**THE PETITION OF MURRAY KELSOE REGARDING PARTICIPATION IN THE UNDERGROUND STORAGE TANK CLEANUP FUND, SWRCB/OCC FILE UST-208**

The State Water Resources Control Board (SWRCB) will consider a proposed order in the above-entitled matter at its board meeting, which will be held on October 21, 2004, at the Cal/EPA Building, 1001 I Street, Sacramento, California. The meeting will be held in the Coastal Hearing Room. The proposed order is provided below.

Evidence relating to this matter will not be heard and no written submittals will be accepted except those limited to the revisions in the draft order. Written comments on the draft order must be received by **noon, October 18, 2004.** Those comments must be addressed to:

Ms. Debbie Irvin
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100
(tel) 916-341-5600
(fax) 916-341-5620

Brief oral comments not to exceed five minutes may be made as long as they address only the changes made in the proposed order. As a result of the meeting, the order may be adopted as proposed or may be modified as determined by the SWRCB.

**D R A F T** October 8, 2004

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

ORDER WQO 2004- -UST

---

In the Matter of the Petition of

**MURRAY KELSOE**

For Review of a Decision
of the Division of Financial Assistance,
State Water Resources Control Board,
Regarding Eligibility of a Claim to the
Underground Storage Tank Cleanup Fund

***SWRCB/OCC FILE UST-208***

---

BY THE BOARD:

This order concerns a petition challenging a final division decision (FDD) issued by the Division of Financial Assistance (Division). Murray Kelsoe (Petitioner) seeks review of the Division's decision to deny Petitioner's claim to the Underground Storage Tank Cleanup Fund (Fund). The Division rejected Petitioner's claim on the grounds of noncompliance with permit requirements. After review of the record, the State Water Resources Control Board (State Board) upholds the Division's decision.

## I. STATUTORY, REGULATORY, PROCEDURAL AND FACTUAL BACKGROUND

The Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Act) authorizes the State Board to administer a program to reimburse underground storage tank (UST) owners and operators for eligible costs incurred as a result of contamination from leaking petroleum USTs. (Health and Saf. Code, §§ 25299.10 – 25299.99.3.)[1] To implement the Act, the Legislature authorized the State Board to adopt regulations governing administration of the Fund. These regulations are codified in title 23, division 3, chapter 18, of the California Code of Regulations (Fund regulations).

---

[1] All statutory references are to the California Health and Safety Code unless otherwise noted.

The Legislature limited participation in the Fund to those petroleum UST owners or operators who meet specified requirements. (§§ 25299.54, 25299.57.) One of these requirements is that a Fund claimant must have complied with the permit requirements of Chapter 6.7 (commencing with section 25280). (§ 25299.57, subd. (d)(3)(A).) Section 25284 of Chapter 6.7 states, in part, that "no person may own or operate an underground storage tank unless a permit for its operation has been issued by the local agency to the owner or operator of the tank." Thus, UST owners or operators are not eligible for reimbursement from the Fund if they have not obtained a permit for the UST that is the ~~source of the unauthorized release~~subject of the claim.

The Act provides an exception to this eligibility requirement. For claims filed on and after January 1, 1994, and for claims that were filed before January 1, 1994, but that are not eligible for a waiver of the permit requirement pursuant to Fund regulations in effect when the claim application was filed, claimants may seek a statutory permit waiver.[2] The State Board's authority to grant a statutory waiver of the permit requirement is governed by section 25299.57, which provides:

> "All claimants who file their claim on or after January 1, 1994, and all claimants who filed their claim prior to that date but are not eligible for a waiver of the permit requirement pursuant to board regulations in effect on the date of the filing of the claim, and who did not obtain or apply for any permit required by subdivision (a) of Section 25284 by January 1, 1990, shall be subject to subparagraph (A) [requirement to comply with permit requirements] regardless of the reason or reasons that the permit was not obtained or applied for. However, on and after January 1, 1994, the board may waive the provisions of subparagraph (A) as a condition for payment from the fund if the board finds all of the following:
>
> > "(i) The claimant was unaware of the permit requirement prior to January 1, 1990, and there was no intent to intentionally avoid the permit requirement or the fees associated with the permit.
> >
> > "(ii) Prior to submittal of the application to the fund, the claimant has complied with Section 25299.31 and has obtained and paid for all permits currently required by this paragraph.

[2] For claims that were filed before January 1, 1994, claimants may seek a permit waiver pursuant to the Fund regulations that were in effect when the claim was filed.

> "(iii) Prior to submittal of the application to the fund, the claimant has paid all fees, interest, and penalties imposed pursuant to Article 5 (commencing with Section 25299.40 and the Revenue and Taxation Code for the underground storage tank that is the subject of the claim." (Health & Saf. Code, § 25299.57, subd. (d)(3)(B).)

In 1983, Petitioner became the owner and operator of the Sunol Tree Gas Station at 3004 Andrade Road in Sunol. In December of 1984, Petitioner replaced the existing USTs with six new fiberglass USTs, piping and dispensers. The Alameda County Health Care Services Agency (Alameda County) began implementing its UST program in 1987, and claims to have notified all UST owners in their jurisdiction of permitting requirements in 1988. Petitioner states that he did not receive Alameda County's 1988 notification, and there is no record of a 1988 notification in Alameda County's files for the Sunol site.[3]

On April 24, 1991, Alameda County issued a Notice of Violation to Petitioner concerning the Sunol site. This Notice informed Petitioner of numerous violations of the California Health and Safety Code, including section 25284, which requires a permit to own or operate a UST. This Notice also informed Petitioner that he was required to submit a Plan of Correction to Alameda County to address the violations by May 24, 1991. On June 5, 1991, Alameda County sent a second Notice of Violation, again requesting that Petitioner submit a Plan of Correction to address the violations that were specified in the Notice of Violation dated April 24, 1991. In 1994, the Alameda County District Attorney's Office initiated an enforcement action against Petitioner, which related to the Sunol site and the three other sites in Alameda County. In August of 1994, the Superior Court issued a judgment against Petitioner that required Petitioner to pay civil penalties and to comply with Health and Safety Code section 25284 and other provisions of the Health and Safety Code. In December of 1994, the Sunol Tree Gas Station was brought into UST permit compliance. Shortly thereafter, the enforcement action was settled pursuant to a Stipulation and Modified Judgment.

---

[3] The record in this matter has been augmented with documents from the City of San Leandro that relate to petitioner's UST permit compliance at a UST facility in San Leandro. These records are relevant to criteria for a statutory permit waiver pursuant to Health and Safety Code section 25299.57, subdivision (d)(3)(B) – whether petitioner was unaware of the permit requirements before January 1, 1990, and whether petitioner intended to avoid permit requirements or associated fees. Petitioner objects to including the material in the record on grounds of relevancy. Since this order finds that statutory permit waivers are not available for failures to obtain permits that are required after January 1, 1990, it is unnecessary to determine whether the statutory waiver criteria are met, making it unnecessary to discuss the added materials in this order. If this order concluded that it was appropriate to determine whether the statutory waiver criteria have been met, assuming arguendo that a waiver could be granted for failures to obtain permits that occur after January 1, 1990, it would be appropriate to consider the added materials.

Petitioner filed for bankruptcy in 1993. Petitioner states that he did not obtain a permit until December of 1994 (even though he became aware of the permit requirements in 1991) because his trustee and the trustee's accountant controlled all monies, and that the trustee did not allow the USTs to be tested until 1994. The station was closed in 1998 and Petitioner received a temporary closure permit for the USTs. In April of 2002, Petitioner removed five 15,000-gallon gasoline USTs and associated piping, and discovered an unauthorized release. In December of 2002, Petitioner installed new USTs, obtained UST permits, and reopened the station.

Petitioner filed a claim with the Fund on June 25, 2002. The Division determined that Petitioner had not complied with permit requirements of Chapter 6.7 of the Health and Safety Code and did not qualify for a permit waiver. On August 28, 2003, Petitioner filed a petition seeking State Board review of the FDD rejecting Petitioner's claim.[4] Petitioner also requested a hearing to present oral argument.

## II. CONTENTIONS AND FINDINGS

**1. Contention**: Petitioner argues that section 25299.57, subdivision (d)(3), subparagraph (A) only requires current compliance with permit requirements. Petitioner contends that he meets the permit requirements because he had obtained a section 25284 permit before the discovery of the unauthorized release and before he applied to the Fund.

**Findings**: The language contained in section 25299.57, subdivision (d)(3) indicates that permit compliance, for purposes of accessing the Fund, is not achieved merely by obtaining the required permits before the unauthorized release is discovered or before the Fund application is submitted. If a claimant was subject to permitting requirements before January 1, 1990, the claimant must show that it applied for or obtained a permit on or before January 1,

[4] The Act directs the State Board to review a final decision of the Division within 90 days after receiving a petition challenging the decision. (Health & Saf. Code, § 25299.56, subd. (c); Cal. Code Regs., tit. 23, § 2814.4, subd. (d).) Fund regulations allow the State Board and petitioner, by written agreement, to extend the 90-day time limit. (Cal. Code Regs., tit. 23, § 2814.4, subd. (d).) If the State Board does not take action on a petition within either the 90-day period or the extension period, the State Board has continuing jurisdiction to review the petition on its own motion. See State Board Order WQ 98-05-UST, *In the Matter of the Petition of Cupertino Electric, Inc.*, 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 State Board's discretion to consider a petition on its own motion as authorized by California Code of Regulations, title 23, section 2814.4, subdivision (e).)

1990, to meet the permit-compliance criterion. This showing is required even if the unauthorized release is discovered and the Fund claim is filed several years after January 1, 1990.

When interpreting a statute, the fundamental objective is to determine and give effect to the intention of the Legislature. (Code Civ. Proc., § 1859.) In construing a statute, courts first look to the plain language of the statute. (*Federal Deposit Insurance Corporation v. Superior Court* (1997) 54 Cal.App.4th 337, 345 [62 Cal.Rptr.2d 713].) If the language of a statute is clear and unambiguous, the language must be given its plain meaning and statutory construction is unnecessary. (*Shippen and Realty Information Systems v. Department of Motor Vehicles* (1984) 161 Cal.App.3d 1119, 1124 [208 Cal.Rptr. 13].) Except when otherwise clearly indicated, words and phrases in a statute are to be construed according to the context and approved usage of the language. *People* v. *One 1952 Mercury 2-Door Sedan* (1959) 176 Cal.App.2d 220, 222 [1 Cal.Rptr. 245].) Statutes should be construed to harmonize its various elements without doing violence to its language or spirit. (*People v. Garcia* (1999) 21 Cal.4th 1, 6 [87 Cal.Rptr.2d. 114].)

Section 25299.57, subdivision (d)(3), subparagraph (A) reads as follows:

> "Except as provided in subparagraph (B), the claimant *has complied* with Section 25299.31 and the permit requirements of Chapter 6.7 (commencing with Section 25280)." (Italics added.)

As stated above, Petitioner asserts that the above language only requires current compliance with permit requirements. The word "complied" is the past participle of the verb "comply" and when preceded with either "have" or "has," the phrase is characterized as the present perfect tense of the verb. (*The Gregg Reference Manual*, Ninth Edition, § 1033.) This tense indicates action that was started in the past and has recently been completed or is continuing until the present time. (*Ibid*.) According to standard usage of the English language, the term "has complied . . . with permit requirements" means that the claimant must have complied in the past and continues to comply with permit requirements. Other language

/ / /

/ / /

/ / /

contained in section 25299.57 shows that past compliance means more than just obtaining a permit before the unauthorized release is discovered or before a Fund claim is filed.[5]

Subdivision (d)(3), subparagraph (B) provides that:

> "All claimants who file their claim on or after January 1, 1994 . . . and who did not obtain or apply for any permit required by subdivision (a) of Section 25284 by January 1, 1990, shall be subject to subparagraph (A) regardless of the reason . . . ."

This language indicates that if a claimant did not obtain or apply for the required permit by January 1, 1990, ~~or qualify for the statutory permit waiver established in subparagraph (B),~~ then the claimant is ineligible for the Fund. The language expressly mentions claimants who file their claims after January 1, 1994, yet conditions eligibility on permit compliance by January 1, 1990. ~~Thus, i~~If ~~someone~~ a claimant failed to obtain the required permit by January 1, 1990, ~~and failed to qualify for a permit waiver,~~ the claimant would be ineligible for the Fund even though the claim was filed in 1994 or later. With Petitioner's proposed interpretation, the January 1, 1990, date has no significance so long as the claimant complied with permit requirements before the release was discovered or before the claim was filed. Petitioner's proposed interpretation of subparagraph (A) would essentially ignore a claimant's permit-compliance status as of January 1, 1990, which is so clearly mandated in subparagraph (B).

Permit noncompliance is not an everlasting bar to Fund eligibility at a site. We interpret section 25299.57, subdivision (d) to allow the Fund to determine permit compliance on a UST basis. In other words, when a UST system is replaced, a new UST permitting cycle begins, and permit noncompliance for a former UST system will not automatically preclude Fund eligibility for any release that may result from a UST system subsequently installed at the site. For example, if a UST owner failed to comply with permitting requirements and did not qualify for a waiver of permitting requirements, the claimant would be ineligible for Fund reimbursement of costs relative to the unauthorized release that resulted from the unpermitted

[5] Language contained in Fund regulations over the years also indicates that a claimant does not satisfy the permit-requirement condition merely by obtaining required permits before the claimant discovers the release or applies to the Fund. The existing Fund regulations condition eligibility on, among other things, the claimant having obtained or applied for "any" permit required by Chapter 6.7 of the Health and Safety Code. (Fund regulations, § 2811, subd. (a)(2).) Earlier versions of the Fund regulations provided that a claimant is eligible if, among other things, the claimant "had and has obtained any permit or permits required of the claimant." (See Fund regulations, § 2811, subd. (a)(2), effective dates December 2, 1991, December 27, 1994, and August 8, 1996.)

USTs. If the owner replaced the USTs and properly permitted the new UST system at all times, then the owner's permit noncompliance with respect to the former USTs at the site would not impact eligibility for any release from the new, properly-permitted UST system at the same site.

**2. Contention**: Petitioner contends that the statutory permit waiver is only applicable for failures to obtain section 25284 permits before January 1, 1990. Petitioner argues that a knowing failure to have a permit is only a ban with respect to pre-1990 permits, and that there was no intent by the Legislature to forever bar an individual from accessing the Fund for failure to have a permit sometime in the past.

**Finding**: We agree with Petitioner that the statutory permit waiver is only available for permits that were required by January 1, 1990. We do not, however, agree with all of the underlying arguments that Petitioner has advanced in support of this conclusion. Nor do we agree with Petitioner on the impact that a January 1, 1990, cutoff date has on his claim to the Fund.

Petitioner was out of compliance with section 25284 permit requirements until December of 1994. ~~Petitioner may have met the~~ There are statutory criteria for a waiver of permit requirements as expressed in section 25299.57, subdivision (d)(3)(B)(i)-(iii), but that waiver, as Petitioner seems to agree, only applies to permits required by January 1, 1990.[6] The unavailability of waivers means that the disqualification from eligibility for permit noncompliance applies with full force to post January 1, 1990, violations. It does not mean, as Petitioner argues, that knowing failure to have permits is only a ban with respect to pre-January-1, 1990, permits. As the introductory sentence in section 25299.57, subdivision-(d)(3)(B) states: "claimants . . . who did not obtain or apply for any permit required by subdivision (a) of Section 25284 by January 1, 1990, shall be subject to subparagraph (A) [requirement to comply with permit requirements] *regardless of the reason or reasons that the permit was not obtained or applied for.* (Italics added). - Under Petitioner's interpretation, eligibility requirements would be stricter for failure to obtain permits that occurred before January 1, 1990, than afterwards. But both the language and the legislative history of these provisions indicate the opposite is true. Failure to obtain a permit was more excusable in the earlier years of the UST program than later, as explained in the *Lloyd* Order.

[6] In light of our findings, we do not need to reach the issue of whether petitioner met the waiver criteria with respect to permits required by January 1, 1990.

Petitioner remained out of compliance with permit requirements from January 2, 1990, through December of 1994, when he finally obtained his permits. Since Petitioner did not have a section 25284 permit from January 2, 1990, through December of 1994, and the statutory permit waiver is not available for permits that were required during this timeframe, Petitioner does not satisfy the eligibility requirements of section 25299.57, subdivision (d)(3).

Section 25299.57, subdivision (d)(3)(A) reads as follows:

> "Except as provided in subparagraph (B), the claimant has complied with Section 25299.31 and the permit requirements of Chapter 6.7 (commencing with Section 25280)."

Section 25284, which is contained in Chapter 6.7 of the Health and Safety Code, provides that no person shall own or operate a UST unless a permit has been issued by the appropriate agency. Section 25284 became effective on January 1, 1984. Therefore, subparagraph (3)(A) requires compliance with section 25284 at all times beginning January 1, 1984, except as provided in subparagraph (B), which provides for a waiver of permit requirements if certain criteria are met.[7]

On its face, section 25299.57, subdivision (d)(3), subparagraph (B) sets a cutoff date for permit waivers, and that date is January 1, 1990. Subparagraph (B) provides for a waiver for a claimant "who did not obtain or apply for any permit required by subdivision (a) of section 25284 by January 1, 1990." Thus, waivers are allowed for permits that were required before 1990, or in the period pending issuance of permits based on applications filed before 1990. All others, except for claimants who filed before 1994 and were eligible for waivers under the State Board regulations then in effect, are ineligible for the Fund if they failed to comply with applicable permit requirements, as specified in subparagraph (A) of subdivision (d)(3) of section 25299.57.

Assembly Bill 1061 (Costa) was enacted in 1993 and added subparagraph (B). Assembly Bill 1061, as it related to the permit waivers, was aimed at addressing a few key issues. First, instead of using the case-by-case approach for granting waivers of the permit

---

[7] Local agencies are responsible for issuing permits required by section 25284. Even though this permit requirement became effective on January 1, 1984, it took many local agencies a few years or more to start issuing actual permits. If a UST owner or operator obtained a section 25284 permit when the applicable local agency began permitting USTs, it is the Fund's practice to consider the owner or operator to be in compliance with UST permitting requirements for purposes of the Fund, even though the UST permit was issued several years after the effective date of section 25284.

requirement as had been used pursuant to applicable Fund regulations, the Legislature moved to an objective standard.[8] Second, the Legislature wanted to avoid the harsh result of complete ineligibility for the Fund in cases where claimants were justifiably unaware of the section 25284 permit requirement. As explained in *In the Matter of Lloyd Properties* (State Board Order WQ-93-1-UST), some UST owners and operators were justifiably unaware of permitting requirements in the early years of the UST program. In the early years after the effective date of section 25284 (1984), the permit requirement was not well publicized in many areas of the state, and UST permitting and enforcement programs were unevenly handled throughout the state. (*Lloyd Order*, p.7.)

The Legislature responded to these issues by establishing the three-criteria standard for permit waivers (instead of the subjective, case-by-case approach), with the key criterion being the lack of knowledge of the permit requirement before January 1, 1990, and the lack of the intention to avoid the permit requirement or the associated fees. This criterion reads as follows:

> "The claimant was unaware of the permit requirement prior to January 1, 1990, and there was no intent to intentionally avoid the permit requirement or the fees associated with the permit." (§ 25299.57, subd. (d)(3)(B)(i).)

There are two elements to this criterion – the lack of awareness of the permit requirement by January 1, 1990, and the lack of the intent to avoid the permit or fee requirement. The fact that the claimant must have been unaware of the permit requirement before January 1, 1990, to satisfy the first element also supports the position that the Legislature intended to limit the waivers to permits that were required by January 1, 1990.

The second element of the criterion, the lack of any intent to avoid permit or fee requirements, is intended primarily to make claimants ineligible for waivers if they intentionally failed to obtain after-the-fact permits or pay past fees once they became aware of the permit requirement. The legislative history indicates that the Legislature was concerned about claimants not obtaining past permits and paying associated back fees. If a claimant was unaware of permit requirements during a period before January 1, 1990, but became aware of them

[8] The Fund regulations in effect when AB 1061 was enacted and which still apply to Fund claims filed before January 1, 1994, allow the State Board to waive permit requirements if a claimant can show that obtaining a permit was beyond the claimant's reasonable control or that under the circumstances of particular case, it would be unreasonable or inequitable to impose the permit requirement.

later~~on or after January 1, 1990~~, then that claimant would be eligible for the waiver so long as there is nothing that shows that the claimant (before or after January 1, 1990) intended to avoid permit and fee requirements. Even if a claimant meets all of the waiver criteria, the waiver only relieves the claimant of pre-January 1, 1990, permit requirements.

The second element also serves to address the issue of how promptly a claimant must have applied for a permit once the claimant became aware of the permitting requirement. The claimant could not be expected to apply the very instant the claimant became aware of the permitting requirement, but it would also be inappropriate to allow a long period of time to obtain a permit, after becoming aware of the permitting requirements, simply because the claimant was initially unaware of those requirements. The second element allows for eligibility for a waiver so long as any delays in compliance were not the result of a deliberate attempt to avoid permitting or fee requirements. For example, in the case of a UST owner who becomes aware of the permit requirement in 1986 and does not obtain a section 25284 permit until 1989, the long, three-year delay in securing a permit after learning of the requirement ordinarily would indicate an intent to avoid the permit requirement or the associated fees.

~~Petitioner argues, based on the fact that the statutory waiver is not available after January 1, 1990, that a claimant is eligible for the Fund so long as the knowing failure to obtain a permit did not occur until after January 1, 1990. Under this interpretation, eligibility requirements would be stricter for failures to obtain permits that occurred before January 1, 1990, than afterwards. But both the language and the legislative history of these provisions indicate the opposite is true. Failure to obtain a permit was more excusable in the earlier years of the UST program than later, as explained in the *Lloyd* Order.~~

We recognize that there is an alternative interpretation of the statute, an interpretation that is not argued by Petitioner, that would result in there being no cutoff date for permit waivers. With this alternative interpretation, waivers could be granted indefinitely so long as the claimant could demonstrate that the claimant was unaware of the permitting requirement before January 1, 1990. As a result, even in the year 2004, which is 20 years after the effective date of section 25284, a claimant could be relieved of the permitting requirement if, among other things, the claimant was unaware of the permitting requirements before January 1, 1990. Under this interpretation, eligibility for the permit waiver is expressly tied to what the claimant knew before 1990. Particularly for failures to obtain permits that occurred many years

after January 1, 1990, (e.g., 2004), having eligibility for the waiver hinge on what the claimant knew before 1990 is illogical, and construing the statute to allow waivers under those circumstances would lead to results not intended by the Legislature. This interpretation would essentially send the message that UST owners and operators have no independent duty to become aware of laws that affect them or their property. This is the wrong message to send when implementing programs designed to protect the environment. The Legislature, when enacting AB 1061, surely intended a cutoff date for the issuance of waivers, and the only logical cutoff date under the statute is January 1, 1990.

**3. Contention**: Petitioner argues that requiring claimants to be in permit compliance before the discovery of the unauthorized release provides ample incentive for claimants to comply with permit requirements. Petitioner further argues that there would be no incentive to comply with current permitting requirements if past noncompliance bars participation in the Fund.

**Finding**: The Legislature conditioned Fund eligibility on permit compliance. Before a local agency may issue a section 25284 permit, the local agency must inspect the UST and determine that it complies with applicable provisions of Title 23 of the California Code of Regulations, Chapter 16 (UST regulations). (Cal Code Regs., tit. 23, § 2712, subd. (c).) The UST regulations contain, among other things, design and construction requirements for USTs and monitoring requirements. (See UST regulations, Articles 3 and 4.) Compliance with these requirements can prevent unauthorized releases and provide for early detection when releases do occur. Thus, obtaining and complying with the terms of a UST permit can prevent releases and minimize the impacts of releases on the environment.

Petitioner's proposed interpretation of permit compliance would encourage UST owners and operators to obtain UST permits before discovering a release, but it would not necessarily encourage earlier permit compliance, which could prevent the unauthorized releases in the first place or allow for early detection of the releases. Further, Petitioner's proposed interpretation may encourage UST owners and operators to delay discovering and reporting their releases until the owners and operators have come into permit compliance, which has obvious, negative impacts on the environment. Petitioner's proposed interpretation of permit compliance would, therefore, hinder the objectives of the UST permitting requirements and may result in delayed discoveries and cleanups of unauthorized releases.

It is true that past permit non-compliance can bar participation in the Fund with respect to a release from the UST system that had not been properly permitted, but this should not eliminate a UST owner or operator's incentive to comply with current permitting requirements. Even where UST owners or operators have not complied with UST permitting requirements in the past, they should be motivated to obtain current permits so that they can lawfully operate the USTs and businesses and avoid penalties for operating unpermitted USTs. Further, as explained earlier, permit noncompliance for a former UST system at a site does not necessarily preclude the same owner or operator from accessing the Fund for any releases that result from a new UST system at the same site, so long as the new UST system is properly permitted at all times.

**4. Contention**: Petitioner contends that the Division is estopped from denying eligibility to Petitioner because the Division represented that UST owners and operators are eligible for the Fund if they are in current compliance with permit requirements and financial responsibility requirements, and there is nothing that put the Petitioner on notice that failure to comply with past permit requirements would result in ineligibility. Petitioner refers to language included in the *Certification of Financial Responsibility Form* (*Certification*). Petitioner claims that if the forms had been accurate, he would have realized that he could not use the Fund for financial assurance and would have obtained an alternate form of financial assurance. Petitioner also argues that it is unfair to deny eligibility since Petitioner has been paying UST storage fees for a number of years.

**Findings**: Four elements are required before an equitable estoppel is applied: (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend that his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of the facts; and (4) the party asserting estoppel must rely upon the conduct to his or her injury. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 399 [261 Cal.Rptr. 310].) Estoppel may be asserted against the government where justice and right require it, but it will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public. (*Ibid.*)

Petitioner has not demonstrated that the four elements are met. It appears that the third element would be especially problematic for Petitioner in light of the facts of this case.

Petitioner executed his *Certification* on December 28, 1994. This form states that if a UST owner or operator is using the Fund as any part of its demonstration of financial responsibility, that execution and submission of the *Certification* certifies that the UST owner or operator is in compliance with all conditions for participation in the Fund.

As discussed earlier, section 25299.57, subdivision (d)(3)(B) expressly conditions Fund eligibility on permit compliance by January 1, 1990, even for Fund claims filed many years after that date. This subdivision became effective on January 1, 1994, almost a year before Petitioner completed his *Certification*. The Fund regulations in effect when Petitioner completed the *Certification* conditioned Fund eligibility on, among other things, compliance with permit requirements. More specifically, to be eligible for reimbursement, the Fund regulations stated that:

> "The claimant *had and has* obtained any permit or permits required of the claimant pursuant to Chapter 6.7, Division 20, of the California Health and Safety Code unless the claimant can demonstrate that waiver of the permit requirement is appropriate in accordance with the criteria set forth below." (Cal. Code Regs., tit. 23, Chap. 18, § 2811, subd. (a)(2), effective date Dec. 27, 1994, italics added.)

The language in section 25299.57, subdivision (d)(3), subparagraph (B), the above-cited Fund regulation, and several State Board precedential decisions concerning the permit requirements that were issued before December 28, 1994, show that Fund eligibility is conditioned not only on permit compliance at the time a Fund application is filed or at the time the unauthorized release is discovered, but also with permit compliance by January 1, 1990.

Additionally, estopping the Division from properly enforcing the permit requirement would nullify a strong rule of policy, adopted for the benefit of the public. As explained before, obtaining and complying with the terms of a permit (e.g., construction standards and monitoring requirements) can prevent an unauthorized release and, in the event a release occurs, minimize the impacts of the release on the environment. USTs must be properly permitted at all times and proper maintenance and operation must be continuous in order to achieve the regulatory purpose behind the permitting requirements. Conditioning Fund eligibility on long-term compliance with permit requirements provides appropriate incentive to accomplish the goals of the UST permitting requirements.

The Legislature established a system whereby the payment of UST storage fees into the Fund is mandatory, but receipt of reimbursement from the Fund is conditioned on certain

eligibility requirements. (§§ 25299.41, 25299.57 & 25299.58.) By conditioning Fund eligibility on regulatory compliance (e.g., compliance with permit requirements and corrective action directives), the Legislature must have intended to provide an incentive for UST owners and operators to comply with UST regulatory requirements. The UST storage fees provide money for cleanup, but the Legislature must have concluded that conditioning Fund eligibility on the payment of UST storage fees, alone, would not provide incentive to UST owners and operators to comply with UST regulatory requirements.

## III. NEED FOR LEGISLATION

Even though we conclude that section 25299.57, subdivision (d)(3) imposes a January 1, 1990, cutoff date for permit waivers, we are mindful of and concerned about some of the ramifications of this deadline. There are UST owners who continued to own their USTs after January 1, 1990, and who were unaware of the UST permitting requirements. Many of these UST owners had no reason to be aware of permitting requirements (e.g., they never operated the USTs or had not operated them several years preceding January 1, 1990). Although we conclude that the Legislature intended a January 1, 1990, cutoff date for the issuance of permit waivers, we also believe that because of the cutoff date chosen by the Legislature and the absence of any exceptions, the result may be harsh for some claimants to the Fund. We direct staff to pursue legislation that would establish a later cutoff date for permit waivers and any other parameters for the issuance of waivers that are consistent with our concerns expressed in this order.

## ~~III~~IV. SUMMARY AND CONCLUSION

1. To participate in the Fund, claimants must demonstrate compliance with section 25284 permitting requirements, unless the claimant qualifies for a waiver of the permitting requirements. To satisfy the permit-compliance criterion, the claimant must demonstrate that it has obtained all section 25284 permits required of the claimant. If a claimant owned or operated USTs as of January 1, 1984, the claimant is considered to be in compliance with permit requirements for purposes of the Fund if the claimant obtained section 25284 permit(s) when the applicable local agency began issuing section 25284 permits.

2. The language in section 25299.57, subdivision (d)(3), subparagraph (B) indicates that the Legislature was aware that claimants would be discovering unauthorized releases and filing Fund claims after January 1, 1994, yet still conditioned eligibility on the claimant's permit compliance by January 1, 1990. Interpreting the permit-compliance criterion

as compliance by the time the unauthorized release was discovered or the time the Fund claim was filed would contradict the express language of the statute and would hinder legislative objectives for this particular eligibility criterion. A UST owner or operator's permit noncompliance with respect to former USTs at a site does not impact eligibility for a release from any new, properly-permitted UST system at the site.

3. If a claimant has not complied with section 25284 permitting requirements, the claimant may seek a waiver of the requirements. For claims filed before January 1, 1994, a claimant may seek a permit waiver based upon Fund regulations in effect when the particular claim was filed. For claims filed after January 1, 1994, and claims that were filed before January 1, 1994, but that are not eligible for a waiver of the permit requirement pursuant to Fund regulations in effect when the claim application was filed, claimants may seek a permit waiver pursuant to Health and Safety Code section 25299.57, subdivision (d)(3), subparagraph (B).

4. Permit waivers authorized in section 25299.57, subdivision (d)(3), subparagraph (B) are only available for permits that were required by January 1, 1990, and may not be used to excuse permit non-compliance after January 1, 1990.

5. Petitioner became the owner and operator of the Sunol Tree Gas Station in 1983, and became subject to section 25284 permitting requirements on January 1, 1984. Alameda County began implementing its UST program in 1987. Petitioner did not obtain section 25284 permits for this facility until December of 1994. Since Petitioner did not properly permit his USTs until seven years after Alameda County first implemented its UST program and began issuing permits, this Board cannot make a finding that Petitioner complied with UST permitting requirements.

6. We do not need to reach the issue of whether Petitioner met the criteria for a waiver of permit requirements as expressed in section 25299.57, subdivision (d)(3), subparagraph (B)(i)-(iii). That waiver is only available for failures to obtain permits that occurred before January 1, 1990, and may not be used to excuse Petitioner's permit noncompliance that lasted beyond January 1, 1990.

7. Four elements are required before an equitable estoppel is applied, and estoppel will not be applied against the government if to do so would effectively nullify a strong rule of policy, adopted for the benefit of the public. Petitioner has not demonstrated these elements, and estopping the Division from enforcing the permit requirement established in the

Act would impede the legislative purpose for conditioning Fund eligibility on compliance with UST permitting requirements.

**CERTIFICATION**

The undersigned, Clerk 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 30~~October 21, 2004.

AYE:

NO:

ABSENT:

ABSTAIN:

**DRAFT**

_____

Debbie Irvin
Clerk to the Board