



Rec'd 1/4/2016



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

State Water Resources Control Board

DEC 29 2015

Craig H. Pizer, Associate General Counsel
Bimbo Bakeries USA
255 Business Center Drive
Horsham, PA 19044

Dear Mr. Pizer:

UNDERGROUND STORAGE TANK CLEANUP FUND MANAGER DECISION (FMD) FOR RECONSIDERATION OF INELIGIBLE COSTS: CLAIM NO. 4424 FOR SITE ADDRESS OAKLAND BAKERY, 955 KENNEDY STREET, OAKLAND, CA 94606

By a letter dated August 28, 2014 letter, you requested an FMD for UST Cleanup Fund staff's determination that \$13,607.41 associated with Reimbursement Request (RR) No. 16 was ineligible for reimbursement. You assert that the amount of \$13,562.30 of the \$13,607.41 is eligible for reimbursement due to common ownership and operations of Bimbo Bakeries USA, Inc. and Earthgrains Baking Companies, Inc. during the time period these costs were paid.

DECISION

After reviewing your letter and supporting documentation, I concur with the staff's decision that the requested amount of \$13,562.30 is not eligible for reimbursement from the Fund because these costs were not paid by or on behalf of Earthgrains Baking Companies Inc., the claimant on record at the time the costs were incurred.

The basis for my decision is summarized below.

APPLICABLE AUTHORITY

The following are excerpted from: The State Water Resources Control Board (State Water Board) precedential decisions; Petroleum Underground Storage Tank Cleanup Fund Regulations, Title 23, Division 3, Chapter 18 of the California Code of Regulations (Fund Regulations); and Division 20, Chapters 6.7 and 6.75 of the California Health and Safety Code.

Health and Safety Code, Sections 25299.54, subdivision (a); 25299.20; and 25299.21 limit access to reimbursement from the Fund to underground storage tank (UST) owners and operators who meet specific statutory requirements.

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, Ca 95812-0100 | www.waterboards.ca.gov

Section 2810.1, subdivision (a) of the Fund Regulations states, that only a current or former UST owner or operator who has paid or will pay for the costs for which reimbursement is requested may file a claim against the Fund.

Section 2812.2 of the Fund Regulations states, that the State Water Board may only reimburse reasonable and necessary corrective action costs that are incurred by or on behalf of a claimant.

The State Water Board addressed and clarified eligible costs incurred on behalf of a claimant in decisions entitled *In the Matter of the Petition of Quaker State Corporation*, State Water Board Order WQ 97-06-UST (*Quaker State*) and *In the Matter of the Petitions of Hollis Rodgers and Emily Van Nuys Trust, et al.*, State Water Board Order WQ 99-02-UST (*Hollis Rodgers*). Under both *Quaker State* and *Hollis Rodgers*, the State Water Board may allow Fund reimbursement for reasonable and necessary corrective action costs incurred by a third party on behalf of an eligible claimant pursuant to an express, written agreement. (See also Cal. Code Regs., tit. 23, § 2812.3, subd. (d).)

BACKGROUND

Kilpatrick's Bakeries, Inc. (Kilpatrick's) owned and operated the subject USTs that were removed over a period of time from October 1989 through January 1991. Kilpatrick's filed Fund Claim No. 4424 in January of 1992. Kilpatrick's then went through a series of mergers, acquisitions, and consolidations.

In 1999 Kilpatrick's consultant, Philip Services Corporation (PSC), notified the Fund that the correct claimant for Claim No. 4424 was The Earthgrains Company. In February 2000, PSC notified the Fund that the claimant for Claim No. 4424 and nine other claims should be changed to Earthgrains Baking Company, Inc. to "correctly establish the company that owned, operated, and incurred the costs of the subject USTs." Relying on PSC's submissions, Fund staff changed the claimant identified in Fund records to Earthgrains Baking Companies, Inc. and issued a Letter of Commitment (LOC).

In August of 2001, Sara Lee Corporation purchased The Earthgrains Company and its subsidiaries, including but not limited to, Earthgrains Baking Companies, Inc. Court documents show that The Earthgrains Company merged into and became The Earthgrains Baking Companies, Inc., which became the direct successor to The Earthgrains Company. Sara Lee Corporation then created Sara Lee Bakery Group, Inc. as its wholly-owned subsidiary, and made the Earthgrains Baking Companies, Inc. a wholly-owned subsidiary of Sara Lee Bakery Group, Inc.

In November 2004, approximately three years after Sara Lee Corporation purchased The Earthgrains Company, Sara Lee Bakery Group, Inc. representatives informed Fund staff of the acquisition and requested that the claimant listed for Claim No. 4424 be changed to Sara Lee Bakery Group, Inc. The representatives indicated that Sara Lee Bakery Group, Inc.'s Federal Employer Identification Number (FEIN) was the same as the FEIN previously

provided for Earthgrains Baking Companies, Inc.¹ Based on Sara Lee Bakery Group, Inc.'s representations at that time, Fund staff changed the claimant name for Claim No. 4424 to Sara Lee Bakery Group, Inc. on November 22, 2004, and continued to the same FEIN previously provided by Earthgrains Baking Companies, Inc.

In November 2010, Sara Lee Corporation agreed to sell its North American Fresh Bakery business, including all shares of Sara Lee Bakery Group, Inc., to Grupo Bimbo, S.A.B. De C.V. (Grupo Bimbo) and BBU, Inc. (BBU)². As a condition of the sale, the United States Department of Justice required Grupo Bimbo and BBU to divest their Sara Lee and Earthgrains assets in California, including the subject site property. Grupo Bimbo and BBU sold the affected California assets to Flower Foods in October of 2012. The sale of the subject site to Flower Foods did not include the transfer of any Fund claims. However, BBU did retain corporate ownership of Sara Lee Bakery Group, Inc. and its subsidiaries, including Earthgrains Baking Companies, Inc.

On August 15, 2013, Sara Lee Bakery Group, Inc. submitted Reimbursement Request No. 16 for \$13,607.41 invoiced by PSC Industrial Outsourcing, LP. The costs submitted for reimbursement under Reimbursement Request No. 16 were paid by Bimbo Bakeries USA, Inc. (Bimbo Bakeries USA)³ and not by the claimant, Sara Lee Bakery Group, Inc. Fund staff had several communications with Sara Lee and Bimbo representatives regarding the corporations' relationships to one another and arrangements regarding work at the subject site and at other properties for which Sara Lee Bakery Group, Inc. has Fund claims.

In December of 2013, the Fund received an assignment agreement requesting to assign Claim No. 4424 from Earthgrains Bakery Group, Inc. to Bimbo Bakeries USA. Fund staff rejected this proposed assignment because the assignor's name listed in the assignment did not match the name FEIN of Earthgrains Bakery Group, Inc., the claimant on record.

In response, representatives of the various Sara Lee, Earthgrains, and Bimbo corporations provided an assignment agreement, dated January 24, 2014, between Earthgrains Baking Companies, LLC and Bimbo Bakeries USA. The representatives also indicated that the claimant for Claim No. 4424 should have remained Earthgrains Baking Companies, Inc., rather than having been changed to Sara Lee Bakery Group, Inc. in 2004. Representatives also clarified that Earthgrains Baking Companies, Inc., had changed its name to Earthgrains Baking Companies, LLC effective December 30, 2013. Furthermore, Fund staff accepted Earthgrains Baking Companies, LLC as the proper claimant on June 4, 2012 and accepted

¹ This appears to have been incorrect, as Sara Lee Bakery Group, Inc. was a distinct legal entity from Earthgrains Baking Companies, Inc., which itself continued in existence and apparently retained its FEIN. In 2013, BBU's Assistant Secretary, Brian Bishop, stated that Sara Lee Bakery Group, Inc. was now known as Earthgrains Bakery Group, Inc. and had an FEIN that was distinct from that of Earthgrains Baking Companies, Inc.

² Grupo Bimbo, a Mexican corporation, carries out its baking business in the United States through BBU, a Delaware corporation headquartered in Horsham, Pennsylvania.

³ Bimbo Bakeries USA, Inc. is a wholly-owned subsidiary of BBU.

the assignment of Claim No. 4424 from Earthgrains Baking Companies, LLC to Bimbo Bakeries USA with an effective date of January 24, 2014.

On August 26, 2014, Fund staff rejected Reimbursement Request No. 16 because the costs at issue had been incurred by Bimbo Bakeries USA prior to the assignment agreement and absent an "on behalf of" agreement.

DISCUSSION

Bimbo Bakeries USA contends on appeal that it is entitled to reimbursement for corrective action costs in the amount of \$13,562.30. You state that Earthgrains Baking Companies, LLC and Bimbo Bakeries USA are both owned by the same parent company, BBU. You assert that since BBU's 2011 acquisition of Earthgrains Baking Companies, Inc. and the resulting integration, all costs of the subsidiaries have been paid by Bimbo Bakeries USA. Finally, you assert that the Fund reimbursed costs paid by Bimbo Bakeries USA in Reimbursement Request No. 15 without question. The Fund acknowledges that it inadvertently paid Reimbursement Request No. 15 to the claimant for corrective action costs paid by Bimbo Bakeries USA. The Fund does not seek remittance of these funds previously reimbursed. The Fund will not, however, reimburse additional reimbursement requests for costs incurred by Bimbo Bakeries USA prior to the January 24, 2014 assignment agreement.

UST Cleanup Fund statutes and regulations limit reimbursement to "an owner or operator who has paid or will pay for the costs claimed." (Fund Regulations §21810.1(a)(6).) The regulations also provide that "costs incurred by or on behalf of a claimant shall be reimbursed by the Fund." (Fund Regulations §2812.2(b).) For costs to be reimbursed when they are incurred on behalf of a claimant, precedential State Water Board decisions require that there be an express agreement in place before the costs are incurred. (*Quaker State*, pp. 6-7 and 12-13.)

Prior to the January 24, 2014 assignment, Bimbo Bakeries USA was not an eligible claimant to the Fund because it was neither itself the operator or owner, nor a successor of the operator or owner, of the USTs formerly located at the subject site. Consequently, costs paid by Bimbo Bakeries USA prior to Jan. 24, 2014, are only reimbursable if incurred on behalf of Earthgrains Baking Companies, LLC, or its predecessors pursuant to an express "on behalf of" agreement".

You contend that Earthgrains Baking Companies, LLC, and Bimbo Bakeries USA were operating in unison and that Bimbo Bakeries USA paid the cleanup costs as a result of the integration of the companies' computing and accounting systems. You have stated that Bimbo Bakeries USA pays for all BBU subsidiaries' expenditures. Fund staff asked for documentation which demonstrates the arrangement between the two related but distinct entities. To date, such documentation has not been provided. Your explanation in the FMD request does not sufficiently demonstrate that the costs at issue were incurred by or on behalf of Earthgrains Baking Companies, Inc., at the time costs under Reimbursement Request No. 16 were incurred.

Earthgrains Baking Companies, LLC, assigned its right to reimbursement under Fund Claim No. 4424 to Bimbo Bakeries USA effective January 24, 2014. Therefore, Bimbo Bakeries USA is now the claimant for Fund Claim No. 4424. An assignee of a Fund claim “steps into the shoes” of the assignor, the prior eligible claimant, but “the assignee takes no greater rights than the assignor had.” (*Lake Publishing*, p. 18.) The costs at issue have not been demonstrated to have been incurred by Bimbo Bakeries USA on behalf of Earthgrains Baking Companies, Inc. Consequently, Bimbo Bakeries USA lacks the right to reimbursement for these costs, even though Bimbo Bakeries USA paid for them. In order to be reimbursed pursuant to an assignment agreement, the person incurring the cost must possess the right to Fund reimbursement at the time the cost is incurred. (*Id.*, pp. 19-20.) Bimbo Bakeries USA acquired the right to reimbursement on January 24, 2014; therefore Bimbo Bakeries USA may only be reimbursed for costs it incurred on or after that date. In summary, Bimbo Bakeries USA has not demonstrated that the \$13,607.41 associated with Reimbursement Request No. 16 were paid by or on behalf of Earthgrains Baking Companies, Inc., the claimant at the time the costs were incurred. Therefore, the costs in the amount of \$13,562.30 are not reimbursable under Claim No. 4424.

APPEAL PROCESS

This represents an FMD. 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 request 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 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 or this FMD is erroneous, inappropriate, or improper.

The FDD appeal request should be submitted as an upload to GeoTracker through the CUF Documents portal. Information on how to upload these requests can be found in the CUF Documents User guide on the Fund GeoTracker Online (GTO) webpage at: http://www.waterboards.ca.gov/water_issues/programs/ustcf/gto/.

If you are unable to submit the request for an FDD electronically, you may mail the request to:

Mr. Darrin Polhemus, Deputy Director
USTCF Claim No. 4424
Division of Financial Assistance
State Water Resources Control Board
P.O. Box 944212
Sacramento, CA 94244-2120

Bimbo Bakeries USA, Inc.
Claim No. 4424

-6-

If you have any questions concerning this letter, please contact Ms. Kelli Garver at kelli.garver@waterboards.ca.gov.

Sincerely,



Lisa Babcock, P.G., C.E.G., Fund Manager
Underground Storage Tank Cleanup Fund

cc:

PSC Industrial Outsourcing, LP
Attn: Angie King & Paul Anderson
210 West Sand Bank Road
Columbia, Illinois 62236

Karel Detterman
Alameda County Environmental
Health
1131 Harbor Bay Parkway, 2nd Floor
Alameda, CA 94502-6577

Cherie McCalou
San Francisco Bay Regional Water
Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612