

EXHIBIT K

UNDERGROUND STORAGE TANK UNAUTHORIZED RELEASE (LEAK) / CONTAMINATION SITE REPORT

| | | |
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| EMERGENCY <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO | HAS STATE OFFICE OF EMERGENCY SERVICES REPORT BEEN FILED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO | FOR LOCAL AGENCY USE ONLY I HEREBY CERTIFY THAT I HAVE DISTRIBUTED THIS INFORMATION ACCORDING TO THE DISTRIBUTION SHOWN ON THE INSTRUCTION SHEET ON THE BACK PAGE OF THIS FORM. |
| REPORT DATE 01/20/07 | CASE # | SIGNED: <i>Mark Cramer</i> / 1/20/07 DATE: |

| | | |
|---|---|---|
| REPORTED BY NAME OF INDIVIDUAL FILING REPORT Mark Cramer | PHONE (530) 225-5407 | SIGNATURE <i>Mark Cramer</i> |
| REPRESENTING <input checked="" type="checkbox"/> LOCAL AGENCY <input type="checkbox"/> OTHER | OWNER/OPERATOR <input type="checkbox"/> REGIONAL BOARD <input type="checkbox"/> | COMPANY OR AGENCY NAME Shasta County Environmental Health Div. |
| ADDRESS 1855 Pleasant Street Redding CA 96001 | | |

| | | |
|--|---|-------------------------|
| RESPONSIBLE PARTY NAME Bob Davis | CONTACT PERSON Bob Davis / Tony Ackenpecht | PHONE (530) 297-1599 |
| ADDRESS 2029 Lakeview Drive Lakehead CA 96051 | | |

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|--|-----------------------------------|-------------------------|
| SITE LOCATION FACILITY NAME (IF APPLICABLE) Anders Shell | OPERATOR Tony Ackenpecht - TBS | PHONE (530) 297-1599 |
| ADDRESS 20887 Anders Rd. Lakehead Shasta 96051 | | |
| CROSS STREET I-5 exit ramp Lakehead | | |

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|--|-------------------------------|-------------------------|
| IMPLEMENTING AGENCIES LOCAL AGENCY Shasta County Environmental Health Div. | CONTACT PERSON Mark Cramer | PHONE (530) 225-5407 |
| REGIONAL BOARD Central Valley - Redding Office | | |
| CONTACT PERSON Grant Stein | | PHONE (530) 224-4788 |

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|--|--|
| SUBSTANCES INVOLVED (1) Gasoline (MTBE) | QUANTITY LOST (GALLONS) <input checked="" type="checkbox"/> UNKNOWN |
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| DISCOVERY/ABATEMENT DATE DISCOVERED 01/20/07 | HOW DISCOVERED: <input type="checkbox"/> INVENTORY CONTROL <input type="checkbox"/> SUBSURFACE MONITORING <input type="checkbox"/> NUISANCE CONDITIONS <input type="checkbox"/> TANK TEST <input type="checkbox"/> TANK REMOVAL <input checked="" type="checkbox"/> OTHER Public Water Well Testings |
| DATE DISCHARGE BEGAN UNKNOWN | METHOD USED TO STOP DISCHARGE (CHECK ALL THAT APPLY): <input type="checkbox"/> REMOVE CONTENTS <input type="checkbox"/> CLOSE TANK & REMOVE <input type="checkbox"/> REPAIR PIPING <input type="checkbox"/> REPAIR TANK <input type="checkbox"/> CLOSE TANK & FILL IN PLACE <input type="checkbox"/> CHANGE PROCEDURE <input checked="" type="checkbox"/> REPLACE TANK <input checked="" type="checkbox"/> OTHER Broken piping subsurface |
| HAS DISCHARGE BEEN STOPPED? <input type="checkbox"/> YES <input type="checkbox"/> NO IF YES, DATE | |

| | |
|---|---|
| SOURCE OF DISCHARGE <input type="checkbox"/> TANK LEAK <input checked="" type="checkbox"/> UNKNOWN | CAUSE(S) <input type="checkbox"/> OVERFILL <input type="checkbox"/> FRACTURE FAILURE <input type="checkbox"/> SPILL <input type="checkbox"/> CORROSION <input checked="" type="checkbox"/> UNKNOWN <input type="checkbox"/> OTHER |
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| CASE TYPE CHECK ONE ONLY <input type="checkbox"/> UNDETERMINED <input type="checkbox"/> SOIL ONLY <input type="checkbox"/> GROUNDWATER <input checked="" type="checkbox"/> DRINKING WATER (CHECK ONLY IF WATER WELLS HAVE ACTUALLY BEEN AFFECTED) |
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| CURRENT STATUS CHECK ONE ONLY <input type="checkbox"/> NO ACTION TAKEN <input type="checkbox"/> PRELIMINARY SITE ASSESSMENT WORKPLAN SUBMITTED <input type="checkbox"/> POLLUTION CHARACTERIZATION <input type="checkbox"/> LEAK BEING CONFIRMED <input checked="" type="checkbox"/> PRELIMINARY SITE ASSESSMENT UNDERWAY <input type="checkbox"/> POST-CLEANUP MONITORING IN PROGRESS <input type="checkbox"/> REMEDIATION PLAN <input type="checkbox"/> CASE CLOSED (CLEANUP COMPLETED OR UNNECESSARY) <input checked="" type="checkbox"/> CLEANUP UNDERWAY |
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| REMEDIAL ACTION CHECK APPROPRIATE ACTION(S) (SEE BACK FOR DETAILS) <input type="checkbox"/> CAP SITE (CD) <input type="checkbox"/> EXCAVATE & DISPOSE (ED) <input type="checkbox"/> REMOVE FREE PRODUCT (FP) <input type="checkbox"/> ENHANCED BIO-DEGRADATION (BT) <input type="checkbox"/> CONTAINMENT BARRIER (CB) <input type="checkbox"/> EXCAVATE & TREAT (ET) <input type="checkbox"/> PUMP & TREAT GROUNDWATER (GT) <input type="checkbox"/> REPLACE SUPPLY (RS) <input type="checkbox"/> VACUUM EXTRACT (VE) <input type="checkbox"/> NO ACTION REQUIRED (NA) <input type="checkbox"/> TREATMENT AT HOOKUP (HU) <input type="checkbox"/> VENT SOIL (VS) <input type="checkbox"/> OTHER (OT) |
|---|

COMMENTS
 On site public drinking water well was found to have MTBE contamination during routine testings of well on 8/18/2007. State I.D. # for well is 4500215.
 Tank removed on 10-9-1997 & replaced with new tank. CD piping disassembled and materials salvaged.

EXHIBIT L

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

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 2812.2² details "allowable reimbursable costs" permitted in a claim against the Fund. Specifically, section

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

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.

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
(Continued)

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.

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

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.

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

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

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

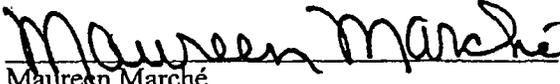
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 29, 1999.

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

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

100-100000-100000



EXHIBIT M

K Blean

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 2000 - 06 - UST

In the Matter of the Petition of
LAKE PUBLISHING COMPANY
for Review of a Determination
of the Division of Clean Water Programs,
State Water Resources Control Board,
Regarding Reimbursement from the
Underground Storage Tank Cleanup Fund

SWRCB/OCC File UST-117

BY THE BOARD:

This order concerns a petition challenging a final division decision issued by the Division of Clean Water Programs (Division). Lake Publishing Company (petitioner) seeks review of the Division's decision to deny a portion of petitioner's request for reimbursement from the Underground Storage Tank (UST) Cleanup Fund (Fund). After review of the record, the State Water Resources Control Board (Board) upholds the basis for the Division's decision, but directs the Division to reimburse petitioner based on the grounds set forth in this order.

This petition raises the issue of how the Division should analyze a reimbursement request when an eligible claimant acquires real property at a reduced price and the purchase contract explicitly contemplates the anticipated costs to clean up contamination from a petroleum UST. The Board concludes that the Division must reduce, by the purchase price reduction, any reimbursement from the Fund to an eligible claimant who acquires real property where the purchase price was reduced to reflect the anticipated costs to clean up the petroleum contamination. To this extent, the Board upholds the Division's decision.

This petition also raises correlated issues associated with the purchase price reduction and the relationship between a seller and buyer. Application of the double payment prohibition necessarily means that a seller of real property has borne a portion of the cost to clean up the contaminated property. Because the Fund would otherwise have reimbursed the cleanup costs to the eligible claimant absent the property transfer, someone has incurred corrective action costs that would otherwise be reimbursable from the Fund. The appropriate resolution is to conclude that the Division should regard the buyer of the real property as incurring corrective action costs on behalf of the seller who reduced the sale price. If a seller is otherwise eligible for reimbursement, the Division shall reimburse the seller for eligible corrective action costs up to the amount determined to be a double payment to the buyer. The order expands upon the Division's decision in this respect.

In addition, this petition raises the issue of whether an eligible claimant may assign its rights to reimbursement from the Fund. The Legislature has limited participation in the Fund program to persons meeting certain eligibility requirements. At the same time, California law favors assignments. This order seeks to harmonize these two policy goals by permitting assignments under certain conditions. If these conditions are satisfied, the Division may honor the assignment to another person of an eligible claimant's rights to reimbursement.

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 USTs may request reimbursement from the Fund for their corrective action costs incurred cleaning up

contamination from petroleum USTs. (*Id.*, §§ 25299.54, 25299.57.) In addition, the Fund reimburses certain types of compensation that an eligible owner or operator has been ordered to pay third persons. (*Id.*, § 25299.58.)

The Legislature empowered the Board to adopt regulations governing access to and reimbursement from 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.

The Act and Fund regulations prohibit a claimant from receiving a double payment on account of reimbursement for any corrective action or third party compensation cost. (Health & Saf. Code, § 25299.54, subd. (g); Cal. Code Regs., tit. 23, § 2812.2, subd. (b).)¹ To avoid making a double payment when a claimant recovers funds from another source, Fund staff must ascertain whether the other source compensated the claimant for costs that the Fund would otherwise reimburse. (See, Board Orders WQ 98-05-UST, *In the Matter of the Petition of Cupertino Electric, Inc. (Cupertino)* and WQ 96-04-UST, *In the Matter of the Petition of Champion/LBS Associates (Champion)*.) The Board has recognized that a double payment may occur when a claimant buys property on which a UST is located and undertakes the costs of cleanup that would otherwise be borne by the seller. If the claimant receives both a reduced purchase price for the property and reimbursement for the costs that occasioned the reduced purchase price, then the claimant will receive an impermissible double benefit. (Board Order WQ 93-2-UST, *In the Matter of the Petition of Bruno Scherrer Corporation (Bruno Scherrer)*, at pp. 10-11.)

The Act directs the Board to review a final decision of the Division within 90 days after receiving a petition challenging the decision. (Health & Saf. Code, § 25299.37,

¹ Unless otherwise noted, all further references are to title 23 of the California Code of Regulations.

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.²

Petitioner purchased an office building and construction yard located in Belmont, California from Williams and Burrows, Inc. (Seller) for \$1.8 million on February 5, 1988. During purchase negotiations, petitioner became aware that USTs were located at the site. As a result, petitioner negotiated a purchase price reduction because petitioner “surely would not pay the original price for contaminated property.” (Letter from Lake Publishing Co. to Dave Deaner, Fund Manager (Oct. 8, 1997).)

Under the terms of the purchase agreement, Seller agreed to remove six USTs that were located on the property and to deliver the property to petitioner in a clean condition. (Addendum to Purchase Agreement and Deposit Receipt (Addendum) (Dec. 2, 1987), ¶ 7.) The Addendum further provided that:

“If Seller has not performed the above [removal and cleanup] requirements prior to Close of Escrow, then an amount of funds shall be retained by the Escrow Company equal to the amount of funds required for the removal of such underground storage tanks and curing of such soils problems.” (*Ibid.*)

Once Seller removed the USTs and completed the cleanup, the escrow company would release the funds to Seller. (*Ibid.*) The parties negotiated this provision to ensure that funds would be available for the corrective action work, and to account for the Seller’s liquidity problems.

² See, *Cupertino, supra*, 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)).

(Request for Final Division Decision from David Lake, Lake Publishing Co. to Harry M. Schueller, Division Chief (Nov. 21, 1997).)

Seller failed to perform the UST removal and cleanup by the close of escrow, February 5, 1988. In the final escrow statement, petitioner and Seller agreed to set aside \$80,000 of the purchase funds to pay for UST removal and cleanup. (Addendum to Escrow Instructions, ¶ A.) The escrow instructions provided that if the \$80,000 had not been released in accordance with the Addendum to the purchase agreement (i.e., if Seller failed to remove the USTs and clean up the property) by June 1, 1988, then the escrow company would remit the funds to petitioner.

The USTs were removed on March 25, 1988. At that time, the parties discovered petroleum contamination from one of the six USTs. Because the Seller did not deliver the property in a clean condition, the escrow company remitted \$80,000 to petitioner pursuant to the amended escrow instructions.

Petitioner applied to the Fund in October 1992. In October 1997 Fund staff concluded that petitioner would receive a double payment if the Fund reimbursed petitioner's corrective action costs because petitioner had already received an \$80,000 discount on the property that was intended to pay for the costs of UST removal and cleanup. Pursuant to *Champion* and *Cupertino*, Fund staff allocated \$37,048 of the \$80,000 purchase price reduction towards ineligible costs (\$5,000 for the deductible, \$624 in ineligible corrective action costs, and \$31,424 for the UST removal). Fund staff then determined that petitioner must use the remaining \$42,952 of the escrow proceeds for corrective action before the Fund could begin reimbursing petitioner.

The Chief of the Division upheld the Fund staff's decision in a Final Division Decision dated December 23, 1997 (Decision). The Division Chief determined that Seller had paid petitioner for the costs of cleanup by accepting a reduced purchase price for the property. Petitioner timely submitted a petition for review to the Board. As part of its petition, the petitioner submitted an assignment of rights to Fund reimbursement executed January 14, 1998, by the Seller in favor of petitioner. (See Letter from Robert Burrows, Williams & Burrows, Inc. to David S. Lake, Lake Publishing Co. (Jan. 14, 1998).)

The petitioner challenges the Division's decision. The petitioner contends that the Division misconstrues the purposes of the escrow agreement. Petitioner maintains that the \$80,000 in escrow funds paid to the petitioner represented liquidated damages for Seller's failure to remove and to clean up any release from the USTs. As a result, petitioner contends that the liquidated damages do not represent a potential double recovery, but instead, a penalty to Seller for nonperformance. In the alternative, petitioner argues that \$80,000 represents a payment by Seller for corrective action costs. Because Seller has assigned any reimbursement rights it may have to the buyer, the petitioner contends it may recover any reimbursement Seller is entitled to receive.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner maintains that the Division misconstrued the provisions of the escrow agreement governing the \$80,000 payment. Petitioner contends that the Board should not consider the \$80,000 as compensation to the petitioner to pay for corrective action costs because the \$80,000 actually constituted a liquidated damage penalty for nonperformance by the Seller. As a result, petitioner maintains that the Board should not consider the \$80,000 as

compensation for corrective action and should not reduce petitioner's reimbursements from the Fund.

Findings: The petitioner's contention does not have merit. Regardless of whether the \$80,000 is denominated "liquidated damages," the money would still constitute a double recovery. Liquidated damages reflect the parties' attempt to estimate the damage to petitioner (i.e., the cost to clean up the contamination) resulting from nonperformance by Seller. The Board considers the \$80,000 price reduction compensation for corrective action costs.

A question of double payment arises when a claimant receives a reduced purchase price for contaminated property and seeks reimbursement from the Fund to clean up the property. The Board initially addressed this problem in *Bruno Scherrer*:

"Buyers in the position of petitioner who undertake to pay costs which otherwise must be borne by the seller normally obtain an adjustment in the price which would otherwise be charged to the buyer. If there is such an adjustment in price, and claims against the Fund by the purchaser are allowed, the result appears to involve a double benefit to the purchaser who receives both a reduced purchase price and reimbursement for the costs which occasioned the reduced purchase price." (*Bruno Scherrer, supra*, at pp. 10-11.)

Petitioner's claim presents this very issue, and the Board sees no reason to reevaluate this straightforward legal proposition. The \$80,000 of the purchase price that reverted to petitioner to pay removal and cleanup costs constitutes a potential double benefit to petitioner.

In effect, petitioner argues that the escrow funds belonged to him and not to Seller (i.e., petitioner did not receive a payment for corrective action from another source, but instead used his own money for corrective action). Ownership of the escrow funds, however, is not at issue here. It appears that petitioner may misunderstand how the issue of double payment arises in the context of a real estate transaction. Typically, double payments occur when a claimant receives funds from another source for its corrective action costs. Here, Seller did not make a

direct cash payment to petitioner. Nonetheless, a question of double payment arises when a claimant receives a reduced purchase price for contaminated property and seeks reimbursement from the Fund to clean up the property. (See, *Bruno Scherrer, supra*, at pp. 10-11.)

Petitioner has explained that the escrow was established with its money to assure Seller, who had the responsibility for contracting for UST removal and cleanup, that funds would be available for the work. (Request for Final Division Decision from David Lake, Lake Publishing Co. to Harry M. Schueller, Division Chief (Nov. 21, 1997).) Petitioner also has noted that it pressed for a reduced purchase price when it became more aware of the potential financial problems associated with USTs and the possibility that Seller would file for bankruptcy. (*Ibid.*)

Thus, petitioner was aware of the presence of the USTs, the likelihood that the USTs may have contaminated the property, and the potential financial problems associated with USTs. Petitioner has acknowledged that it considered these factors when it negotiated with Seller for a reduced purchase price. (*Ibid.*) In addition, the parties intended the \$80,000 in reduced purchase price to be used for the UST removal and cleanup. If the Fund reimbursed petitioner for its cleanup costs — for which the \$80,000 was also intended — then petitioner would receive a windfall because it would receive both a discount on the purchase price of the property and Fund reimbursement for the costs that occasioned the discounted price.

Petitioner maintains that the \$80,000 in escrow funds constituted liquidated damages for Seller's failure to perform according to the purchase agreement. Whether or not the \$80,000 was a liquidated damage does not alter the Board's analysis.³ The term "liquidated damages" denotes a specific sum fixed by the parties to a contract that is to be paid to satisfy a loss or injury arising from a breach of the contract. (See Civ. Code, § 1671 (establishing the

³ Petitioner concedes that the contract does not specifically refer to the \$80,000 in reverted escrow funds as liquidated damages. For purposes of this analysis, but without considering the merits of the issue, the Board accepts petitioner's assertion that the \$80,000 was a liquidated damage.

validity of liquidated damages provisions.) The sum must represent a reasonable attempt to anticipate the losses that may be suffered in the event of a breach of the contract. (*Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 656 [60 Cal.Rptr.2d 677].) Even if the parties contracted for the payment of liquidated damages, the question of double payment would still exist because the parties intended the money to satisfy petitioner's injuries arising from Seller's failure to clean up the site. In other words, the parties intended the money to pay for petitioner's cleanup costs. These are the same costs that the Fund would otherwise reimburse. The \$80,000 represents a potential double payment to petitioner if the Board were to reimburse petitioner for all eligible corrective action costs.

2. Contention: Petitioner contends that if the Division correctly determined that the escrow funds actually belonged to Seller, then Seller has the right to reimbursement from the Fund. To this extent, the Seller would have paid for corrective action through a lower sale price. Petitioner maintains that the amount the Division determines to be a double recovery for the purchaser would be the amount of corrective action paid by Seller.

Findings: The Board has not had occasion to consider this issue before, but in light of the Legislature's enumerated goals and subject to eligibility requirements elsewhere in the Act, the Board finds that an otherwise eligible seller of real property may submit a claim or join the purchaser's claim and seek reimbursement for the costs the Fund determines would otherwise be a double recovery to the purchaser. To comport with the Act, any reimbursement pursuant to this analysis cannot result in the Fund reimbursing more than it would have reimbursed had there only been one eligible claimant who owned the Belmont property throughout the UST operation, discovery, removal, and cleanup phases. Fund staff should

reimburse the eligible seller and the eligible buyer together the amount that would have been reimbursed to a single eligible claimant if there had been no real property transaction.

The Legislature established the Fund to help clean up the contamination that too often has accompanied the underground storage of petroleum. An important legislative goal enumerated by the Legislature is that the Fund should operate efficiently to encourage corrective action in the first instance “by the owner or operator of a leaking underground storage tank.” (Health & Saf. Code, § 25299.10, subd. (b)(8).) In fact, efficiency underlies three of the Legislature’s findings concerning the Fund. (*Id.*, §§ 25299.10, subds. (b)(1), (7)-(8) and 25299.90, subd. (e) (recognizing the benefits of reimbursing commingled plume claimants jointly).) The Board, therefore, strives to interpret the Act in a manner that promotes the efficient clean up of unauthorized releases, while following the letter of the law.

The Legislature limited the types of costs the Board may reimburse from the Fund. Broadly, the Board can only reimburse claimants for eligible corrective action, third party, and regulatory technical assistance costs. (Health & Saf. Code, §§ 25299.57-.58.)⁴ Corrective action encompasses:

“[A]ny activity necessary to investigate and analyze the effects of an unauthorized release; propose a cost-effective plan to protect human health, safety, and the environment and to restore or protect current and potential beneficial uses of water; and implement and evaluate the effectiveness of the activity(ies).” (Cal. Code of Regs., tit. 23, § 2804.)

An eligible claimant may receive reimbursement for the costs of implementing a corrective action activity, provided the cost is “reasonable and necessary.” (Health & Saf. Code, § 25299.57, subd. (b)(1).) In order to receive reimbursement for a claimed corrective action cost,

⁴ Corrective action and regulatory technical assistance costs are the only costs at issue in this order. Neither Seller nor petitioner can be a third party, and thereby trigger a third-party compensation claim because Fund regulations specifically exclude the owners of the real property at which the UST is located. (Cal. Code Regs., tit. 23, § 2804 (defining “third party”).)

the cost must have been "incurred by or on behalf of a claimant." (Cal. Code of Regs., tit. 23, § 2812.2, subd. (b); see also Health & Saf. Code, §§ 25299.55, subd. (c) and 25299.57, subd. (b)(1).)

The Board construes section 2812.2, subdivision (b), to allow a purchaser to incur corrective action costs on behalf of a seller through a reduced purchase price. Section 2812.2, subdivision (b) provides that corrective action costs "incurred . . . on behalf of a claimant shall be reimbursable from the Fund." (Cal. Code of Regs., tit. 23, § 2812.2, subd. (b).) Subdivision (b) continues by stating that "[n]o claimant shall be entitled to double payment on account of any corrective action or third party compensation claim cost." (*Ibid.*, see also, Health & Saf. Code, § 25299.54, subd. (g).) The regulation continues by identifying certain circumstances where a person might compensate a claimant, but the compensation would not be considered a double payment (e.g., where the claimant is then obligated to repay the person paying on behalf of the claimant).

A purchase price reduction by a seller does not implicate the double payment prohibition with respect to the seller.⁵ Nothing in section 2812.2, subdivision (b), restricts reimbursement to a seller for corrective action costs the seller effectively paid through a reduced purchase price. If a seller funds all or a portion of the corrective action through a purchase price reduction, if a seller is otherwise eligible to submit a claim to the Fund, and if a seller is not receiving compensation from another source that would run afoul of the statutory and regulatory double payment prohibition, the Board sees no reason why the claimant-seller should not be reimbursed the amount of the purchase price reduction that would otherwise constitute a double payment to the purchaser.

⁵ In contrast, as the Board has previously observed in *Bruno Scherrer*, a purchase price reduction would amount to a double payment to the purchaser if the Board were to reimburse the purchaser for all corrective action costs. (*Bruno Scherrer, supra*, at pp. 10-11.)

Construing a purchase price reduction to allow reimbursement of a seller is consistent with the Board's prior interpretations of "on behalf of" agreements. The "on behalf of" language in section 2812.2, subdivision (b) originated from the Board's recognition that claimants may not always have funds available to pay for corrective action in the first instance. A person may incur corrective action costs on behalf of a claimant pursuant to an express agreement in place before the costs were incurred. (See, Board Orders WQ 97-06-UST, *In the Matter of the Petition of Quaker State Corporation (Quaker State)* and WQ 99-02-UST, *In the Matter of the Petitions of Hollis Rodgers et al. (Hollis Rodgers)*.) In the case of a purchase price reduction, the express agreement comes in the form of a contract price that is below the fair market value of the property in a clean state. Further, the purchase contract will typically precede the purchaser undertaking corrective action. Hence, the Board's present analysis is consistent with the Board's prior, precedential orders. Moreover, the present analysis affords the parties greater flexibility in managing a site cleanup, thereby promoting the efficiency sought by the Legislature when it enacted the Act.

Absent language to the contrary, the Board construes a reduction in purchase price as the expression of a seller's agreement to assume responsibility for a portion of the property's Fund-reimbursable corrective action costs. For the Fund's purposes, a purchaser has agreed to incur corrective action costs on behalf of a seller. The Board is cognizant that a purchase price reduction frequently includes other valuable consideration (e.g., a purchaser's express or tacit agreement to clean up the contamination relieves a seller of contracting and bidding obligations and other inconveniences associated with corrective action, and a seller may receive valuable releases from responsibility and indemnification to insulate it from further responsibility). In this sense, the purchase price reduction typically includes a premium above

the anticipated corrective action costs. Therefore, the purchase price reduction reflects the maximum reimbursement a seller may receive from the Fund.

A seller's reimbursement will be the amount of double payment the Fund staff determine that the purchaser will receive. In light of the Fund's offset procedures as detailed in *Cupertino*,⁶ the actual double payment amount to a purchaser will typically be less than the purchase price reduction. The Board believes that calculating a seller's reimbursement based on the double recovery, as opposed to the purchase price reduction, is appropriate. First, the *Cupertino* "hard costs" used to determine the purchaser's double payment are costs associated with the UST that the seller would have borne had it retained the property and that two parties would most likely account for in adjusting the sale price of contaminated property. Second, the offset procedure, as applied in the purchase price reduction context, results in an equitable allocation of costs because the "hard cost" offset compelled by *Cupertino* may be viewed as the premium a seller incurs for not undertaking corrective action itself.

The Board believes the approach outlined in this order reflects the Act's intent and promotes sound public policy. If an eligible seller and an eligible purchaser contract to have the purchaser undertake corrective action, both parties have acknowledged that the most efficient corrective action approach is to have the purchaser undertake the corrective action. The Act establishes a goal of efficient corrective action. The Board can honor the parties' decision and promote efficiency by reimbursing a seller as detailed in this order. Further, if the Board concluded that a seller could not seek reimbursement for its purchase price reduction, the Fund

⁶ In *Cupertino*, the Board detailed the Fund's process for analyzing double payments. First, Fund staff determine the compensation a claimant has received from other sources. When the purpose of the compensation is expressly identified (e.g., \$10,000 to compensate claimant for lost business income and \$10,000 to compensate a claimant for corrective action costs) the Fund typically honors the express allocation. Where there is no express allocation, the Board has instructed Division staff to analyze the "hard costs" (i.e., the "actual, ascertainable costs to which the settlement money reasonably may be attributed based on the complaint or other demand"). (*Cupertino, supra*, pp. 10-11.) The Division staff then utilize the "hard costs" as an offset to reduce the amount of double recovery. (*Id.*, pp. 22-23.)

would recognize a benefit each time contaminated property sold at a reduced price. This could unnecessarily chill the transfer of and needlessly stall remediation of properties the Act was intended to protect.

In the present case, Seller is entitled to reimbursement of up to \$37,952 (\$42,952 less the statutory \$5,000 deductible) for eligible corrective action costs. As explained above, the Board concludes that the escrow instructions provided an \$80,000 purchase price reduction to pay for corrective action. This amount constituted the baseline for determining the petitioner's double recovery. Division staff then used the offset process established in *Champion* and *Cupertino* to calculate \$37,048 in "hard costs" that could be used to offset the \$80,000 price reduction. The amount of double recovery to the petitioner is therefore \$42,952. The petitioner must incur \$42,952 in eligible corrective action costs before it may be reimbursed under its existing claim. Any eligible corrective action costs in excess of \$42,952 may be reimbursed to the petitioner's claim. The Seller may submit a claim for reimbursement of the eligible corrective action costs up to \$42,952, which will then be decreased by the statutory deductible.

3. Contention: Petitioner maintains that to the extent the Seller is entitled to reimbursement from the Fund, the Seller has assigned petitioner the Seller's rights to submit a claim to the Fund and to receive any reimbursement from the Fund. Petitioner thereby contends that it is entitled to any reimbursement the Seller would otherwise have received.

Findings: The Division has traditionally not allowed a claimant to assign its rights to reimbursement from the Fund. However, in light of a strong policy in California law favoring the assignment of rights and interests in property, the Board concludes that in certain circumstances a claimant may assign its rights to reimbursement. Any such assignment would be governed by principles the Board has already applied to "on behalf of" agreements. As such,

petitioner may submit a claim to the Fund in Seller's name and as the assignee of the Seller, or consistent with long-standing Fund practice and this order, may have Seller joined on the existing claim as a joint claimant.

The Board has previously addressed the issue of assignments in *Bruno Scherrer*. *Bruno Scherrer* involved a claim submitted by the Bruno Scherrer Corporation (Bruno Scherrer), who leased property at which a UST had previously been operated. The UST had been removed before Bruno Scherrer acquired the property. As a result Bruno Scherrer was not eligible to submit a claim because it was not an owner or operator. Bruno Scherrer purchased the property agreeing to undertake all further corrective action. (*Bruno Scherrer, supra*, p. 9.) At some time after purchasing the property and after incurring substantial corrective action costs, Bruno Scherrer received an assignment of rights to reimbursement from the Fund.⁷ (*Ibid.*) In the circumstances presented by *Bruno Scherrer*, the Board declined to honor the assignment.

The Board rejected the assignment to Bruno Scherrer relying on two principal factors. First, the Legislature limited access to the Fund to owners and operators of USTs. Bruno Scherrer was neither. (*Bruno Scherrer, supra*, p.10.) Second, the Board concluded that it would be inappropriate for reimbursement to turn on whether a person had been able to negotiate, after the property's sale, for an assignment from an eligible claimant. (*Id.*, pp. 11-12.) Bruno Scherrer had the good fortune to obtain the assignment after incurring costs. But the Board reasoned it would be unjust to reimburse a person in Bruno Scherrer's position when other responsible parties may be unable to secure an assignment (sometimes for reasons beyond a person's control, such as the death of the eligible claimant). In a footnote, the Board specifically

⁷ Although Bruno Scherrer did not disclose the exact date of the assignment, a review of the record indicates that corrective action occurred before the Legislature established the Fund, and yet the assignment specifically referenced the Fund. Therefore, it is reasonable to conclude that the assignment occurred after Bruno Scherrer had incurred the corrective action costs.

preserved the issue of “access to the Fund by persons who bargain for and obtain an assignment of rights from a seller who was a tank owner during the process of purchase of the contaminated property.” (*Id.*, p. 10, fn. 2.)

After further consideration of the assignment issue, the Board concludes that *Bruno Scherrer* adopted an unnecessarily strict view of assignments. The Board therefore declines to extend *Bruno Scherrer*, and modifies its holding consistent with the discussion below and consistent with the line of Board orders governing “on behalf of” agreements. Despite these modifications, the Board observes that the outcome in *Bruno Scherrer* would have been identical if analyzed pursuant to the present order. As a result, although the Board has refined its analytical framework with respect to assignments, Bruno Scherrer would still not be eligible for reimbursement.

There is no dispute that California law strongly favors assignments. “Assignment is a term which may comprehensively cover the transfer of title to any kind of property.” (1 Witkin, *Summary of Cal. Law* (9th ed. 1987) *Contracts* § 921, p. 822.) More narrowly, assignment refers to the transfer of a right to recover money or other personal property. (*Ibid.*) A person may assign a right to recover money or other personal property by a judicial proceeding. (Civ. Code, § 954.) This right is personal property. (*Id.*, § 14, subd. (3).) A “right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such.” (*Id.*, § 1458.) Further, “[p]roperty of any kind may be transferred, except as otherwise provided by [article 2, chapter 1, title IV, part 4, division 3 of the Civil Code (commencing with section 1044)].” (*Id.*, § 1044.) The sole restriction on transfers in article 2 is that a “mere possibility, not coupled with an interest, cannot be transferred.” (*Id.*, § 1045.)

California's courts have broadly interpreted the ability to transfer property and choses in action.⁸ Civil Code sections 954 and 1458 "establish the policy of the state, the 'assignability of things [in action] is now the rule; nonassignability, the exception . . .'" (*Bush v. Superior Court (Rains)* (1992) 10 Cal.App.4th 1374, 1381 [13 Cal.Rptr.2d 382], citations omitted (upholding assignment of an equitable indemnity claim against concurrent tortfeasors).) The law is replete with cases promoting the free transfer of property and choses in action. (See 1 Witkin, *supra*, Contracts §§ 925, 929, 932, 933, 935, 936, 937, and cases cited therein.) Although there are circumstances when an assignment will not be enforced,⁹ the Board does not conclude that as a matter of law a claim to the Fund is nonassignable.

In light of California's public policy favoring the transfer of property and choses in action, at this time the Board will construe the Act in a manner that promotes the public policy favoring transferability of property. An assignment of rights to claim against the Fund involves a hybrid of an assignment of property (i.e., the potential reimbursement from the Fund) and a chose in action (i.e., the ability to pursue a reimbursement from the Fund in a judicial proceeding, which in and of itself is also a property interest). Subject to the limitations enumerated below, the Board will honor assignments from an eligible claimant to another person. The limitations this order places on assignments are informed by the Board's and the Division's substantial experience with "on behalf of" agreements and sound public policy. Despite the conclusions contained in this order, the Board is mindful of its authority to limit the

⁸ A "chose in action" or a "thing in action" is a right to recover money or other personal property by a judicial action. (Civ. Code, § 953.)

⁹ In the development of California's law governing assignments, actions "which arise from a wrong done to the person, the reputation, or the feelings of the injured party, and from breaches of contracts of a purely personal nature (like promises of marriage) were deemed to be nonassignable." (*Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 504 [86 Cal.Rptr.2d 536].)

assignability of claims in some cases¹⁰ and may invoke this authority where circumstances warrant.

In *Bruno Scherrer*, the Board declined to honor an assignment because the Legislature limited the filing of claims to eligible "owners and operators of tanks." (*Bruno Scherrer, supra*, p. 10.) The approach in *Bruno Scherrer* appears overly formulaic because an assignment from an owner or operator results in the assignee submitting a claim in the name of the owner or operator. (See *Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170, 173, fn. 1 [61 Cal.Rptr.2d 574] (assignee merely stands in shoes of the assignor and action proceeds in the assignor's name).)

"It is well settled 'that an assignee of a chose in action does not sue in his own right but stands in the shoes of the assignor. [Citation.] A thing or chose in action would never be assignable if the assignee independently had to meet the requirements already satisfied by the assignor. If he could meet the requirements he would need no assignment; if not he could not use the assignment.' (*Bush, supra*, 10 Cal.App.4th at 1380.)" *Koudmani v. Ogle Enterprises, Inc.* (1996) 47 Cal.App.4th 1650, 1659-1660 [55 Cal.Rptr.2d 330].)

On a certain level, it appears the decision in *Bruno Scherrer* may have misconstrued the purpose and effect of an assignment, and to this extent, the Board disapproves that portion of *Bruno Scherrer*.

A person to whom reimbursement from the Fund is assigned steps into the shoes of the eligible claimant. The assignee takes no greater rights than the assignor had. (Civ. Code, § 1459; Code of Civ. Proc., § 368.) "[T]he assignee of a chose in action stands in the shoes of his assignor, taking his rights and remedies subject to any right to offset or other defenses

¹⁰ Notwithstanding Civil Code sections 954, 1044, and 1458, a person may restrict assignment of its obligations. (*Farmland Irrigation Co. v. Dopplmaier* (1957) 48 Cal.2d 208, 222 [308 P.2d 732].) The instrument creating an obligation may expressly provide that it shall not be assigned. (1 Witkin, *supra*, Contracts, § 926, p. 827, and cases cited therein.) The Board issues a quasi-contractual "Letter of Commitment" that obligates the Fund to reimburse eligible costs to the claimant, so long as the claimant remains eligible. In light of California law, the Board has authority to restrict assignment of obligations created pursuant to a "Letter of Commitment."

existing against the assignor prior to actual notice of the assignment.” (*In re Marriage of Comer* (1996) 14 Cal.4th 504, 524 [59 Cal.Rptr.2d 155, 927 P.2d 265], citations omitted.) As a result, an assignee of a Fund claim will have to demonstrate the priority and eligibility of the eligible Fund claimant. Offsets that would otherwise diminish the claimant’s reimbursement (e.g., insurance and settlement proceeds) will similarly reduce the amount reimbursed to the claimant’s assignee. Any fraud or misrepresentation on the part of the claimant or the claimant’s assignee will render the claim ineligible for participation in the Fund and potentially subject the assignor and assignee to legal action. In many respects, the Fund staff should treat an assignment as an “on behalf of” agreement, but the process will be streamlined from the claimant and assignee’s perspectives because the assignee will be able to proceed without relying on the intermediate submission of documents to the claimant for submission to the Fund.

Consistent with the Board’s orders in *Quaker State* and *Hollis Rodgers*, the Board will permit an assignee to submit a claim for eligible costs (1) the assignee incurred subsequent to a written assignment of rights to Fund, or (2) the assignor incurred prior to the written assignment of rights to the Fund. The Board’s order in *Quaker State* compels the result in scenario (1) because it requires an express agreement before a person may incur costs “on behalf of” a claimant and receive reimbursement for the costs from the Fund. (*Quaker State, supra*, pp. 6-7.) The Act and California’s law governing assignments compels the result in scenario (2) because the Act establishes the claimant-assignor’s right to reimbursement while the assignment cuts off the rights in favor of the assignee.

When the Division examines a cost associated with an assigned claim, the Division must determine whether the person incurring the cost had the right to reimbursement (either by the Act or by assignment) at the time it incurred the cost. If so, the cost may be

reimbursed pursuant to the valid assignment. Several examples illustrate the application of this rule. The Division could reimburse an assignee for a cost incurred by an assignor prior to the assignment because at the time the assignor incurred the cost it had the right to reimbursement pursuant to the Act. Similarly, the Division could reimburse an assignee for a cost incurred by the assignee subsequent to an assignment because at the time the assignee incurred the cost it had the right to reimbursement pursuant to the assignment. In corollary, the Division could not reimburse a cost incurred by an assignor subsequent to the assignment because at the time the assignor incurred the cost it had already assigned its claim against the Fund and had no surviving right to reimbursement for the subsequently incurred costs. Also, the Division could not reimburse a cost incurred by an assignee prior to the assignment because at the time the assignee incurred the cost it did not have any right to reimbursement under the Act or pursuant to an assignment.

Requiring a conjunction of the right to reimbursement and the incurrence of the eligible costs also addresses one of the Board's primary concerns in *Bruno Scherrer*. In *Bruno Scherrer*, the Board emphasized that reimbursement should not depend on whether a person had the good fortune to obtain from an owner or operator an assignment of rights to reimbursement from the Fund. (*Bruno Scherrer, supra*, pp. 11-12.) This was a valid concern in *Bruno Scherrer*, where the assignment occurred after the costs were incurred. It would be arbitrary to allow a person's reimbursement to hinge on the luck of finding an eligible owner or operator after the person incurred costs. In contrast, when an eligible owner or operator and another person structure their obligations in such a way that the other person assumes responsibility with the express expectation of reimbursement from the Fund, the Board should not disregard the parties' intention lightly. Hence, by grafting the principles the Board has established in *Quaker State* and

Hollis Rodgers into the treatment of assignments, this order continues to adhere to some of the Board's concerns in *Bruno Scherrer*.¹¹

In addition to the fundamental precept that the incurrence of costs must be coupled with the right to reimbursement, the Board also observes that other provisions governing "on behalf of" agreements will limit assignments. In *Hollis Rodgers*, the Board held that "on behalf of" agreements may not be used to circumvent the priority scheme or to unravel the provisions of a release or indemnity. (*Hollis Rodgers, supra*, pp. 20-21.) Similarly, the Board concludes that claimants may not use assignments to circumvent the priority scheme or to unravel the provisions of a release or indemnity. A lower priority claimant may not receive an assignment from a higher priority claimant, except to the extent permitted for "on behalf of" agreements. (See, *id.*, pp. 18-21.) Further, a claimant may not assign the right to reimbursement from the Fund if the assignee has previously released or indemnified the claimant-assignor. (See, *id.*, p. 21.)

The assignments contemplated by this order will further the Act's goals. An assignment of claims against the Fund allows eligible owners and operators to order their affairs in a manner that promotes prompt, efficient cleanup. By affording claimants a flexible mechanism to conduct corrective action and seek reimbursement for the costs, the Board believes that owners and operators unable to finance corrective action themselves will have an additional resource to meet their cleanup responsibilities, without requiring intervention by the Board or other regulatory agencies. At the same time, as outlined above, permitting assignments of claims comports with the language of the Act.

¹¹ The Board also notes that if Bruno Scherrer's claim were analyzed pursuant to this order, the result would be the same as the *Bruno Scherrer* order because Bruno Scherrer obtained the assignment after incurring the costs.

In the present case, at the time Seller incurred the corrective action costs through the purchase price reduction, Seller was eligible for reimbursement because it was an eligible owner or operator incurring eligible costs. The Seller-assignor was eligible for reimbursement of the costs it had already incurred at the time it assigned its claim in favor of petitioner. Therefore, petitioner may seek reimbursement for the costs pursuant to the valid assignment of rights. Petitioner may seek reimbursement by submitting a new claim in the name of Seller, identifying the petitioner as the assignee of Seller. Alternatively, petitioner may request that the Seller be joined as joint claimant, and the costs may be reimbursed under the joint claim.

III. SUMMARY AND CONCLUSION

1. Only eligible owners or operators of USTs may file a claim with the Fund.
2. A reduction in purchase price that is intended to offset anticipated corrective action costs represents a potential double recovery to the purchaser if the Board reimburses all the purchaser's corrective action costs.
3. A purchaser of property at which there has been an unauthorized release from a UST incurs costs on behalf of the seller when the purchaser incurs corrective action costs after the seller had reduced the purchase price of the property in recognition of the anticipated corrective action costs.
4. The amount of double recovery the Division determines to be attributable to the purchase price reduction represents the maximum amount of reimbursable corrective action costs incurred by the seller.
5. The Board may reimburse the seller of property with a reduced purchase price the amount determined to be a double recovery to the purchaser, so long as there are eligible corrective action costs to support the reimbursement.

6. Seller and petitioner reduced the sale price of the subject property by \$80,000 in recognition of the anticipated cleanup costs, and the Division determined that \$42,952 of the price reduction would constitute a double recovery to petitioner.

7. Seller may submit a claim or join petitioner's claim to seek reimbursement of up to \$42,952 if Seller can demonstrate eligible corrective action costs that the petitioner incurred on behalf of Seller through the purchase price reduction.

8. A claimant may assign its claim and the Board will reimburse claims assigned, so long as the eligible costs were incurred at a time when the incurring party was entitled to reimbursement.

9. Seller was an eligible claimant at the time of the purchase price reduction, so pursuant to the assignment, petitioner may submit a claim as the assignee of Seller, or may have Seller joined as a joint claimant on petitioner's existing claim.

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IV. ORDER

IT IS THEREFORE ORDERED that the portion of the Decision denying reimbursement of the first \$42,952 in eligible corrective action costs under petitioner's existing claim is upheld. It is further ordered that the Division will honor a claim submitted by Seller in recognition of the purchase price reduction and that such claim may be for up to \$42,952, subject to proof of the eligible costs claimed. Because Seller has assigned its rights to reimbursement from the Fund, consistent with this order, petitioner may step into Seller's shoes and submit a claim as the assignee of Seller or join Seller on petitioner's existing claim.

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 26, 2000.

AYE: Arthur G. Baggett, Jr.
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None

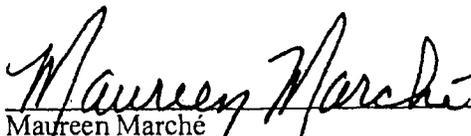

Maureen Marché
Administrative Assistant to the Board

EXHIBIT N



Reference: 508093

May 8, 2012

Ms. Pamela C. Creedon, Executive Officer
California Regional Water Quality Control Board, Central Valley Region
415 Knollcrest Drive
Redding, CA 96002

**Subject: Reconsideration of Cleanup and Abatement Order R5-2011-0713, TBS
Petroleum LLC, a California Limited Company, Antlers Shell/Subway,
20884 Antlers Road, Lakehead, Shasta County, California**

Dear Ms. Creedon:

Mr. Bob Davis, the former owner of Antlers Shell, has requested SHN Consulting Engineers & Geologists, Inc. (SHN) to evaluate the existing data and previously prepared reports to determine the cause of groundwater pollution at the Antlers Shell site. We are transmitting this letter report to provide the Regional Board with the most likely cause of groundwater pollution at Antlers Shell based upon our professional evaluation and opinions.

I have worked for SHN for the last 17 years, and I am currently the director of SHN's Environmental Services Division. I am a California Registered Professional Civil Engineer. I have independently reviewed and developed my opinion based upon the following reports, analyses, and data:

- March 2, 2009, *Report of Findings: Initial Subsurface Investigation*, prepared by LACO Associates (LACO) on behalf of TBS Petroleum (Cleanup Team's Evidence List [CT] #27)
- April 27, 2009, *Supplemental Information: Initial Subsurface Investigation*, LACO Associates (CT #30)
- Nov. 17, 2009, letter from Mr. John Aveggio, SHN to Grant Stein (CT #36).
- April 27, 2010, *Order to Submit Information Pursuant to California Water Code 13267*, Central Valley Water Board (CT #39)
- April 20, 2011, *Submittal of Additional Information*, prepared by John Aveggio, SHN (CT #50)
- December 6, 2011, "Transmittal, Cleanup and Abatement Order R5-2011-0713, Central Valley Water Board" (CT # 65)
- May 2006, US EPA "Lead Scavengers Compendium: Overview of Properties, Occurrence, and Remedial Technologies," U.S. Environmental Protection Agency (EPA 2006)
- May 21, 2010, "Recommendation for States, Tribes and EPA Regions to Investigate and Clean Up Lead Scavengers when Present at Leaking Underground Storage Tank (LUST) Sites" (EPA 2010)

Ms. Pamela C. Creedon

Reconsideration of CAO R5-2011-0713, TBS Petroleum LLC, a California Limited Company,
Antlers Shell/Subway, 20884 Antlers Road, Lakehead, Shasta County, California

May 8, 2012

Page 2

- March 30, 2000, "Transmittal of Final Draft Guidelines for Investigation and Cleanup of MTBE and Other Oxygenates," State Water Resources Control Board (SWRCB, 2000)
- Bob Davis Declaration #1 (Davis decl. #1)
- Antlers Shell lab reports, 2011 - 2012

Site History

Based upon the declaration of Mr. Bob Davis and the documents listed above, the chronological history of the Antlers Shell Site is as follows:

January 30, 1990: Bob Davis purchased Antlers Shell /Subway from Mr. Olan F. Bailey and Mrs. Beverly A. Bailey (Bob Davis Declaration [Davis decl. #1]).

October 9, 1997: Bob Davis removed single walled underground storage tanks (USTs) and associated piping (CT #65).

October 10 and 21: As directed by Shasta County Department of Environmental Health (SCDEH), soil samples were collected from the UST excavation and submitted for analysis (CT #65).

October 22, 1997: Bob Davis installed two double-walled USTs with double-walled flexible hose. New concrete aprons surrounding the tank farm and asphalt surrounding the site were also constructed (Davis decl. #1).

December 16, 1997: SCDEH issued a "no further action" letter (CT #65).

January 8, 2004: In the on-site water well sampled for volatile organic compounds (VOCs), Methyl Tertiary-Butyl Ether (MTBE) and 1,2-dichloroethane (1,2-DCA) were not detected (< 3 and < 0.5 micrograms per liter [ug/L], respectively) (CT #65).

December 20, 2004: Bob Davis entered into a real estate purchase contract for the sale of Antlers Shell to TBS Petroleum (Davis decl. #1).

Spring 2007: Water was observed coming out of the ground in the vicinity of the USTs at the joint between the concrete pad and new asphalt. The leak continued unabated for approximately three months (Davis decl. #1).

August 8, 2007: In the on-site water well sampled for VOCs, MTBE was detected at 14.9 ug/L (CT #65).

February 7, 2008: Nitrate was detected at 18.1 milligrams per liter (mg/L) (Davis decl. #1).

March 10, 2008: In the on-site water well sampled for VOCs, MTBE was detected at 9.4 ug/L and 1,2-DCA at 0.68 ug/L (Davis decl. #1).

Ms. Pamela C. Creedon

Reconsideration of CAO R5-2011-0713, TBS Petroleum LLC, a California Limited Company,
Antlers Shell/Subway, 20884 Antlers Road, Lakehead, Shasta County, California

May 8, 2012

Page 3

Conclusion

Upon our review and evaluation of the existing data (CTs #27, 30, 36, 39, 50, 65, Antlers Shell lab reports 2011-2012, and the other documents referenced), it is our professional opinion that the discharge of MTBE and associated hydrocarbons (waste) into waters of the state was caused by the flooding of the UST tank farm cavity when the waterline broke and went unrepaired for approximately three months in 2007 (Davis decl. #1).

Conceptual Site Model

The basis of our site conceptual model is that a limited amount of petroleum hydrocarbons was released into the tank pit from the single-walled tank system. In order to remain in compliance with the underground storage tank regulations, Mr. Davis upgraded his station in 1997 (Davis decl. #1). Of the six soil confirmation samples collected from the floor of the tank excavation, and the two soil stockpile samples collected during the tank removal activities in October of 1997, only MTBE was detected in two of the excavation floor samples (0.033 and 0.085 milligrams per kilogram [mg/kg]) and total xylenes were detected in one of the stockpile samples at 0.018 mg/kg. In addition, four soil samples were collected from beneath the fuel island. MTBE was detected in only one fuel island sample, at 0.030 mg/kg, and toluene was detected in three soil samples, with a maximum of 0.013 mg/kg (CT #39 and #65).

Shasta County issued a no further action letter for the site. The rationale for the no further action letter was that only residual levels of petroleum hydrocarbons were detected in the tank-removal compliance soil samples. As Cleanup and Abatement Order R5-2011-0713 states, the SCEDH records indicated no obvious odor or soil discoloration upon tank removal, or any presence of groundwater in the excavation (CT #65). These residual levels of petroleum hydrocarbons were essentially immobile (they were in the unsaturated zone and below a new and substantial asphalt and concrete cap). Figure 1 depicts site conditions prior to the water leak.

As previously stated in Mr. Aveggio's November 17, 2009, letter (CT #36) and Davis decl. #1, in 2007, under TBS ownership, a subsurface water line that traversed the tank pit broke and leaked into the tank pit for approximately three months. Apparently, TBS allowed the tank pit to become saturated, and water was observed on the ground surface. The flooding was so severe that the water that was observed percolating to the ground surface from the area around the tank pit was enough to create a sheet flow discharge that traveled to the street, as shown on Figure 2 (Davis decl. #1). It is likely that several thousand gallons of water per day were released into the subsurface and ground surface during this period of approximately three months, which means potentially over 200,000 gallons of water was discharged from the broken water line.

It is probable that this extended water leak created a driving aqueous hydraulic force to mobilize the in situ residual material that remained in the tank pit and subsequently caused the contamination observed in the groundwater and the supply well during the 2009 site investigation (LACO CT #27) (see Figure 3). The water leaking from the broken pipe originates from the supply well. The supply well draws water from beneath the site. The water-bearing zone beneath the site

Ms. Pamela C. Creedon

Reconsideration of CAO R5-2011-0713, TBS Petroleum LLC, a California Limited Company,
Antlers Shell/Subway, 20884 Antlers Road, Lakehead, Shasta County, California

May 8, 2012

Page 4

was modified by TBS's lack of action and allowing the pipe to continue to leak for such an extended amount of time. This unabated water leak, combined with the hydraulic cone of influence caused by the supply well's operation, created a recirculating system of water that distorted the long-standing equilibrium conditions that had kept the residual tank pit contamination from mobilizing or impacting any sensitive receptor. We believe that the leaked water contained petroleum hydrocarbons once the flooding had mobilized the previously stable residual contamination. We believe the addition of water to the tank pit over an extended period could provide the transport mechanism for the residual sub-surface contamination to become more widespread and subsequently allow the contamination to migrate to the "waters of the state" (groundwater table).

It is our opinion that the lack of a prompt response by TBS to repair the leak created the groundwater contamination observed at the site. We believe this is the reason that petroleum hydrocarbon constituents were never detected in the supply well prior to the water leak, but were detected approximately three months after the water leak was repaired and in every sampling event since.

A site investigation was conducted on behalf of TBS in January 2009. A report of findings was prepared by LACO presenting the results of the investigation (CT #27). Eight soil borings were installed, and both soil and groundwater samples were collected from these borings. The boring logs indicate a silty clay layer from approximately 6 to 10 feet below grade surface. Underlying the silty clay layer is silt with clay (typically a relatively low permeability soil) present from approximately 10 to 18 feet below grade surface in the vicinity of the tank pit. The floor of the tank pit is approximately 10 feet below grade surface. The boring logs also indicate that first encountered groundwater ranged from approximately 20 to 26 feet below grade surface. This data illustrates that fine-grained material is located immediately below the tank pit and extends approximately 8 feet beyond the floor of the tank pit, and groundwater was approximately 10 feet below the floor of the tank pit. The April 27, 2010 report prepared by the Regional Board (CT #27) indicates that in 1972, when the supply well was installed, the first water observed was at 50 feet below ground surface. According to existing site data, the first encountered groundwater was reported below the tank pit (CT #27 and #39).

The April 27, 2010 case file review prepared by Grant Stein (CT #39) included a simple model analysis. That model assumes that the release began in 1997, when the single-walled tanks were removed, and that MTBE would not have reached the supply well until 2007. However, the history of the use of MTBE in gasoline dates back to the mid-1980s, when leaded gasoline was being phased out. MTBE was added (typically at 2 to 5% by volume) to replace lead to enhance octane. By 1992, it was blended into gasoline at 10 to 15% by volume in the wintertime to be used as a fuel oxygenate. By 1996, it was blended in at 11% by volume statewide (SWRCB 2000). Because the residual MTBE was measured in tank pit soils, the source of the MTBE was most likely released prior to 1997 when the tanks were removed.

Another contaminant detected in the well following the water leak, but not present in the 2004 supply well analysis, is 1,2-dichloroethane (1,2-DCA) (Davis decl. #1). 1,2-DCA was used in leaded gasoline as a "lead scavenger" to prevent the buildup of lead deposits and foul internal combustion engines (EPA 2006). 1,2-DCA was used as a lead scavenger in leaded gasoline until 1986, when

Ms. Pamela C. Creedon

Reconsideration of CAO R5-2011-0713, TBS Petroleum LLC, a California Limited Company,
Antlers Shell/Subway, 20884 Antlers Road, Lakehead, Shasta County, California

May 8, 2012

Page 5

leaded gasoline was phased out (and replaced by MTBE). The EPA notes that although for the most part leaded gasolines were phased out by 1986, studies show that significant concentrations of lead scavengers persist at many former leaded-gasoline spill sites (EPA 2010). 1,2-DCA is moderately soluble in water. In addition, 1,2-DCA does not readily adsorb to soil (EPA 2006).

As part of our review of the April 20, 2011, letter (CT #50) and additional nitrate analytical data from the supply well (Antlers Shell lab data 2011-2012) we plotted nitrate concentrations over time. The nitrate data shows a spike associated with the water leak, as shown in Figure 4. We believe that the subsurface saturation associated with the water leak extended to beneath an adjacent leachfield and subsequently mobilized nitrate in a manner similar to the way the water leak mobilized MTBE. Unlike the tank farm, the leachfield is not capped by asphalt or concrete. The leachfield is subject to infiltration from precipitation and, by design, is loaded periodically by the disposal of primary treated effluent. Historically, nitrate concentrations in the supply well were below 10 mg/L for 10 years with no apparent seasonal variation. The spike in nitrate concentrations coincides with the spike in MTBE concentrations and the presence of 1,2-DCA in groundwater, all of which occurred after the water release in the spring of 2007.

Summary

Our conceptual model indicates that historically, a limited amount of petroleum hydrocarbons leaked from the former single-wall UST system and that the release to groundwater was caused by the extended water leak in the tank pit. We believe the excess water in the tank pit provided the transport mechanism that conveyed the residual hydrocarbons remaining in the vicinity of the tank pit into the groundwater. This is verified by the slug of nitrate and 1,2-DCA observed in the supply well.

The following facts reinforce this conceptual model:

1. The groundwater first encountered during drilling activities ranged from 20 to 50 feet below ground surface.
2. Soil below the tank pit is a relatively low-permeability clayey silt.
3. During the tank removal in 1997, the SCDEH did not observe any discolored soil, hydrocarbon odor, or water in the tank pit excavation or fuel island.
4. TBS bought the property "as is" in Winter 2004-2005.
5. MTBE and 1,2-DCA were not detected in the on-site water well sampled in January 8, 2004.
6. Water was observed coming out of the ground in the vicinity of the USTs at the joint between the concrete pad and the new asphalt between March 2007 and June 2007.
7. Flooding of the tank pit added a vertical hydraulic head of approximately 10 feet.
8. MTBE was not detected in the water supply well until August 2007 (8 months after TBS took ownership and 3 to 6 months after onset of the leak). The Regional Board

Ms. Pamela C. Creedon

Reconsideration of CAO R5-2011-0713, TBS Petroleum LLC, a California Limited Company,
Antlers Shell/Subway, 20884 Antlers Road, Lakehead, Shasta County, California

May 8, 2012

Page 6

May 2010 letter indicates that quarterly sampling of the on-site domestic well for VOCs began in 2004, and no VOCs were detected until August 2007.

9. The presence of MTBE, 1,2- DCA, and nitrate in the supply well during approximately the same period, and the associated increase and subsequent decrease in concentration (which represents a "time-discrete" or "slug" pollution event) were most likely caused by the water leak.

Based upon our review and evaluation of the currently available data, reports, and our independent evaluation of this material, it is my professional opinion that the discharge of waste was caused by the waterline leak and would not have occurred absent the leak.

Please call me at 707-441-8855 if you have any questions, or if I can help you in any way.

Sincerely,

SHN Consulting Engineers & Geologists, Inc



Mike Foget, PE

California Registered Profession Civil Engineer license #54123
Environmental Services Director

MKF:jlr

c. : Bob Davis

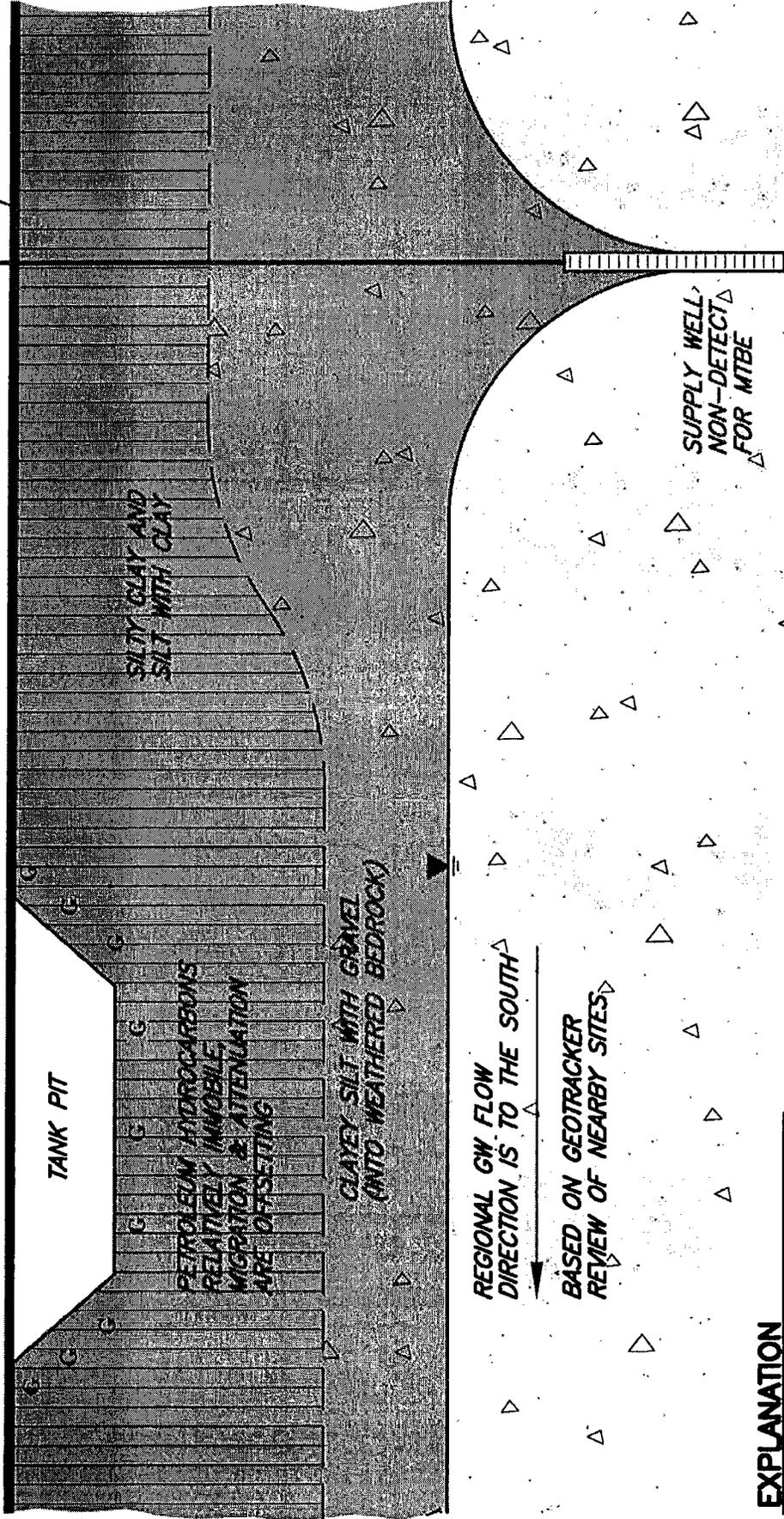
Mr. Loren J. Harlow, Stoel Rives, LLP



PRE-FLOOD

ASPHALT/
CONCRETE
CAP

SUPPLY WELL



TANK PIT

PETROLEUM HYDROCARBONS
RELATIVELY IMMOBILE
MIGRATION & ATTENUATION
ARE OFFSETTING

CLAYEY SILT WITH GRAVEL
(ANTO WEATHERED BEDROCK)

SILTY CLAY AND
SILT WITH CLAY

SUPPLY WELL,
NON-DETECT
FOR MTBE

REGIONAL GW FLOW
DIRECTION IS TO THE SOUTH

BASED ON GEOTRACKER
REVIEW OF NEARBY SITES

EXPLANATION

- GROUNDWATER LEVEL
- GASOLINE CONSTITUENTS

CROSS SECTION VIEW LOOKING FROM EAST TO WEST



NOT TO SCALE



Bob Davis
Antlers Shell
Lakehead, California

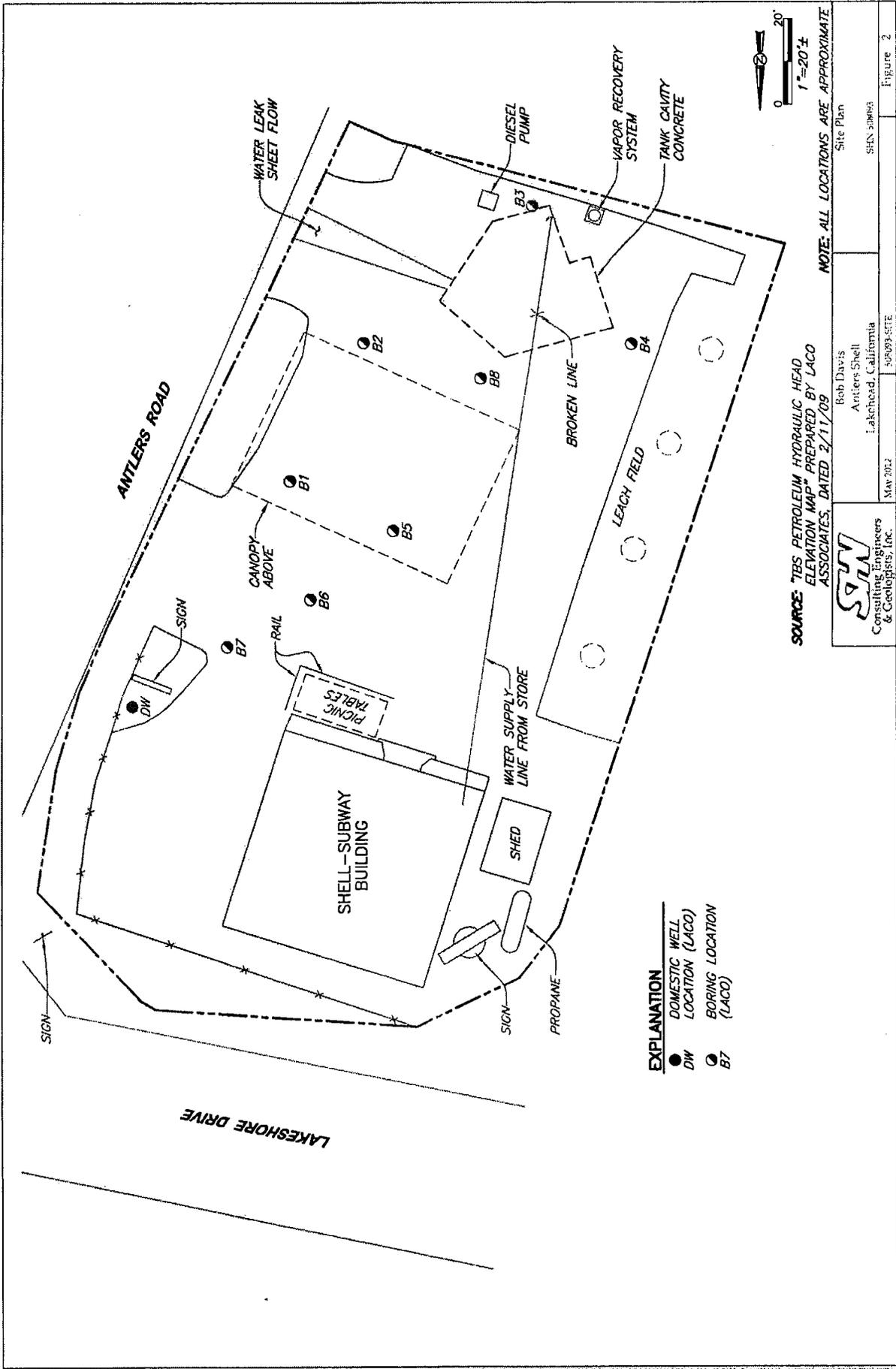
Pre-Flood Conditions

SHN 508093

508093-SCHEM-2012

May 2012

Figure 1



- EXPLANATION**
- DOMESTIC WELL LOCATION (LACO)
 - BORING LOCATION (LACO)

SOURCE: TIBBS PETROLEUM HYDRAULIC HEAD ELEVATION MAP* PREPARED BY LACO ASSOCIATES, DATED 2/17/09

NOTE: ALL LOCATIONS ARE APPROXIMATE

SAW
 Consulting Engineers & Geologists, Inc.

Bob Davis
 Antlers Shell
 Lakeshore, California
 308893-SITE
 MAY 2012

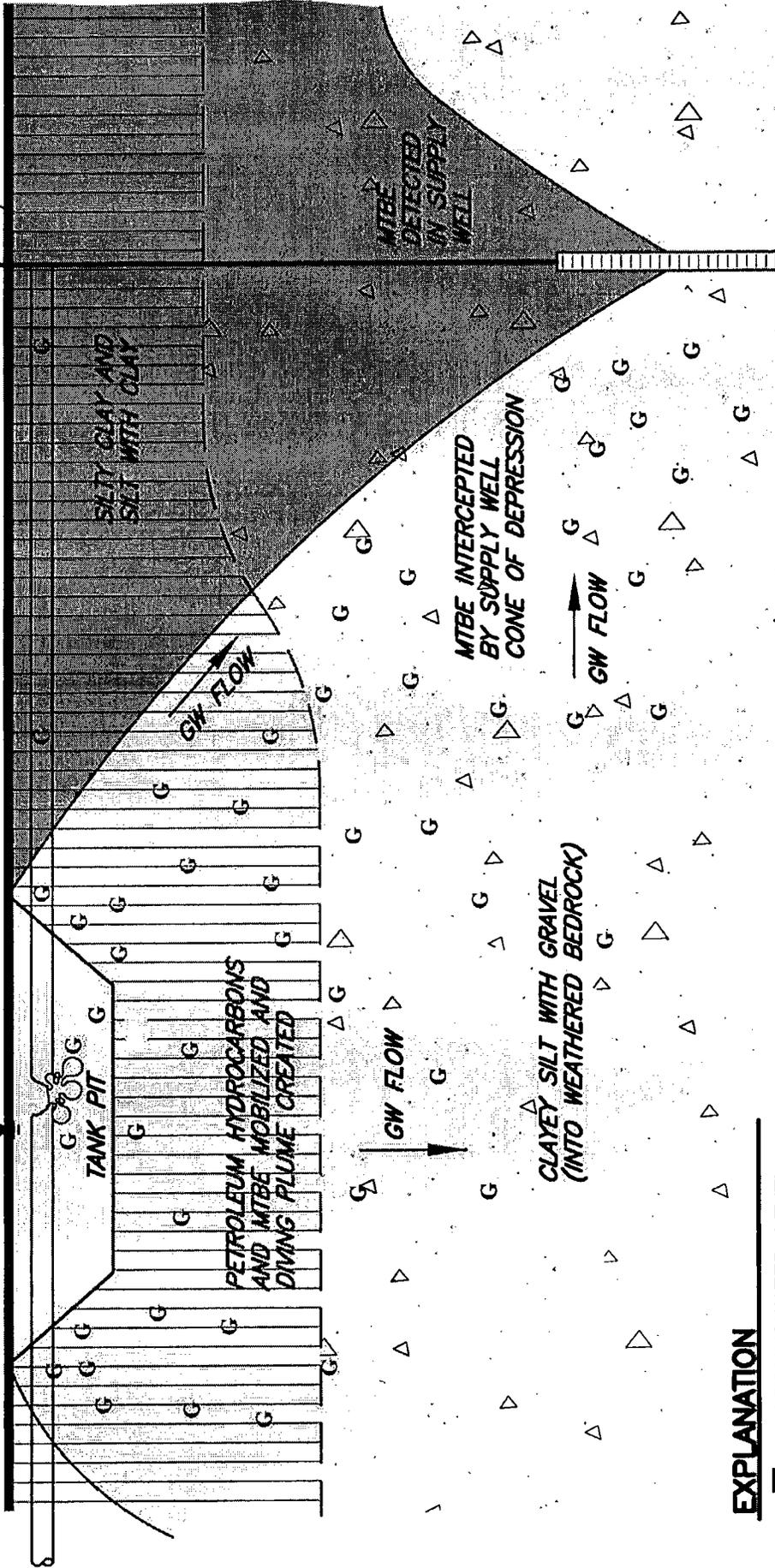
Site Plan
 SHEN-510005

POST-FLOOD

TANK PIT FILLED AND OVERFLOWS FROM BROKEN WATER LINE WHICH CREATES A GROUNDWATER MOUND THAT THEN CHANGES THE GROUNDWATER FLOW DIRECTION

ASPHALT/ CONCRETE CAP

SUPPLY WELL



EXPLANATION

- GROUNDWATER LEVEL
- GASOLINE CONSTITUENTS

CROSS SECTION VIEW LOOKING FROM EAST TO WEST



Bob Davis
Antlers Shell
Lakehead, California

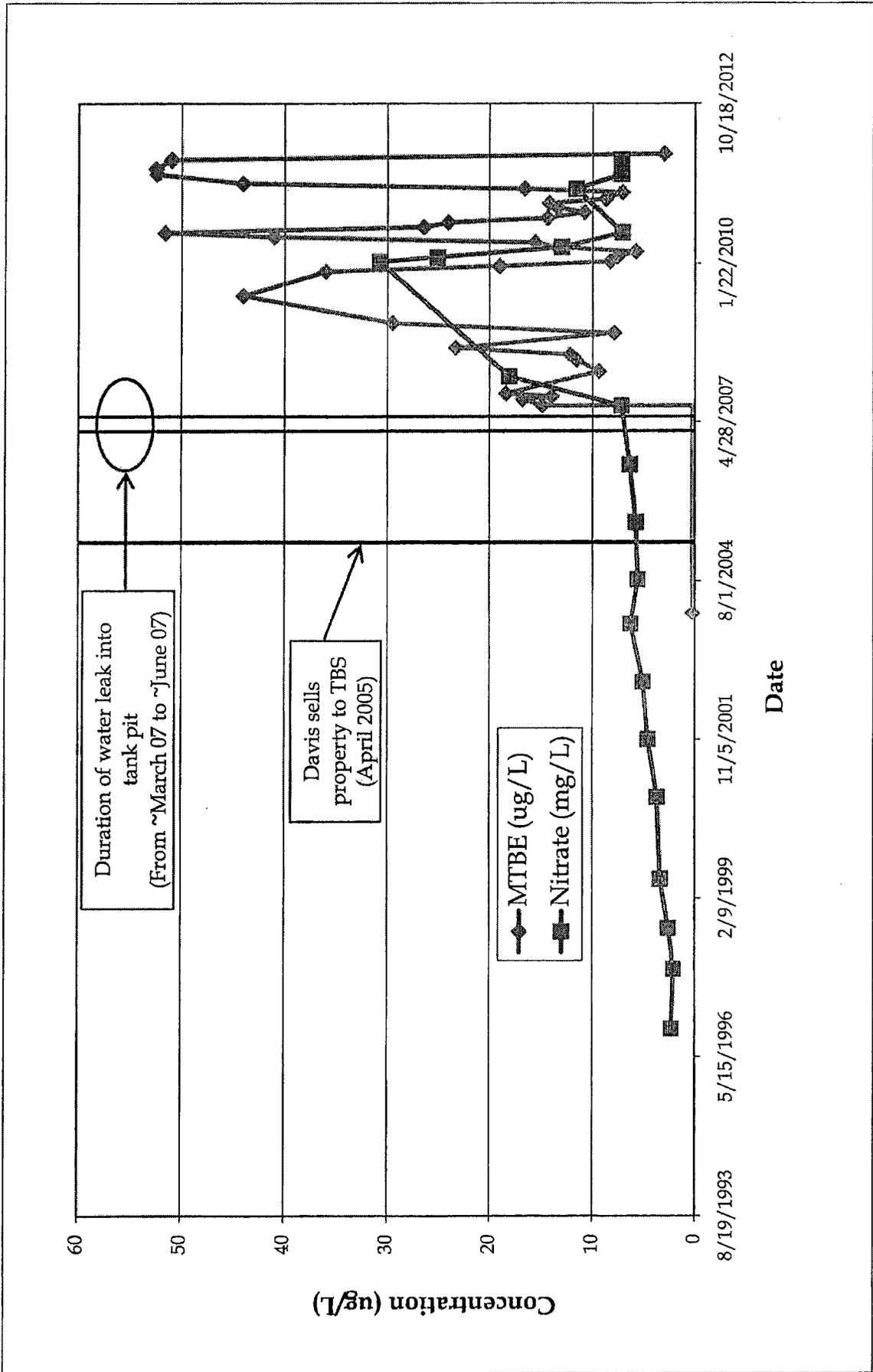
May 2012

508093-SCHEM-2012

Figure 3

NOT TO SCALE

Fate and Transport of MTBE
Post-Flood Conditions
SHN 508093



**Bob Davis
Antlers Shell
Lakehead, California**

**MTBE & Nitrate
Concentrations Versus Time**
SFN 508093

May 2012

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Figure 4

