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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of **LLOYD PROPERTIES** For Review of a Determination of the Division of Clean Water Programs, State Water Resources Control Board, Regarding Participation in the Underground Storage Tank Cleanup Fund. OCC File No. UST-6	**ORDER NO. WQ 93-1-UST**

BY THE BOARD:

Lloyd Properties (petitioner), a partnership, seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) rejecting a claim filed by the petitioner which sought reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

For the reasons hereafter stated, we determine that the petitioner is not an eligible claimant against the Fund and that the Division's Decision ought to be affirmed.

I. BACKGROUND

Chapter 6.75 of the California Health and Safety Code commencing with Section 25299.10, authorizes the State Water Resources Control Board (State Water Board) to conduct a program to reimburse certain owners and operators of petroleum underground storage tanks for corrective action costs incurred by

such owners and operators.[1] Section 25299.77 of the Health and Safety Code authorizes the State Water Board to adopt regulations to implement the reimbursement program. On September 26, 1991, the State Water Board adopted regulations, hereafter referred to as Cleanup Fund Regulations or Regulations. These Regulations are contained in Chapter 18, Division 3, Title 23 of the California Code of Regulations, and became effective on December 2, 1991. Among other things, the Cleanup Fund Regulations provide for submittal of reimbursement claims to the State Water Board by owners and operators of petroleum underground storage tanks, for acceptance or rejection of these claims by the Division, and for appeal of any discretionary Division decision to the State Water Board.

Petitioner submitted a reimbursement claim to the Division. The site involved in petitioner's claim is located at 218 Dobbins Street, Vacaville, California. The actual date of installation of the 1,000 gallon tank involved in the unauthorized release at this site is unknown, as is the actual date of the unauthorized petroleum release from that tank. It is estimated that the tank was installed in the 1950s or 1960s. For many years prior to 1986, the site was owned and operated by the Lloyd Chandler Furniture Company, Inc., a company which was owned by Lloyd and Mildred Chandler. On April 19, 1986, the site was deeded over to Lloyd Chandler, Jr., Nancy C. Beeman, and Kim Chandler, the children of Lloyd and Mildred Chandler. These

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1 Unless otherwise indicated, all statutory references in this Order are to the California Health and Safety Code.

three children are now the three partners who comprise Lloyd Properties. The site apparently is now being used by Lloyd Properties in a business known as Chandler's Home Appliance Center.

In August of 1990, it was brought to the attention of the Vacaville Fire Department that an "out-of-service tank" might be located at the site. The Fire Department contacted Mr. Kim Chandler who acknowledged that he was aware of the existence of a pump and underground storage tank at the site. Mr. Chandler also indicated that the tank had not been in service since 1981. The Fire Department advised Mr. Chandler of the requirements related to out of service tanks and of the procedures which applied to underground storage tanks. Mr. Chandler thereupon contacted various contractors to obtain bids for removal of the tank in question. On September 5, 1990, the contractor who had been selected submitted an application to the Fire Department to remove the tank, and on September 28 the necessary permit was issued. The tank was removed on December 12, 1990. Contamination at the site was discovered and appropriate remedial activities were undertaken by the petitioner. Remedial activities at the site continue to this date. At this time, the majority of the contamination at the site has been remediated and the petitioner has implemented quarterly ground water monitoring with the approval of the Central Valley Regional Water Quality Control Board. Petitioner seeks reimbursement from the Fund for

approximately $86,000 of corrective action costs already expended and future remedial action costs which are estimated at about $124,500.

Neither the petitioner nor the petitioner's predecessor in interest, the Lloyd Chandler Furniture Company, Inc., ever obtained the permit to own or operate an underground storage tank which is required by Section 25284 of the Health and Safety Code. Petitioner's claim was therefore rejected by the Division on the grounds of permit noncompliance.

II. CONTENTIONS AND FINDINGS

Contentions: Petitioner acknowledges that the permit required by Section 25284 of the Health and Safety Code was not obtained prior to January 1, 1990. Petitioner, however, contends that Section 2811(a)(2) of the Cleanup Fund Regulations allows a waiver of the permit requirement where the claimant can demonstrate that the circumstances are such that it would be inequitable or unreasonable to enforce the permit requirement against the claimant. Petitioner further contends that the circumstances of this case are such that it would be unfair and unreasonable to enforce the permit requirements against the petitioner.

The circumstances relied upon by petitioner in support of its contention can be summarized as follows. Use of the tank in question was discontinued in 1981, some three years before the permit requirement of Section 25284 came into existence. The

local authorities charged with enforcement of the underground storage tank laws and issuance of the required permits were in large part understaffed and enforcement of the applicable laws was uneven throughout the State. Petitioner was not notified by local authorities of any permit requirement prior to August of 1990, and petitioner was not in fact aware of the applicable permit requirements until August of 1990. Petitioner argues that it would be unfair to require the petitioner to have the same level of knowledge of underground storage tank laws as persons in the petroleum industry. The petitioner also points out that when the petitioner was advised of the applicable requirements, the petitioner promptly sought a closure permit and proceeded to remove the tank in question and to remediate the site. Petitioner argues that any delay between January 1, 1990 (the last date to obtain or apply for a permit) and September 28, 1990 (the date when the removal permit was obtained) was immaterial and did not prejudice the state or any legitimate interest of the state. We find the contentions and arguments of the petitioner to be unpersuasive.

Findings: At the outset, it is appropriate for us to discuss the permit requirement of Section 25284(a) and our view of this requirement.

Chapter 6.75 of the California Health and Safety Code was enacted during 1983. The Chapter became effective on January 1, 1984. Section 25284(a) of this chapter generally provides that no person shall own or operate an underground

storage tank unless a permit to operate the tank has been issued by the appropriate local agency to the owner.[2]

Compliance with permit requirements is a statutory condition of participation in the Fund. The requirement is expressed in Section 25299.57(a) and (d)(3) of the Health and Safety Code. Generally, this section provides that a claim against the Fund is eligible only if the State Water Board finds that the claimant has complied with the "permit requirements of Chapter 6.75 (commencing with Section 25280)" of the Health and Safety Code.

Conceivably, the Underground Storage Tank Cleanup Fund Program (Program) could have been implemented on the basis of a stringent interpretation of Section 25299.57 and its permit requirement. That is, since the permit requirement became effective on January 1, 1984, the Program could have proceeded on the premise that unless a tank was properly permitted at all times from and after January 1, 1984, no claim with respect to that tank would be allowed to participate in the Fund.

During development of the Program Regulations and discussion of how the Program should be implemented, it was strenuously argued by commentators that strict application of the permit requirements of Section 25299.57(a) and (d)(3) and Section 25284(a) would defeat the legislative intent in

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2 Section 25286 provided that an application for permit must be made by the owner on a standardized form prepared by the State Water Board. Since that form was not ready until June of 1984, it is possible to argue that the permit requirement did not really become effective until about July of 1984. In view of the fact that the Cleanup Fund Regulations generally extended the permit compliance date to January 1, 1990, this point appears to be moot for all practical purposes.

establishing the Fund in that it would unfairly preclude many of the persons who were intended to benefit from the Fund from participation. The comments received during development of the Regulations indicated that there were a number of understandable reasons why permits were not obtained in the early years after adoption of the permit requirement contained in Section 25284. Among other reasons suggested for relaxation of the permit requirement were some of the very factors mentioned by petitioner--the permit requirement was not well publicized in many areas of the state, and the underground storage tank permit and enforcement programs were very unevenly handled throughout the state.

Ultimately the State Water Board decided to take a somewhat liberal view of the statutory permit requirement. The State Water Board's approach is primarily reflected in Section 2811(a)(2) of the Cleanup Fund Regulations. Section 2811(a)(2) provides in part that in order to obtain reimbursement from the Fund a claimant must have:

> "... obtained any permit or permits required of the claimant pursuant to Chapter 6.7, Division 20, of the California Health and Safety Code, or ... filed a substantially complete application for such permit or permits, not later than January 1, 1990, unless the claimant can demonstrate to the satisfaction of the Division that obtaining any required permit was beyond the reasonable control of the claimant or that under the circumstances of the particular case it would be unreasonable or inequitable to require the claimant to have filed an application for such a permit by January 1, 1990. Any claimant who is excused from obtaining a permit or filing an application pursuant to this subsection shall continue to pursue and obtain any permits required by Chapter 6.75 with reasonable diligence ...."

In effect, Section 2811(a)(2) of the Regulations liberalized the permit requirements in three ways. First, in most cases, it extended the permit compliance date from January 1, 1984 to January 1, 1990. Second, it provided that the filing of a substantially complete application for any necessary permit by January 1, 1990, was the equivalent of actually obtaining a permit by that date. Third, it provided an opportunity for a claimant to demonstrate on a case-by-case basis that the facts of his case were such that obtaining any necessary permit was beyond his reasonable control or that it would be unreasonable or inequitable to apply the permit requirement to the claimant.

For practical purposes, then, the permit requirement can be fulfilled in several ways:

1. First, since the requirement is that the claimant obtain any permit required of the claimant, the claimant may demonstrate that in his particular case no permit was required.

2. Second, the claimant can demonstrate that any necessary permit required by Section 25284 was acquired by January 1, 1990, or that a substantially complete application for the permit was filed by that date.

3. Third, the claimant can demonstrate that the facts of his case are such that obtaining of any necessary permit was beyond his reasonable control or that it would be unreasonable or inequitable to impose the permit requirement against the claimant.

The Division has in fact, on a case-by-case basis, accepted a number of applications from claimants who were subject to the permit requirement and who failed to fulfill the requirement by January 1, 1990. The situations which have thus far been held to be sufficient to justify relief from the permit requirement include the following:

1. Situations where the claimant can demonstrate that the claimant justifiably lacked knowledge of the existence of the tank or tanks in sufficient time to obtain or apply for a Section 25284 permit by January 1, 1990, so long as the claimant took appropriate steps to properly permit or close the tanks after becoming aware of their existence and so long as there are no other circumstances which would make it inappropriate to allow relief from the permit condition;

2. Situations where the tanks were closed or decommissioned in some substantial manner prior to January 1, 1984, so that the tanks could not be used after that date without significant effort to reopen the tanks, so long as the tanks were not in fact used after January 1, 1984;

3. Situations where the tanks were physically removed prior to January 1, 1990, under the oversight or with knowledge of a regulatory agency;

4. Situations where permit compliance is deemed to involve a useless or unnecessary act, such as cases where removal of the tanks was already in progress on January 1, 1990;

5. Situations where the claimant was not an owner of the tanks on January 1, 1990, such as a case where the claimant property owner sold the property and the tanks prior to January 1, 1990;

6. Situations where permit compliance appears to have been beyond the reasonable control of the claimant, such as situations where a tank owner was mentally incompetent; and

7. Situations where the permitting agency actually inspected a claimant's tank but failed to advise the claimant of the requirement to obtain a Section 25284 permit. There certainly may be other circumstances which will justify relief, and the Division and the State Water Board will continue to individually consider alleged justifying circumstances on a case-by-case basis.

The Division, however, has consistently refused to accept simple allegations that the claimant was not aware of the permit requirement imposed by Section 25284, or that permit compliance ought to be excused because the claimant was not notified of the permit requirement by appropriate governmental agencies, as an acceptable basis for relief from the permit requirement. This has been the Division's position whether or not the claimant can be classified as a member of the petroleum industry or an incidental user of an underground storage tank containing petroleum, and even if the claimant proceeds promptly and appropriately when the claimant becomes aware of the permit requirements. Likewise, the Division has refused to accept mere

discontinuation of use of a tank prior to January 1, 1984, as a suitable basis for elimination of the permit requirement. The reason is that Section 25284(a) requires a permit to own as well as to operate an underground storage tank. The Division has always viewed this language as requiring a permit to own a tank even though the tank is not being operated at any particular point of time. We accept and approve of the Division's handling of these issues.

With respect to this petition, the petitioner has not demonstrated sufficient mitigating circumstances to justify relief from the permit requirement. Petitioner's excuse is simply that the petitioner did not have actual knowledge of the permit condition and was not advised of this requirement by any governmental agency prior to August of 1990. In our view, these excuses are not sufficient. As we have indicated, the requirement for permit compliance as a condition of access to the Fund is legislatively mandated. We do not have legal authority to simply do away with or ignore the requirement. If we were to accept the simple excuses that a claimant did not know that a permit was required, or that the claimant was not told that a permit was required, we would for all practical purposes repeal the permit requirement imposed by the Legislature. Governmental agencies were not required to specifically notify tank owners and operators of the permit requirements of Section 25284. All persons, in particular property owners, have an independent duty to ascertain those laws which affect them and their property.

We are not convinced that the fact that a tank was not used after the 1984 effective date of the permit law makes it unreasonable or inequitable to require compliance with the permit requirement. Section 25298 of the Health and Safety Code requires that tanks which are taken out of operation comply with all permit, inspection and monitoring requirements, unless the tanks are properly closed. The requirements for proper closure include a demonstration that all residual amounts of any petroleum or other hazardous substances stored in the tank have been removed, that the site has been investigated to determine if there have been any releases, and that any appropriate remedial action has been taken. These requirements serve to avoid or reduce the extent of releases form inactive tanks. The owner of an inactive tank who promptly close the tank after the permit requirement was enacted, and completed any necessary cleanup before the Fund was created, would be ineligible for reimbursement from the Fund. Under these circumstances, where petitioner did not comply with either the permit requirement or the closure requirement until after January 1, 1990, it is not inequitable to hold petitioner responsible for compliance with the permit requirement. Consequently, we find that the petitioner has not demonstrated sufficient grounds to be relieved of the permit requirement, and that petitioner is presently unable to claim against the Fund.

While the present claim of the petitioner must be rejected, we recognize that there may be subsequent changes in

the legislation which controls the Fund. It is not the intent of this order to preclude the petitioner from reapplying to the Fund for cost reimbursement in the event of any subsequent legislative modification which would allow persons in the position of the petitioner to become eligible claimants against the Fund.

III. SUMMARY AND CONCLUSIONS

1. Where a permit or permits are required pursuant to Chapter 6.75, Division 20 of California Health and Safety Code, access to the Fund is limited to those who obtained or applied for such permit or permits not later than January 1, 1990, unless the claimant can demonstrate that obtaining or applying for the required permit or permits was beyond the reasonable control of the claimant or that it would be unreasonable or inequitable to impose the permit requirement against the claimant.

2. An assertion by a claimant that the claimant did not obtain or apply for a necessary permit because the claimant was not aware of the permit requirement and was not advised of the permit requirement by governmental agencies is not adequate

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for relief from the permit requirement imposed by Section 25299.57(a) and (d)(2) and Section 25284(a) of the California Health and Safety Code.

3. The petitioner is not presently an eligible claimant against the Fund.

IV. ORDER

IT IS THEREFORE ORDERED that the Decision of the Division rejecting the present claim of the petitioner, Claim No. 312, is affirmed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 21, 1993.

AYE: Eliseo M. Samaniego
John Caffrey
Marc Del Piero
James M. Stubchaer

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marché
Administrative Assistant
to the Board