



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Division of Financial Assistance
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Arnold Schwarzenegger
Governor

Alameda County

DEC 14 2009

DEC 17 2009

CERTIFIED MAIL: 7003 1680 0000 6168 0961
Return Receipt Requested

Environmental Health

Mr. Michael J. Veiluva
Alborg, Veiluva, & Epstein, LLP
200 Pringle Ave., Suite 410
Walnut Creek, CA 94596-7380

Dear Mr. Veiluva:

UNDERGROUND STORAGE TANK (UST) CLEANUP FUND (FUND), FINAL DIVISION DECISION (FDD) FOR PRIORITY RECLASSIFICATION ELIGIBILITY: CLAIM NO. 011496; FOR SITE ADDRESS: 2008 1ST ST, LIVERMORE

By a letter dated August 19, 2009, you requested an FDD on behalf of your client, Mr. Balaji Angle, claimant to the Fund for reconsideration of the Fund Manager Decision (FMD) dated June 26, 2008. The FMD upheld the Staff Decision to deny your request to change your Priority "C" Classification to a Priority "B".

Decision

Following my review of your letter and the supporting documents in Mr. Angle's claim file (Claim No. 11496) and documents in Claim No. 3272, I find that I must uphold the FMD that your client's claim does not meet the qualifications for a Priority Class "B" (small business). 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) (commencing with Section 2803), the *Petroleum Underground Storage Tank Cleanup Fund Statutes*, *California Health and Safety Code* (H&SC) Division 20, Chapter 6.75 (Fund Statutes) (commencing with Section 25299.10), Section 14837 of the *California Government Code* and the regulations implementing that section, Title 2, Division 2, Chapter 3, Subchapter 8, Office of Small Business Procurement and Contracts of the *California Code of Regulations* (Small Business Regulations).

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Section 25299.52(b) of the H&SC states, in part, that the State Water Resources Control Board (State Water Board) shall pay claims in accordance with the following order of priority:

- (1) [Residential tank owners].
- (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 or operator that is a city, county, district, or nonprofit 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. . . .

Section 2811.1(b) of the Fund Regulations provides additional direction, stating:

- (b) 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.

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Section 2804 of the Fund Regulations defines "small business" as:

"Small business" means a business which, at the time of application to the Fund, fits the definition of a small business set forth in Government Code section 14837, subdivision (d), except that a business that is domiciled or has its principal office outside of the state is a "small business" if the business otherwise fits the definition set forth in section 14837, subdivision (d).

Section 14837(d) of the Government Code defines "small business," in relevant part, as:

(d)(1) "Small business" means an independently owned and operated business that is not dominant in its field of operation, . . . and that, together with affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three years, or is a manufacturer, as defined in subdivision (c), with 100 or fewer employees.

The Small Business Regulations implement Government Code Section 14837(d) by establishing current small business standards. Section 1896.12(a), of the Small Business Regulations describes, in relevant part, the current qualifying criteria for small business certification as follows:

- (a) To be eligible for certification as a small business, a business must meet all of the following qualifying criteria:
- (1) It is independently owned and operated; and
 - (2) . . . [business location requirement not relevant for Fund purposes]
 - (3) . . . [business owners' domicile requirement not relevant for Fund purposes]
 - (4) It is not dominant in its field of operation(s), and
 - (5) It is either:
 - (A) A business that, together with all affiliates, has 100 or fewer employees, and annual gross receipts of twelve million dollars (\$12,000,000) or less as averaged for the previous three tax years, as adjusted by the Department pursuant to Government Code Section 14837(d)(3); or
 - (B) A manufacturer as defined herein that, together with all affiliates, has 100 or fewer employees...

Discussion of Why You Do Not Meet Requirements

You do not meet the Priority "B" Classification requirements because:

- You applied to the Fund in 1996. Your total employee counts for 1995 are unknown. To date, you have been unable to provide the DE6 information required to make this determination as requested by the Fund. For the purposes of assignment to a Priority Class "B" you cannot exceed 100 employees, including all affiliates.

The Fund, in relevant part, bases claim priority on the lowest priority appropriate for the owners and operators at the time of discovery of the unauthorized release and the time of application to the Fund. (Section 2811.1(b) of the Fund Regulations.) Your claim is for an occurrence that includes three releases. The UST owner and operator at the time of discovery of the initial release was found to meet the requirements of Priority Class "C." Therefore, Priority Class "C" is the appropriate priority class for your claim. I understand that your clients sought the appropriate tax returns from the Internal Revenue Service and were advised by letter dated April 22, 2009, that these records were no longer available. You have provided additional information that enabled Fund Staff to locate in Claim No. 3272 documentation of a March 1996 Fund tax review of your 1992, 1993, and 1994 returns, which concluded that your gross annual receipts were consistent with Priority Class "B" requirements. As described in more detail below, however, this fact does not support the classification of Claim No. 11496 as Priority Class "B" because the owner and operator at the time of the discovery of the initial release applied as Priority Class "C" and was found to meet those requirements.

I also understand that your clients submitted 2008 employment records for our review. The employment records relevant to making a priority determination are those for 1995, the year prior to the application filing date for Claim No. 11496. However, even if you could provide these documents, it would not affect the priority classification of this claim because the claim is appropriately assigned to Priority Class "C" for the reason described below.

I understand that both Claim No. 11496 and Claim No. 3272 pertain to a single occurrence at the subject site. For that reason both claims have been reviewed to determine the appropriate priority class for Claim No. 11496. Desert Petroleum (Desert) was the claimant for Claim No. 3272 which was filed in January 1992 seeking reimbursement for corrective action costs related to an unauthorized release that was discovered in 1988. You purchased the site in January 1994. Desert was in the process of conducting a site investigation when, in March and August of 1995, two additional unauthorized releases were discovered. You were added to Desert's Claim No. 3272 as a joint claimant in October 1995. Though the Fund's tax review showed your gross annual receipts in 1992, 1993, and 1994 were consistent with

Priority Class "B," the claim properly continued to be classified in Priority Class "C" because Desert met Priority Class "C" requirements based on its claim application.

You filed your own Claim No. 11496 in February 1996 and later were removed as a joint claimant from Claim No. 3272. The application for Claim No. 11496 requested assignment to Priority Class "B," but the claim was assigned to Priority Class "C" because Desert, the previous owner and operator, had applied as and been determined to be eligible for Priority Class "C" in its Claim No. 3272. The Cursory Review Checklist for Claim No. 11496 notes that the priority for Desert was Priority Class "C." It was appropriate to base the priority of Claim No. 11496 on the lowest priority applicable to of any of the owners or operators associated with the releases.

As previously mentioned, Section 25299.52(b) of the H&SC requires claim priority to be determined according to specified resource levels of the UST owners and operators associated with the claim. A "claim" is defined as the various documents submitted to the Fund for reimbursement of costs incurred due to an occurrence. (Section 25299.13 of the H&SC.) An occurrence may include more than one unauthorized release. (*Id.*, Section 25299.19 of the H&SC.) If there are multiple unauthorized releases included in an occurrence, then the State Water Board, when making a decision regarding the appropriate priority class for a claim, must consider the priority of the UST owners and operators at the time of discovery of each of the unauthorized releases. For purposes of assignment to a priority class, the State Water Board must base the priority of a claim on the lowest priority appropriate for any 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 that such treatment is inconsistent with the statutory priority scheme. (Section 2811.1(b) of the Fund Regulations.)

When you filed the application for Claim No. 11496 and were added as a joint claimant to Claim No. 3272, it had already been clearly determined that Desert met the criteria for Priority Class C. Even though it was documented that Mr. Angle met the Priority B criteria for tax years 1992, 1993, and 1994, under Claim No. 3272, Claim Nos. 3272 and 11496 both merited assignment to Priority Class "C" because Desert belonged to Priority Class "C." When the priority ranking of the relevant owners and operators are different, the Fund is required to select the lowest priority class as described above.

Finally, I note that the Fund tax review provided for Mr. Angle under Claim 3272 did not include the affiliate tax information that Mr. Angle described in his April 22, 2009, correspondence to the Fund. It also did not address the Fund's need to examine 1995 employment records. For all of these reasons, the March 19, 1996, rejection letter you cited in your appeal does not support a finding that Claim No. 11496 is eligible for Priority Class "B."

Appeal Process

This represents an FDD 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. Barbara L. Evoy, 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 you have any further questions, please call me at (916) 341-5632 or if you have questions specific to your claim, please call Ms. Natalie Daniel at (916) 341- 5844.

Sincerely,



Barbara L. Evoy, Deputy Director
Division of Financial Assistance

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

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

Ms. Dorothy Rice, Executive Office (Via E-mail only)
Ms. Patty Zwarts, CalEPA (Via E-mail only)