



State Water Resources Control Board



Linda S. Adams
Acting Secretary for
Environmental Protection

Division of Financial Assistance
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Edmund G. Brown Jr.
Governor

CERTIFIED MAIL: 7001 0320 0000 7544 4784
Return Receipt Requested

Mr. Michael J. Veiluva
Alborg, Veiluva & Martin LLP
200 Pringle Avenue, Suite 410
Walnut Creek, California 94596

Dear Mr. Veiluva:

UNDERGROUND STORAGE TANK (UST) CLEANUP FUND, REVISED FINAL
DIVISION DECISION FOR PRIORITY CLASSIFICATION: CLAIM NO. 11496 (SITE
ADDRESS: 2008 1st STREET, LIVERMORE)

On behalf of UST Cleanup Fund (Fund) claimant Balaji Angle (Angle), you filed a petition requesting review by the State Water Resources Control Board (State Water Board) of the Final Division Decision (FDD) issued on December 14, 2009. In that FDD, the Deputy Director of the Division of Financial Assistance (Division) denied your request to change the priority classification of Claim No. 11496 from Priority Class C to Priority Class B.

Decision

I have reconsidered the previous decision and determined that Claim No. 11496 will be assigned to Priority Class B. This Revised Final Division Decision (RFDD) supersedes the FDD issued on December 14, 2009. The basis for my decision is summarized below.

Applicable Authority

The following sections cited are excerpted from the *Petroleum Underground Storage Tank Cleanup Fund Regulations*, Title 23, Division 3, Chapter 18, of the California Code of Regulations (Fund Regulations) or *Petroleum Underground Storage Tank Cleanup Fund Statutes*, California Health and Safety Code (H&SC), Division 20, Chapter 6.75.

Section 25299.52 of the HS&C provides that the State Water Board shall adopt a priority ranking list and pay claims according to specified rankings.¹ With exceptions not relevant here, the statute provides that claims shall be paid in the following order of priority:

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¹ Further statutory references are to the Health and Safety Code, unless otherwise noted.

- 1) Owners of . . . [residential tanks],
- 2) Owners and operators of tanks that are either of the following:
 - (A) An owner or operator of a tank that is a small business, by meeting the requirements of subdivision (d) of Section 14837 of the Government Code. An owner or operator that meets that definition of small business, but who is domiciled or has its principal office outside of the state, shall be classified in this category if the owner or operator otherwise meets the requirements of subdivision (d) of Section 14837 of the Government Code with regard to the number of employees and the total annual revenues received.
 - (B) An owner that is a city, county, district, or non-profit organization that receives total annual revenues of not more than seven million dollars (\$7,000,000.). . . .
- 3) Owners or operators of tanks that are either of the following:
 - (A) The owner or operator owns and operates a business that employs fewer than 500 full-time and part-time employees, is independently owned and operated, and is not dominant in its field of operation.
 - (B) The owner or operator is a city, county, district, or nonprofit organization that employs fewer than 500 full-time and part-time employees. . . .
- 4) All other tank owners and operators.
(§ 25299.52, subd. (b).)

Regulations implementing the Fund statute (commencing with section 2803 of title 23 of the California Code of Regulations, hereafter Fund Regulations) also address priority ranking, identifying the statutory priority categories as Priority Classes A, B, C, and D, respectively. (Cal. Code Regs., tit. 23, § 2811.1, subd. (a).)

Fund Regulations provide additional direction, stating:

For purposes of assignment to a priority class, the Board will base the priority of a claim on the lowest priority appropriate for any claimant, including any joint claimant, the owners and operators at the time of discovery of the unauthorized release, and the owners and operators at the time of application to the Fund, *unless the claimant can demonstrate to the satisfaction of the Division that such treatment would be inconsistent with the priority scheme mandated by section 25299.52, subdivision (b) of the Health and Safety Code.*

(Cal. Code Regs., tit. 23, § 2811.1, subd. (b), italics added.)

Background

The Angles are owners and operators of the service station and USTs located at 2008 1st Street, Livermore (site). The Angles purchased the site from Desert Petroleum (Desert) in January 1994.

In 1988, Desert had an unauthorized release from a petroleum UST. The Alameda County Department of Environmental Health (Alameda County) required Desert to conduct a site investigation. In January 1992, Desert filed Fund Claim No. 3272 and was determined to be eligible as a Priority Class C claimant. In February 1992, Desert initiated bankruptcy proceedings.²

Desert's site investigation was ongoing when the Angles purchased the site in January 1994. In March 1995, an additional unauthorized release was discovered at the site. In September 1995, Alameda County directed the Angles to conduct a site investigation. Desert pulled its contractor and discontinued its remediation activities at the site investigation in or around August 1996.

In October 1995, Desert had requested the Fund to add the Angles as a joint claimant for Fund Claim No. 3272. On February 20, 1996, the Fund requested that the Angles submit an application form and provide three years of tax returns. Mr. Balaji Angle filed Fund Claim No. 11496 on February 28, 1996.

The Fund reviewed the Angle application materials for Claim No. 11496, including tax returns for 1992 – 1994, and determined that the Angles met the requirements for Priority Class B. (Tax review worksheet, March 12, 1996.) The Angle claim, however, could not be classified higher than Priority Class C because Desert was a Priority Class C. The Fund found Claim No. 11496 to be ineligible because it was a duplicate of Claim No. 3272. (Fund staff decision to reject claim, March 19, 1996.) In the same letter, the Fund approved a request to add the Angles as joint claimants for Claim No. 3272.

By August 1997 Desert had stopped cooperating with the Angles regarding submissions for Fund Claim No. 3272. On December 18, 1997, the Angles requested the Fund to activate Claim No. 11496 and remove their name from Claim No. 3272. On December 24, 1997, the Fund activated Claim No. 11496 as Priority Class C.

The Angles proceeded with site cleanup and Mr. Angle received reimbursements from the Fund without interruption until January 2009. At that time they were notified that reimbursements for Claim No. 11496 would be suspended along with other Priority Class C claims due to the Fund's revenue shortage. The claimant appealed this decision and requested reclassification as Priority Class B. A Fund Manager Decision and Final Division Decision both concluded that the claimant had been properly assigned to Priority Class C.

² Facts are presented here as stated in the record for claim nos. 3272 and 11496.

Discussion

As noted above, Fund Regulations require the State Water Board to base the priority of a claim on the lowest priority appropriate for any claimant, joint claimant, or other owner or operator, unless the claimant demonstrates that such treatment is inconsistent with the statutory priority scheme. (Cal. Code Regs., tit. 23, § 2811.1, subd. (b).) In this case, Desert qualified for Priority Class C and the Angles qualified for Priority Class B, so Claim Nos. 3272 and 11496 were both properly assigned to Priority Class C in the first instance.

I conclude, however, that is appropriate to exercise the authority provided to the Division in subdivision (b) of section 2811.1 of the Fund Regulations and reassign Claim No. 11496 to Priority Class B because the particular circumstances of this claim are not consistent with its classification as Priority Class C under the statutory priority scheme. The claimants have demonstrated that assignment to Priority Class B is appropriate for the following reasons: the Angles documented that they met the requirements for Priority Class B at the time of application to the Fund in 1996, the Priority Class C previous site owner and joint claimant filed for bankruptcy before the Angles purchased the property in 1994, there was an additional unauthorized release after the Angles purchased the site, the previous site owner and joint claimant did not participate in site cleanup activities after 1996, and the Angles have been responsible for and conducted corrective action at the site since 1995.

Summary

I have reconsidered the previous decision and determined that Claim No. 11496 will be assigned to Priority Class B. Fund Regulations permit classification as Priority Class B because the claimant has demonstrated that the unique circumstances of this claim are inconsistent with assignment to Priority Class C under the statutory priority scheme. This Revised Final Division Decision (RFDD) supersedes the FDD issued on December 14, 2009. This RFDD grants the relief requested in your petition to the State Water Board and I anticipate that the petition will be dismissed as moot.

Appeal Process

This represents an RFDD in this matter. In accordance with Section 2814.2 of the Fund Regulations, if you are not in agreement with this decision, you may file a petition for review with the State Water Resources Control Board (State Water Board). The petition must be received by the State Water Board within 30 calendar days from the date of this letter.

Any petition for review must be sent to Mr. Charles Hoppin, Chair, with copies to Mr. Michael A. M. Lauffer, Chief Counsel, and Ms. Elizabeth L. Haven, Deputy Director, Division of Financial Assistance. The petition must be addressed to them at:

State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

The petition to the State Water Board must include, at a minimum: (1) the name and address of the petitioner; (2) a copy of the FDD that the State Water Board is requested to review; (3) an explanation why the claimant believes the FDD is erroneous, inappropriate, or improper; (4) a statement describing how the petitioner is damaged by the FDD; and (5) a description of the remedy or outcome desired.

If the State Water Board does not receive a petition for review within 30 days from the date of this letter, this FDD is final and conclusive.

If you have any further questions, please call me at (916) 341-5457 or if you have questions specific to your claim, please call Diana Romero at (916) 341-5766.

Sincerely,



Elizabeth L. Haven, Deputy Director
Division of Financial Assistance

cc: Mr. Balaji Angle
35584 Conovan
Fremont, CA 94536

Ms. Donna Drogos
Alameda County EHD
1131 Harbor Bay Parkway, 2nd Fl.
Alameda, CA 94502-6577