California (Van Nuys property). On October 21, 1958, the Van Nuys Trusts' predecessors-in-interest leased the property to Texaco Refining and Marketing, Inc. (Texaco), formerly Tidewater Oil Company.

Texaco leased the property to operate a gasoline service station and related facilities. At the inception of the lease, Texaco installed three USTs on the site. The lease specified a 25-year term ending on August 31, 1983.

Texaco assigned its rights in the lease to Phillips Petroleum (Phillips) in July 1966. Phillips remained on the property until April 1976, when it assigned its rights in the lease to Tosco Corporation (Tosco), formerly Lion Oil Company.

On February 7, 1980, the Van Nuys Trusts issued the Van Nuys property lessees, including Texaco, Phillips, and Tosco, a notice to terminate and forfeit the lease. Subsequent to receiving the notice of termination, the lessees disputed the bases for termination with the Van Nuys Trusts. Regardless of the disputed bases, the notice of termination became legally effective on February 20, 1980. At that time, legal ownership of the USTs devolved to the Van Nuys Trusts.

Although the lease legally terminated in 1980, Tosco continued to operate its gasoline station at the Van Nuys property. On October 25, 1982, Tosco filed an application with the City of Los Angeles Fire Department (Fire Department) to abandon the USTs. It appears that Tosco removed all three USTs the next day. There is no indication that any regulatory agency directed either Tosco or the Van Nuys Trusts to conduct any investigation or corrective action at that time.

In September 1992 the Van Nuys Trusts became aware of petroleum contamination at the Van Nuys property. The Fire Department informed the Van Nuys Trusts' counsel on June 23, 1994, that it was referring the matter to the California Regional Water Quality Control Board, Los Angeles Region for further action. The Van Nuys Trusts filed a claim with the Fund in June 1995.

Subsequent to filing a claim, the Van Nuys Trusts filed a lawsuit against Texaco, Phillips, and Tosco alleging that releases from the service station facilities during their tenancy caused the contamination. The Van Nuys Trusts initiated their litigation against the lessees in August 1995.

The parties to the litigation vigorously disputed causation and liability for the contamination. For example, a consultant for Phillips testified during discovery that there appeared to be at least two sources of unauthorized releases at the site. (Deposition Transcript of David A. Blakely, Oct. 4, 1996, 51:21-52:11.)[9] The consultant attributed the newer release to events after the USTs ceased operating, when the Van Nuys Trusts owned the USTs. (*Id.*, 52:5-

[9] References to the deposition transcript contain page and line numbers. The page number precedes the colon and the line number(s) follow the colon.

15.) The older release would have occurred prior to 1982, when the Van Nuys Trusts neither owned nor operated the USTs at the site.

Texaco and Phillips agreed to settle the Van Nuys Trusts' lawsuit against them. As part of a settlement agreement effective November 15, 1997, no party admitted liability for the releases from the USTs at the Van Nuys property. (Settlement Remediation and Indemnity Agreement and Release (Van Nuys Agreement), ¶ 2.5.) Texaco and Phillips agreed to pay the Van Nuys Trusts a specified sum for costs not reimbursable by the Fund. (*Id.*, ¶ 4.)

The Van Nuys Agreement identifies the mechanism by which the parties will conduct cleanup at the Van Nuys property. The agreement obligates the Van Nuys Trusts to "retain and contract with an environmental consultant or environmental consultants, the identity of which shall be acceptable to plaintiffs and Texaco, to perform any corrective action activities regarding the property." (Emphasis omitted.) (Van Nuys Agreement, ¶ 6.3.) However, "Texaco shall, on behalf of Plaintiffs, take the lead in overseeing and directing the work performed by environmental consultant(s) in connection with the corrective action." (Emphasis omitted.) (*Id.*, ¶ 6.4.)

The Van Nuys Trusts and Texaco are jointly responsible for approving work invoices. (Van Nuys Agreement, ¶ 7.) Once the parties approve an invoice, a person designated by the Van Nuys Trusts shall issue a check from an account established by the parties for corrective action costs. (*Id.*, ¶¶ 7.4, 8.1.) The Van Nuys Agreement obligates Texaco to advance an initial $45,000 into the account and to advance additional sums to keep the account liquid. (*Id.*, ¶ 8.2-3.) The agreement further requires the Van Nuys Trusts to deposit into the same account, within 30 days, any reimbursement the trusts receive from the Fund for corrective action

costs advanced by Texaco. (*Id.*, ¶ 9.3.) Ultimately, any amount remaining in the parties' account devolves to Texaco. (*Id.*, ¶ 8.6.)

In a Final Division Decision dated August 26, 1998, the Division concluded that the Van Nuys Trusts were ineligible for reimbursement from the Fund because the trusts never owned or operated the USTs and could not be considered de facto owners of the USTs. The Division further concluded that even if the Van Nuys Trusts were eligible to file a claim, Texaco was incurring costs on its own behalf, not on behalf of the claimants. Relying on the Board's decision in *Quaker State*, the Division determined that the Van Nuys Agreement was an impermissible attempt to circumvent the legislatively created priority scheme. In sum, the Division denied the Van Nuys Trusts' claim because the Division concluded: (1) that the trusts were ineligible because they never owned the USTs and (2) that the Van Nuys Agreement was an impermissible attempt to circumvent the Legislature's priority scheme.

Subsequent to the August 26, 1998 Final Division Decision, the Van Nuys Trust petitioned the Board to review the Division's decision. The trusts' petition referenced additional information concerning the trusts' ownership of the USTs at the Van Nuys property. Based on the new information, the Division revised its decision. On November 20, 1998, the Division determined that the Van Nuys Trusts were eligible owners of USTs. As a result, the Fund could commence review of $262,476.49 in costs incurred by the Van Nuys Trusts prior to the Van Nuys Agreement. Nonetheless, the Division adhered to its conclusion that the Van Nuys

Agreement constituted an impermissible attempt to circumvent the priority scheme. As a result, the trusts would not be eligible for costs incurred under the Van Nuys Agreement.[10]

The Van Nuys Trusts challenge the Division's determination. The trusts contend: (1) that Texaco incurred costs on behalf of the Van Nuys Trusts pursuant to a valid cost-advancing agreement and (2) that the Van Nuys Agreement does not represent an impermissible attempt to circumvent the Fund's priority scheme.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioners maintain that the oil companies have advanced corrective action costs to and that the oil companies have incurred costs on behalf of petitioners. To support their claims, petitioners point to the plain language of the Fund regulations and the Board's holding in *Quaker State*, which recognizes express agreements between responsible parties.

Findings: The Rodgers Remediation Agreement and Van Nuys Agreement constitute permissible, express agreements to advance costs pursuant to Fund regulations. The Board's decision in *Quaker State* allows for express agreements between responsible parties to incur costs on behalf of one another. Further, pursuant to Fund regulations a valid on behalf of agreement must compel a claimant to reimburse the party advancing costs from any Fund reimbursement.

Section 2812.2 authorizes the use of agreements between responsible parties to pay for eligible corrective action costs. In general, section 2812.2 only allows reimbursement for

[10] Like Chevron, however, Fund regulations would permit Texaco to submit a claim on its own behalf for its costs incurred at the Van Nuys property. Any claim submitted by Texaco would have a lower priority pursuant to the Act. (Health & Saf. Code, § 25299.52, subd. (b).)

costs incurred by an eligible claimant. Importantly, section 2812.2, subdivision (b), prevents claimants from receiving a double payment. A double payment occurs when a claimant receives a payment from one person (e.g., another responsible party) and also receives a reimbursement from the Fund for the same cost. (Cal. Code Regs., tit. 23, § 2812.2, subd. (b).)

The Board recognized early in the Fund's development that, in certain circumstances, a claimant would not be paying directly for corrective action work.[11] As a result, the Board crafted the double payment provision of section 2812.2, subdivision (b), to exclude certain on behalf of and cost-advancing agreements from the definition of double payment. Section 2812.2 reflects the Board's attempt to afford claimants flexibility in how a claimant may incur corrective action costs.

To avoid the double payment provision generally described in section 2812.2, subdivision (b), the Board excepts from the definition of double payment any eligible costs "advanced to the claimant, or incurred on behalf of the claimant, under circumstances where the claimant is obligated to repay such advances from any reimbursement received from the Fund." (Cal. Code Regs., tit. 23, § 2812.2, subd. (b).) Section 2812.2, subdivision (b), therefore contains two essential elements for a valid agreement. First, a person must either advance the costs to the claimant or incur the costs on behalf of the claimant. Second, the claimant must repay the advances to the person to the extent the Fund reimburses the claimant for the costs advanced.

In addition to the requirements of section 2812.2, subdivision (b), the Board requires an express agreement before a person incurs costs on behalf of a claimant. In *Quaker*

State, the Board found that "in order for a person to incur costs on behalf of a claimant, the person and the claimant must expressly agree before incurring those costs that they will be incurred on the claimant's behalf." (*Quaker State*, *supra*, pp. 12-13.) The Board reached this conclusion relying on the plain meaning of the regulation in conjunction with the Legislature's intent. (*Id.*, pp. 7-8.)

The requirement for an express agreement also provides the mechanism for Fund staff to ascertain whether a claimant has met the twin requirements of section 2812.2, subdivision (b). If the Fund cannot conclude that the requirements for a valid on behalf of agreement exist, then the Fund risks violating the Board's prohibition on double payments. Only through an express agreement can the Fund staff definitively conclude that (1) a person is advancing costs to or incurring costs on behalf of a claimant and (2) the claimant is required to repay the person advancing costs from any reimbursement from the Fund. Section 2812.2 and *Quaker State* together reflect reasonable requirements that are consistent with the Act's legislative intent.

The Rodgers Remediation Agreement and the Van Nuys Agreement are both valid on behalf of agreements. First, both agreements clearly spell out that the oil companies are advancing the costs to Rodgers and the Van Nuys Trusts. The agreements in both cases require the claimants to contract with environmental consultants. Although the agreements rely on different mechanisms, in both cases the claimants must review and approve any invoices. The Rodgers Remediation Agreement requires Rodgers to endorse over to the environmental

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[11] The prototypical example of this type of relationship is the insured-insurer relationship. The insurer might pay certain costs on behalf of its insured, while preserving through a subrogation provision the insurer's rights to any recovery the insured receives. In many instances, the insurer secures contractors and performs the work for the *(Continued)*

consultants checks issued by Chevron. The Van Nuys Agreement, in contrast, requires the Van Nuys Trusts to issue a check from an account funded by Texaco and Fund reimbursements. Both approaches are mechanisms for the oil companies to advance costs to and pay costs on behalf of the claimants.

Second, both agreements require the claimants to remit any Fund reimbursement to the oil companies. Rodgers must endorse any check directly to Chevron. The Van Nuys Trusts must deposit any Fund reimbursement checks into the account established by Texaco to fund corrective action. Although Texaco does not immediately receive the Fund reimbursement, the Van Nuys Agreement dictates that any money remaining in the account after site closure reverts to Texaco.[12] Consequently, the Van Nuys Agreement requires the trusts to reimburse Texaco for any costs advanced by Texaco and reimbursed by the Fund. As such, both agreements comply with the requirements of section 2812.2, subdivision (b).

Finally, both agreements are express agreements. The agreements entered by the petitioners and the oil companies identify the costs for which the oil companies advance costs to the petitioners. To the Board's knowledge, neither petitioner has attempted to recover corrective action costs incurred by the oil companies before the effective dates of the agreements. As a result, both agreements comport with requirements of section 2812.2, subdivision (b) and *Quaker State*. Assuming the agreements do not constitute attempts to circumvent the Legislature's priority scheme, the agreements constitute valid cost-advancing, on behalf of agreements.

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insured. In a technical sense, the insured has not incurred corrective action costs; the insurer has incurred and paid all corrective action costs.

[12] In the event the Van Nuys Trusts receive any reimbursement from the Fund after the corrective action account has been closed, the Van Nuys Agreement requires the trusts to remit the reimbursement to Texaco within thirty working days. (Van Nuys Agreement, ¶ 8.5.)

2. Contention: Petitioners contend that the Division's decisions improperly determined that the Rodgers Remediation Agreement and the Van Nuys Agreement were attempts to circumvent the legislated priority scheme. Petitioners argue that the agreements represent a permissible means of allocating responsibilities for corrective action costs when liability is disputed and difficult to calculate.

Findings: The Rodgers Remediation Agreement and the Van Nuys Agreement reflect attempts to strike a pragmatic balance on liability for corrective action costs. Local agencies had named petitioners and the oil companies as responsible parties. Petitioners and the oil companies dispute liability for any alleged release from the USTs at the sites. To initiate prompt cleanup and alleviate the need for protracted litigation to resolve liability, Rodgers and the Van Nuys Trusts entered into agreements with the oil companies whereby the oil companies would advance the petitioners the funds to clean up the sites. In addition, the oil companies agreed to provide their own expertise in coordinating and leading the corrective action. Finally, petitioners and the oil companies are all eligible owners and/or operators of petroleum USTs. Given the circumstances surrounding the agreements, both agreements are valid on behalf of agreements and do not constitute an impermissible attempt to circumvent the priority scheme.

Fund staff have an obligation to evaluate whether an on behalf of agreement is merely an attempt to circumvent the Act's priority scheme. The Legislature adopted the Act with a finding that it was in the public interest for the state to provide financial assistance to small businesses. (Health & Saf. Code, § 25299.10, subd. (b)(11).) To effect this finding, the Legislature established a priority scheme that focuses Fund resources toward small businesses before larger owners and operators. (*Id.*, § 25299.52, subd. (b).) Because lower priority owners and operators sometimes fund on behalf of agreements, Fund staff must assess whether an on

behalf of agreement merely represents an attempt to have a lower priority claim funded sooner than the Legislature directed.

To date, the only guidance the Board has provided Fund staff concerning on behalf of agreements is the decision in *Quaker State*. The Board observed that the Fund's practice had been not to reimburse "other responsible parties [who] advance money to claimants when doing so would have constituted a clear circumvention of eligibility requirements or the priority scheme." (*Quaker State*, *supra*, p. 7, fn. 3.) The discussion in *Quaker State* of what constituted a "clear circumvention of . . . the priority scheme," involved the case of a large oil company that operated USTs for many years and attempted to fund the cleanup for a small business owner who never operated the USTs. There was no indication in that case that an unauthorized release occurred while the small business owned the USTs. As a result, the Board tacitly approved the Fund's practice not to fund claims like those discussed in the *Quaker State* order.

Neither the Rodgers claim nor the Van Nuys Trusts claim rises to the level of a clear attempt to circumvent the priority scheme. Although there may be some costs properly attributable to the oil companies' Class "D" priority claims that may be funded early, the agreements provide substantial benefits to all parties and to the people of California. Moreover, the agreements attempt to resolve what would otherwise be difficult issues of causation and liability. The Board cannot conclude the agreements are clear attempts to circumvent the priority scheme.

Absent a judicial finding, the Board is unable to determine who is liable for specific costs resulting from the unauthorized UST releases at these sites. Petitioner Rodgers' liability may be significant in that Rodgers operated the USTs during their last five years of

service, when the USTs were older and more prone to leaks. As for the Van Nuys Trusts, there is evidence that a release may have occurred when the trusts owned the USTs. The oil companies may have substantial liability by virtue of operating at each site for many years, but the Board is not equipped to undertake the "administratively burdensome task of determining who is most responsible for site cleanups." (See, e.g., *Quaker State*, p. 8 (discussing the situation where corrective action costs have been incurred in the absence of an express agreement).)

Our decision to reimburse costs incurred under the Rodgers Remediation Agreement and the Van Nuys Agreement will advance the Act's purposes. While the agreements may not be satisfying from the perspective of resolving liability, the agreements assist small businesses that regulatory agencies have found to be responsible for unauthorized releases from USTs in cleaning up pollutants associated with those unauthorized releases. Further, the resources provided by the oil companies (including funding and expertise) help ensure that small businesses can undertake corrective action promptly.[13] Absent the agreements, the petitioners could have spent years litigating liability. Any litigation could have distracted the responsible parties from what should be their primary focus--remediating the unauthorized releases of petroleum.

As discussed above, the Fund staff have an obligation under the Act and the decision in *Quaker State* to review on behalf of agreements to ensure that an agreement is not a clear attempt to circumvent the priority scheme.[14] The Act, however, does not require eligible

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[13] The Board is mindful that many of the internal, administrative costs incurred by the oil companies will not be reimbursed. For example, the internal project management resources the oil companies bring to bear to coordinate environmental contractors and interaction with regulatory agencies typically are not reimbursable.

[14] Fund staff have a continuing obligation under the Act, the regulations, and *Quaker State* to assess whether an on behalf of agreement is an attempt to circumvent eligibility requirements. The issue of using an on behalf of *(Continued)*

tank owners and operators to litigate claims against other responsible parties to resolve or to apportion liability. The Van Nuys Trusts incurred over $240,000 in corrective action costs before and while litigating their claims against Texaco. After two years of litigation there was no definitive apportionment of liability. Ultimately, multiple responsible parties agreed on a system whereby one party advanced the costs of cleanup to the other. The same is true of Rodgers' claim. Based on these facts, the Board does not find that the agreements were clear attempts to circumvent the priority scheme.

The facts presented in the Rodgers and Van Nuys Trusts petitions should provide Fund staff sufficient guidance for typical on behalf of arrangements. If there are difficult, unresolved issues of liability and a regulatory agency has named multiple responsible parties, Fund staff should honor valid on behalf of agreements among the eligible responsible parties.

This conclusion does not mean that the Division should honor on behalf of agreements in all circumstances. There are factors not present in these cases that would render an agreement between responsible parties an impermissible attempt to circumvent the priority scheme. In the examples below, the party advancing the costs is legally incurring costs on their own behalf.

First, if a judicial action or comparable action (such as arbitration) results in a definitive apportionment of liability, responsible parties cannot use an on behalf of agreement to unravel the apportionment. For example, if a court finds a person responsible for 90 percent of the corrective action costs at a site and allocates the remaining 10 percent to another person, the

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agreement to circumvent eligibility requirements is not at issue in these petitions, and should remain a concern for Fund staff reviewing on behalf of agreements. To the extent this opinion guides Fund staff in evaluating whether an agreement circumvents the priority scheme, the factors set forth in this order should not constrain Fund staff in evaluating whether an agreement circumvents the eligibility requirements.

Fund will honor the court's finding. If the person found liable for 90 percent of costs advances costs to a higher priority claimant who is responsible for 10 percent of the costs, the Fund may only reimburse 10 percent of the eligible corrective action costs under the higher priority claim. Similarly, if a court found a person 100-percent liable for corrective action costs, the responsible party could not attempt to shift costs to a higher priority person designated as responsible by a regulatory agency.

Second, if a person has previously released another person from liability at a site, the person cannot then incur costs on behalf of the released party. An example of this type of arrangement would be when a low priority claimant acquires a site knowing that USTs are present and that unauthorized releases of petroleum are possible from USTs. If the person acquires the property with knowledge of the potential for petroleum contamination and agrees to release the prior owner or operator from liability, then the acquirer cannot fund an on behalf of agreement with a higher priority owner or operator whom the acquirer had previously released.

Third, if a person has previously agreed to indemnify another person, then the indemnitor cannot incur costs on behalf of the indemnitee. This example is similar to the provisions for releases. As with a releasor, an indemnitor has effectively contracted for liability. If a person provides an indemnity with the knowledge that USTs are present and of the potential for unauthorized releases of petroleum from the USTs, between the parties the indemnitor would be responsible for the corrective action costs. Since the indemnitor would be responsible for the costs, it could not incur the costs on behalf of the indemnitee.

The three foregoing examples are simply illustrative of the types of arrangements that would be clear attempts to circumvent the priority scheme. In each example, the key factor is that ultimate responsibility between the parties lies with the party funding the corrective

action. Either through a judicial proceeding or a previous contractual relationship between the parties, the party funding the agreement had been assigned or had accepted responsibility for the corrective action costs. The Board does not intend, however, for Fund staff to regard these examples as exhaustive. In order to effect the purposes of the Act's priority scheme, Fund staff must remain vigilant for clear attempts to circumvent the priority scheme through on behalf of agreements.

III. SUMMARY AND CONCLUSION

1. Claimants are only eligible for reimbursement from the Fund to the extent they incur eligible corrective action costs.

2. Fund regulations allow responsible parties to enter into agreements to advance costs to or to incur costs on behalf of a claimant.

3. Where a responsible party advances costs to a claimant or incurs costs on behalf of a claimant pursuant to an express agreement, the Board will evaluate whether the express agreement is an impermissible attempt to circumvent the Act's priority scheme.

4. Petitioners and the oil companies have been named as responsible parties by the regulatory agencies with responsibility to direct corrective action at the subject sites.

5. There are difficult and unresolved issues of liability between petitioners and the oil companies for corrective action costs at the subject sites.

6. Petitioners and the oil companies resolved their potential liability contingent upon petitioners and the oil companies jointly undertaking corrective action at the subject sites.

7. The agreements between petitioners and the oil companies constitute valid agreements whereby the oil companies advance costs to the petitioners to pay corrective action costs.

8. The agreements between petitioners and the oil companies require the petitioners to repay the oil companies any corrective action costs reimbursed by the Fund.

9. Petitioners are eligible for reimbursement of eligible corrective action costs advanced by the oil companies after the effective dates of the agreements between the petitioners and the oil companies.

IV. ORDER

IT IS THEREFORE ORDERED that the final decisions of the Division denying the petitioners' claims are reversed. Petitioners are eligible to file claims against the Fund subject to the requirements of the Act and the Fund's regulations.

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 April 29, 1999.

AYE: James M. Stubchaer
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant to the Board