



State Water Resources Control Board



Division of Financial Assistance

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Linda S. Adams
Secretary for

Environmental Protection

Arnold Schwarzenegger
Governor

DEC 22 2008

Mr. Robert B. Baston
3340 St Mary's Rd
Lafayette, CA 94549

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ENVIRONMENTAL HEALTH SERVICES

Dear Mr. Baston:

UNDERGROUND STORAGE TANK (UST) CLEANUP FUND (FUND), FUND
MANAGER DECISION (FMD) FOR ELIGIBILITY DETERMINATION:
CLAIM NO. 018282; FOR SITE ADDRESS: 1200 12TH ST E, OAKLAND

By a letter dated September 11, 2006, you requested an FMD for reconsideration of the Fund Staff Decision dated April 17, 2006. Fund Staff denied the claim because of non-compliance with the UST permitting requirements in *Health and Safety Code (H&SC) Section 25299.57(d)(3)(A)*¹ and you did not meet the requirements for a permit waiver in H&SC Section 25299.57(d)(3)(B).

Decision

Following my review of your letter and the supporting documents in your file, I find that I must uphold the Staff Decision that you are ineligible for participation in the Fund for the following reasons. You did not comply with the UST permitting requirements pursuant to H&SC Section 25299.57(d)(4)(A). Also, you do not meet the requirements for a permit waiver for claims to the Fund that were filed on or after January 1, 1994, and before January 1, 2008.

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.

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.



(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. 18282 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, November 24, 2004, must be applied to determine whether you are eligible for a permit waiver.

At the time that you filed your claim, November 24, 2004, 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....

In 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

In 1923, the USTs were installed. The site was formerly known as Baston Tire and Supply Company. The business operated until the death of your father in 1987. According to your letter dated March 14, 2006, the business was closed on September 30, 1987, and you state, "All of the documentation regarding the USTs was destroyed during the closing of the business."

After closing the business in 1990, you sent a letter to Alameda County Health Care Services, Environmental Health Services (ACEHS) acknowledging the Notice of Violation that ACEHS sent you on December 3, 1990, regarding the removal of the USTs. You indicated to ACEHS that you could not remove the USTs until the legal action was settled on your father's estate.

In 1993, the legal action was completed and you received title to the property. After receiving title to the property, you inquired about obtaining financing to remove the USTs. In 1995, you signed a contract with Bernable & Brinker, Inc. to remove the two USTs which were subsequently removed on July 23, 1996. As a result of the UST

removal, contamination was confirmed and corrective action began at the site. On October 18, 2006, you received a Remedial Action Completion Certificate from ACEHS.

On November 24, 2004, the Fund received your application. However, the Priority Class you had requested was the lowest priority, which is Priority Class D. After Fund Staff reviewed your claim application to determine priority class, Fund Staff advised you that you may qualify for a higher priority, which is Priority Class B. In March 2006, you requested a change in your priority from Priority Class D to Priority Class B. Fund Staff reviewed the required documentation and you met the criteria for Priority Class B. However, after a complete review of your application, Fund Staff denied the claim by letter dated April 17, 2006, because you had not complied with permitting requirements and did not meet the applicable requirements for a permit waiver.

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 May 1987. The permit records from the ACEHS indicate you obtained a six-month interim permit in 1991. In 1996 you completed the permit application to have the USTs removed. 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 the authority for permit requirement was under the ACEHS. You did not maintain permit compliance with the permit requirements until the USTs were removed in 1996. 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 November 24, 2004, 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 November 24, 2004, 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 maintain permit compliance with the permit requirements until July 25, 1996, when you obtained removal permit. 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).

Because your situation is not like Mr. Kelsoe's you do not meet the Kelsoe fact pattern. Like Mr. Kelsoe, your permit violations began before 1990 and continued beyond January 1, 1990. Unlike Mr. Kelsoe, however, you did not pay money into the Fund and 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 maintain permit compliance with the permit requirements until July 23, 1996, when you obtained a removal permit. A permit waiver under H&SC Section 25299.57(d)(3)(B) cannot be used to excuse your permit non-compliance after January 1, 1990, unless the situation is comparable to the Kelsoe fact pattern. As stated above, your situation is not like Mr. Kelsoe's because you did not pay money into the Fund and did not have a period of substantial compliance with permitting requirements such as Mr. Kelsoe. Therefore, 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. 18282 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

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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/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. Based on current information, it appears you may not be eligible for the permit waiver, but you may apply and the Fund will make the final determination. All previous applicable backup documentation submitted with this Claim No. 18282, 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.

Appeal Process

This represents an FMD in this matter. In accordance with Section 2814.1 of the Fund Regulations, if you are not in agreement with this FMD, you may request a Final Division Decision (FDD). 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:

Ms. Barbara L. Evoy, Deputy Director USTCF Claim No. 018282
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;

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and (3) an explanation and supporting documentation of why the claimant believes the action or this FMD is erroneous, inappropriate, or improper.

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

Sincerely,



Ronald M. Duff, P.E., Fund Manager
Underground Storage Tank Cleanup Fund

Enclosure

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