

202925



State Water Resources Control Board



Linda S. Adams
Secretary for
Environmental Protection

Division of Financial Assistance
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Arnold Schwarzenegger
Governor

DEC 1 1 2008

Alameda County

DEC 1 6 2008

Diana Pagano
6912 Broadway Terrace
Oakland, CA 94611

Environmental Health

UNDERGROUND STORAGE TANK CLEANUP FUND (FUND), STAFF DECISION TO REJECT CLAIM: CLAIM NO. 018824; FOR SITE ADDRESS: 14901 14TH ST E, SAN LEANDRO

Your claim has been found to be ineligible for placement on the Priority List for the following reason:

Claimant's non-compliance with the UST permitting requirements in *Health and Safety Code* (H&SC) Section 25299.57(d)(3)(A)¹ and did not meet the requirements for a permit waiver in H&SC Section 25299.57(d)(3)(B).

Applicable Authority

Effective January 1, 2008, H&SC Section 25299.57(d)(4) reads, in part:²

- (A) Except as provided in subparagraphs (B) and (C), the claimant has complied with the permit requirements of Chapter 6.7 (commencing with Section 25280). A claimant shall obtain a permit required by subdivision (a) of Section 25284 for the underground storage tank that is the subject of the claim when the claimant becomes subject to subdivision (a) of Section 25284 or when the applicable local agency begins issuing permits pursuant to subdivision (a) of Section 25284, whichever occurs later.
- (C) All claimants who file their claim on or after January 1, 2008, and who do not obtain a permit required by subdivision (a) of Section 25284 in accordance with subparagraph (A) or (B) may seek a waiver of the requirement to obtain a permit....
- (E) All claimants who file a claim before January 1, 2008, and who are not eligible for a waiver of the permit requirements pursuant to applicable statutes or regulations in effect on the date of the filing of the claim may resubmit a new claim pursuant to subparagraph (C) on or after January 1, 2008....

You filed Claim No. 018824 before January 1, 2008. Therefore, pursuant to H&SC Section 25299.57(d)(4)(E), the applicable statutes or regulations in effect on the date of the filing of the claim, dated October 30, 2006, must be applied to determine whether you are eligible for a permit waiver.

¹ Effective January 1, 2008, H&SC Section 25299.57(d)(4)(A) clarified the permit requirement previously located in H&SC Section 25299.57(d)(3)(A).

² H&SC Section 25299.57(d)(4)(B), effective January 1, 2008, codifies the Fund's interpretation of H&SC Section 25299.57(d)(3)(A) as it existed before January 1, 2008.

At the time that you filed a claim, dated October 30, 2006, H&SC Section 25299.57(d)(3)(B) read, in part:

All claimants who file their claim on or after January 1, 1994, and all claimants who filed their claim prior to that date but are not eligible for a waiver of the permit requirement pursuant to board regulations in effect on the date of the filing of the claim, and who did not obtain or apply for any permit required by subdivision (a) of Section 25284 by January 1, 1990, shall be subject to subparagraph (A) regardless of the reason or reasons that the permit was not obtained or applied for. However, on and after January 1, 1994, the board may waive the provisions of subparagraph (A) as a condition for payment from the fund if the board finds all of the following:

- (i) The claimant was unaware of the permit requirement prior to January 1, 1990, and there was no intent to intentionally avoid the permit requirement or the fees associated with the permit....

October 2004, the State Water Resources Control Board (State Water Board) issued an order interpreting H&SC Section 25299.57(d)(3). (*In the Matter of the Petition of Murray Kelsoe WQ 2004-0015-UST (Kelsoe Order).*) In the *Kelsoe Order*, the State Water Board found that Mr. Kelsoe had not complied with permitting requirements because the USTs at issue had not been properly permitted at all times, beginning from when the local agency began issuing UST permits pursuant to H&SC Section 25284(a). The State Water Board also held that permit waivers authorized under H&SC Section 25299.57(d)(3)(B) may only be used to excuse permit non-compliance that occurred before January 1, 1990.

Mr. Kelsoe filed a petition for writ of mandate in Alameda County Superior Court (Superior Court) challenging the *Kelsoe Order*. After his petition for writ of mandate was denied by the Superior Court, Mr. Kelsoe filed an appeal with the First District Court of Appeal (Court of Appeal). On July 20, 2007, the Court of Appeal determined that the State Water Board should have determined whether Mr. Kelsoe was entitled to a permit waiver under H&SC Section 25299.57(d)(3)(B). The Court of Appeal modified the July 20, 2007, decision on August 17, 2007. (*Kelsoe v. State Water Resources Control Board* (2007) 153 Cal.App.4th 569, 581 [63 Cal.Rptr.3d 156].) In its August 17, 2007, decision, the Court of Appeal limited the applicability of its ruling in the Kelsoe matter to fact patterns similar to Kelsoe (i.e., claimants whose violations began before 1990 and continued beyond January 1, 1990, but who later paid thousands of dollars into the Fund over a period of substantial compliance). The Court of Appeal reversed the trial court decision and remanded the matter for the limited purpose of determining whether Mr. Kelsoe satisfies the requirements for a permit waiver. Following the modification of the Court of Appeal decision on August 17, 2007, the Superior Court directed the State Water Board to vacate its *Kelsoe Order* for the limited purpose of determining whether Mr. Kelsoe satisfies the requirements for a permit waiver. The Superior Court directed that this determination be made in a manner consistent with the holding of the Court of Appeal. In all other respects, the Superior Court denied Mr. Kelsoe's petition for writ of mandate. Consistent with the July 20, 2007, Court of Appeal decision, as modified on August 17, 2007, the State Water Board issued State Water Board Order WQ 2007-0011 EXEC in December 2007 (*In the Matter of the Petition of Murray Kelsoe WQ 2007-0011 EXEC*), partially amending the *Kelsoe Order*.

Background

The subject site has historically operated three USTs for a number of years. In 1983, you became the property owner at the subject site in which the USTs existed. According to the Report of Limited Soil Investigation dated October 26, 1993, prepared by Hageman-Aguiar, Inc., the USTs have been out of use for more than 10 years.

On October 15, 1993, soil sampling was conducted by drilling four soil borings. During the drilling operation, the soil samples were analyzed. Based upon analysis of the data generated from this limited soil investigation, the low-level residual gasoline concentrations found in the vicinity of the existing USTs.

November 19, 1993, the City of San Leandro (City) requested a meeting with you regarding the contamination on your property and to discuss the closure of the USTs prior to approving any Work Plans.

In 1997, Hageman-Aguiar Inc., removed four USTs. Under the direction of the City, eight soil samples were taken from the tank excavation and one from the waste oil excavation. Based on the low levels, additional over-excavation would not be required.

June 12, 2006, the City informed you that your site was listed as a contaminated property. The City required further investigation and referred your site to Alameda County Environmental Health LOP Program (ACEH). On October 6, 2006, ACEH's requested further investigation to delineate the contamination of the plume.

On October 30, 2006, you submitted a claim to the Fund for financial assistance with the cleanup of your site.

Discussion

A. Compliance With Permit Requirements

Pursuant to H&SC Section 25299.57(d)(4)(A), in order to be eligible to file a claim with the Fund, the claimant must show that:

...the claimant has complied with the permit requirements of Chapter 6.7 (commencing with Section 25280). A claimant shall obtain a permit required by subdivision (a) of Section 25284 for the underground storage tank that is the subject of the claim when the claimant becomes subject to subdivision (a) of Section 25284 or when the applicable local agency begins issuing permits pursuant to subdivision (a) of Section 25284, whichever occurs later.

You acquired the site in which the USTs were already installed on the site. The requirement for a UST owner to obtain a permit to own or operate a UST was adopted in the law effective January 1, 1984. (See H&SC Section 25284.) You became subject to the permit requirement in H&SC Section 25284 when you the local agency began issuing permits. You did not comply with the permit requirements until you obtained a removal permit in 1997. Therefore, you do not meet the requirement in H&SC Section 25299.57(d)(4)(A). You must meet the requirements for a permit waiver in order to be eligible for the Fund.

B. Compliance With Permit Waiver Requirements

Pursuant to H&SC Section 25299.57(d)(4)(E), I must apply the applicable statutes or regulations in effect on the date of the filing of the claim, dated October 30, 2006, to determine whether you are eligible for a permit waiver. You had to meet the requirements of H&SC Section 25299.57(d)(3)(B), as effective on October 30, 2006, and as interpreted by the Kelsoe Order in order to obtain a permit waiver.

A permit waiver under H&SC Section 25299.57(d)(3)(B) may be used to excuse permit non-compliance for permits required before January 1, 1990. With the exception of claimants who meet the Kelsoe fact pattern, a permit waiver under H&SC Section 25299.57(d)(3)(B) cannot be used to excuse permit non-compliance after January 1, 1990. You did not comply with the permit requirements until you obtained a removal permit in 1997. Therefore, a permit waiver under H&SC Section 25299.57(d)(3)(B) cannot be used to excuse permit non-compliance after January 1, 1990, unless your situation meets the Kelsoe fact pattern (i.e., claimants whose violations began before 1990 and continued beyond January 1, 1990, but who later paid thousands of dollars into the Fund over a period of substantial compliance).

Your situation does not meet the Kelsoe fact pattern, your permit violations began before 1990 and beyond. However, unlike Mr. Kelsoe, you did not pay money into the Fund and since you never obtained a permit, you did not have a period of substantial compliance with permitting requirements. Therefore, you are not eligible for a waiver of post-January 1, 1990, permit non-compliance under the *Kelsoe Order*.

Summary

As explained above, under the new statutes effective January 1, 2008, you did not comply with the UST permitting requirements pursuant to H&SC Section 25299.57(d)(4)(A). Therefore, you must meet the requirements for a permit waiver in order to be eligible for the Fund.

You did not obtain a permit until you obtained a removal permit in 1997. A permit waiver under H&SC Section 25299.57(d)(3)(B) cannot be used to excuse for your permit non-compliance after January 1, 1990, unless the situation is comparable to the Kelsoe fact pattern. As described above, your situation is not similar to Mr. Kelsoe's because you did not pay money into the Fund and did not have period of substantial compliance with permitting requirements such as Mr. Kelsoe. Your situation is not similar to Mr. Kelsoe's. You are not eligible to be considered for a permit waiver for post-January 1, 1990, permit non-compliance under H&SC Section 25299.57(d)(3)(B) and the *Kelsoe Order* and Claim No. 018824 is not eligible for the Fund.

Effective January 1, 2008, the requirements for a permit waiver were amended by Chapter 282, Statutes 2007. The new requirements for a permit waiver are applicable only for claims submitted to the Fund on or after January 1, 2008. I have enclosed the H&SC Section 25299.57(d)(4)(C) permit waiver form for your review. Please review the information on the enclosed permit waiver form and if you feel that your situation meets the new permit waiver requirements under H&SC Section 25299.57(d)(4)(C) you may re-apply to the Fund. The new application is located at http://www.waterboards.ca.gov/water_cwphome/ustcf.

Pursuant to H&SC Section 25299.57(d)(4)(D), claimants who qualify for a permit waiver under H&SC Section 25299.57(d)(4)(C) must pay a higher deductible on their claim, depending upon the date that the claimant complied with UST permitting requirements or closure requirements. Claimants who comply on or before December 22, 1998, must pay twice the amount of deductible that would otherwise apply to the claim, and claimants who comply after December 22, 1998, must pay a deductible that is four times the amount that would otherwise apply to the claim.

If you believe you meet the new permit waiver requirements under H&SC Section 25299.57(d)(4)(C), you must complete and submit a new application and the enclosed permit waiver form. Any previous applicable backup documentation submitted with this Claim No. 018824, will be incorporated into the new claim application; therefore duplication is not necessary, except for forms that require a current date/signature (e.g., updated financial responsibility documents). You also may be required to provide additional information requested by Fund staff.

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

If you disagree with this Staff Decision, you may appeal to the Fund Manager pursuant to Section 2814 of the *Petroleum Underground Storage Tank Cleanup Fund Regulations*. If you would like review of the decision by the Fund Manager, please submit your request along with any additional documentation to:

Ronald M. Duff, Fund Manager, Claim #018824
Underground Storage Tank Cleanup Fund
State Water Resources Control Board
Division of Financial Assistance
P.O. Box 944212
Sacramento, CA 94244-2120

A request to the Fund Manager must include, at a minimum: (1) a statement describing how the claimant is damaged by the prior Staff Decision; (2) a description of the remedy or outcome desired; and (3) an explanation of why the claimant believes the Staff Decision is erroneous, inappropriate or improper.

If you do not request a review by the Fund Manager within thirty (30) calendar days from the date of this letter, the Staff Decision will then become final and conclusive.

Diana Pagano

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If you have any questions, please call me at (916) 341-5714.

Sincerely,

ISI

Shari Knieriem
Claims Review Unit
Underground Storage Tank Cleanup Fund

Enclosures

cc: Ms. Donna Drogos W/O
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1131 Harbor Bay Pkway, 2nd Fl.
Alameda, CA 94502-6577

Mr. Steven Plunkett W/O
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