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SECRETARY FOR
ENVIRONMENTAL PROTECTION

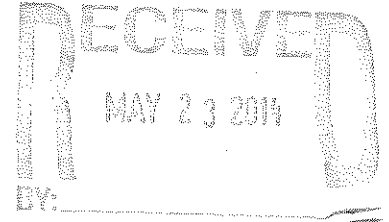
Alameda County

MAY 23 2014

State Water Resources Control Board

Environmental Health

May 20, 2014



Mr. Gregory C. Brandt
Port of Oakland
c/o Wendel, Rosen, Black & Dean, LLP
1111 Broadway 24th Fl.
Oakland, CA 94607

Dear Mr. Brandt:

UNDERGROUND STORAGE TANK CLEANUP FUND (FUND), FUND MANAGER
DECISION (FMD) FOR ELIGIBILITY DETERMINATION: CLAIM NO. 017196; FOR SITE
ADDRESS: 707 FERRY STREET, OAKLAND

You requested an FMD on behalf of your client, the Port of Oakland (Port), for
reconsideration of the Fund Staff Decision dated April 29, 2003. Fund Staff denied Claim
No. 17196 because the Port did not comply with permitting requirements.

Decision

After reviewing the request, supporting documents, and claim file, I am upholding the Staff
Decision. The Port is ineligible for participation in the Fund because the Port failed to
comply with the permit requirement in Section 25299.57(d)(4)(A) of the California Health &
Safety Code (H&SC). The Port also does not meet the criteria for a waiver of the permit
requirements for claims to the Fund that were filed on or after January 1, 1994, and before
January 1, 2008. In addition, the Port is not eligible for reimbursement from the Fund
because the appropriate regulatory agency, Alameda County Health Services Agency,
Department of Environmental Health (Alameda County), did not direct the Port to conduct
corrective action to clean up an unauthorized release of petroleum from one or more of the
underground storage tanks (USTs) at the site.

Background

The Port is a public entity that owns 5,000 acres of real property within the City of Oakland.
Since 1927, the property has been used for industrial and commercial purposes. Both the
Port and its tenants owned a large number of USTs on the property.
This site is located at 707 Ferry Street in Oakland. The Port installed at least three USTs at
this site in the 1960s (one 10,000-gallon diesel UST and two 1,000-gallon gasoline UST.
Transbay Container (Transbay) leased the site from the Port for a number of years.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

Regulations (Fund Regulations) or *Petroleum Underground Storage Tank Cleanup Fund Statutes*, California Health and Safety Code (H&SC), Division 20, Chapter 6.75.

To be eligible for reimbursement from the Fund, a claimant must show that there has been an unauthorized release of petroleum from a UST and that the claimant was required to perform corrective action to clean up the release. (H&SC Section 25299.57(d) & Fund Regulations, Section 2811(a).) After the 10,000-gallon UST failed a precision test, the Port filed a URF stating that there was a leak in the top of the UST. Transbay continued to operate the UST after the Port filed the URF, but only filled the UST 3/4 full. There is no other documentation regarding this release. Additionally, there is no documentation of a release from either of the two 1,000-gallon USTs. Further, there is no documentation that Alameda County ever directed either the Port or Transbay to perform corrective action on this site. Therefore, even if there was an unauthorized release from one or more of the USTs at this site, the Port is not eligible for reimbursement from the Fund because it was not required to perform corrective action.

Compliance with Permit Requirements

Section 25299.57(d)(4)(A) of H&SC states in part, in order to be eligible to file a claim with the Fund, the claimant must show that:¹

... 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.

The Port filed Claim No. 17196 before January 1, 2008. Therefore, pursuant to Section 25299.57(d)(4)(E) of H&SC, the applicable statutes or regulations in effect on the date of the filing of the claim, March 25, 2002, must be applied to determine whether the Port is eligible for a waiver of the permit requirements.

At the time the Port filed a claim (March 25, 2002) Section 25299.57(d)(3)(B) of H&SC 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,

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).

obtain an operating permit for the USTs until it obtained an interim permit on January 16, 1991, which only was valid for six months. The Port did not provide any evidence of operating permits for the USTs between the time the interim permit expired July of 1991 and the time the USTs were removed in 1993 and 1996.³ Based on the information provided, with the exception of the six month interim permit period, the Port did not comply with the permit requirements until it properly removed the USTs on December 3, 1993 and June 21, 1996. Therefore, the Port does not meet the requirement in Section 25299.57(d)(4)(A) of H&SC.

The Port must meet the requirements for a waiver of the permit requirements in order to be eligible for the Fund.

Compliance with Permit Waiver Requirements

The Port contends that it is eligible for a permit waiver. The Port states that it implemented a tank removal and upgrade program in 1990 and that it focused first on active USTs before moving on to inactive USTs and that the Port did not seek permits for the USTs at the site because they were designated for removal and the Port believed that it only had to permit active USTs. While the Port's environmental consultant did recommend removal of the three USTs at the site in June of 1990, the USTs continued to be used after that recommendation.

As documentation of its tank removal and upgrade program, the Port provided the Fund with the Port's Tank Management Strategy Report dated February 1990. The Port contends that it submitted the Tank Management Strategy Report to Alameda County, that its actions were taken under the supervision and oversight of Alameda County, and that Alameda County was aware that the Port's USTs were unpermitted. Alameda County has not and will not confirm this contention. Alameda County did confirm that it required UST owners and operators during this time period to submit an application for permits and maintain the permits in accordance with H&SC Chapter 6.7 and implementing regulations.

Section 25299.57(d)(4)(E) of H&SC states, I must apply the applicable statutes or regulations in effect on the date of the filing of the claim, March 25, 2002, to determine whether the Port is eligible for a permit waiver. The Port had to meet the requirements of Section 25299.57(d)(3)(B) of H&SC, effective on March 25, 2002, and as interpreted by the *Kelsoe Order*, except to the extent that the *Kelsoe Order* was superseded by the Court of Appeal's decision, in order to obtain a waiver of the permit requirements.

A permit waiver under Section 25299.57(d)(3)(B) of H&SC 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 Section

³ The Port has provided an operating permit for a UST at this site issued by Alameda County on October 21, 1996, however, this permit was issued after the USTs at issue had been removed.

25299.57(d)(4)(C) of Section you may re-apply to the Fund. The new application is located at <http://www.waterboards.ca.gov/cwphome/ustcf>.

Pursuant to Section 25299.57(d)(4)(D) of H&SC, claimants who qualify for a permit waiver under Section 25299.57(d)(4)(C) of H&SC 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 the Port believes it meets the new requirements for a waiver of the permit requirement under Section 25299.57(d)(4)(C) of H&SC, the Port must complete and submit a new application and the enclosed permit waiver form. Any previous applicable backup documentation submitted with this Claim No. 17196 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). The Port also must provide documentation showing that Alameda County directed the Port to conduct corrective action to clean up an unauthorized release of petroleum from one or more of the USTs at the site. The Port may be required to provide additional information requested by Fund staff.

Appeal Process

This is an FMD in this matter. If you do not agree with this FMD, you may request a Final Division Decision (FDD) in accordance with Section 2814.1 of the Fund Regulations. The appeal must be received by the Deputy Director of the Division of Financial Assistance within 60 days of the date of this letter. If you do not request an FDD within those 60 days, this decision will become final and conclusive. The request should be sent to:

Mr. John Russell, Acting Deputy Director
USTCF Claim No. 017196
Division of Financial Assistance
State Water Resources Control Board
P.O. Box 944212
Sacramento, CA 94244-2120

The request for an FDD must include, at a minimum: (1) a statement describing how the claimant is damaged by this FMD; (2) a description of the remedy or outcome desired; and (3) an explanation and supporting documentation of why the claimant believes the action of this FMD is erroneous, inappropriate, or improper.

Port of Oakland
Claim No. 017196

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bcc USTCF claim file
Diana Romero, DFA
Lisa Labrado, DFA
Judy Reid, DFA
Julie Osborn, OCC
Claim Review Unit, DFA