

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
NORMAN WONG, DBA AUTO PARTS)
DISTRIBUTOR)
)
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-16.)
_____)

ORDER NO. WQ 93-6-UST

BY THE BOARD:

Norman Wong, dba Auto Parts Distributor (petitioner), 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, this order determines that the petitioner is an eligible claimant against the Fund and that the Decision to the contrary ought to be reversed.

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

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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 2021 North Weber Avenue, Fresno, California. The claim of the petitioner was eventually rejected by the Division on the ground of noncompliance with the permit requirements of Section 25284(a) of the Health and Safety Code.

The factual background relevant to this petition is as follows. Petitioner has operated an auto parts sales and service business at the site in question for a number of years. Prior to

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

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December of 1990, the following underground petroleum storage tanks were located on this site:

<u>Capacity</u>	<u>Substance Stored</u>
10,000 Gallons	Gasoline
10,000 Gallons	Gasoline
500 Gallons	Waste Oil
500 Gallons	Solvent

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In June of 1990, the County of Fresno, Department of Health, advised the petitioner of the fact that permits for the tanks were required by Section 25284(a) of the Health and Safety Code. The petitioner notified the County of his intent to remove the tanks. The petitioner subsequently obtained a removal permit from the County and the tanks were removed in December of 1990. The petitioner never did obtain the permits required by Section 25284(a) of the Health and Safety Code. However, under the circumstances of this case, where the tank owner intended to and did proceed to remove the tanks within a reasonable time, the County has advised the Division that the County would not normally issue a Section 25284 permit in any event. The County would simply issue the necessary removal permits as was done in this case.

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After removal of the tanks, contamination was discovered and petitioner is in the process of site cleanup.

In June of 1984, the petitioner filed the required Hazardous Substance Storage Statement with the State Water Board. Among other things, this Statement advised the State of the existence, nature, and location of the four tanks described

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above. Local agencies were also aware of the existence and location of these tanks. In 1975, in accordance with the then existing requirements, the petitioner had notified the Fresno Fire Department of the existence and location of these tanks, and the tanks were thereafter inspected on an annual basis by the Fire Department. In addition, the County of Fresno itself was aware of the existence of these tanks. The Fresno County Department of Weights and Measures also inspected the tanks on a yearly basis.

Relevant statutes and regulations require that claimants against the Fund obtain or apply for the necessary permits to own or operate petroleum tanks not later than January 1, 1990, or that such claimants be able to demonstrate that the facts of the particular case are such that it would be unreasonable or inequitable to enforce this requirement against the claimants. (Cleanup Fund Regulations, Section 2811(a)(2).) The Division determined that the petitioner had not obtained or applied for the required permits by January 1, 1990, and that the facts and circumstances of the case were such that it would not be inequitable to impose the permit requirements against the petitioner. In part, this Decision appears to be based on a printed statement included in the Hazardous Waste Storage Statement filed by the petitioner in 1984 which indicated:

"All Underground Tanks will be subject to local regulation. Some jurisdictions have already begun programs. Check with your local county government for further information."

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The Division felt, in part, that this statement put the petitioner on notice of the permit requirements and that petitioner should therefore have complied with these requirements.

II. CONTENTION AND FINDINGS

Contention: The petitioner contends that he acted in good faith and was unaware of the permit requirements of Section 25284(a) of the Health and Safety Code prior to notification of these requirements by Fresno County in June of 1990. He argues that the County did not notify him of the permit requirements prior to June of 1990, and that he has at all times complied with all known requirements pertaining to the underground storage tanks, including notification to the Fresno Fire Department of the location and existence of the tanks, and registering of the tanks with the State through filing of the required Hazardous Substance Storage Statement in 1984. He points to the fact that the tanks were subjected to an annual inspection by both the Fire Department and the Fresno County Department of Weights and Measures and that at no time was he advised of the permit requirements. He contends that under these circumstances he should not be penalized by ineligibility for reimbursement from the Fund.

Findings: The State Water Board has addressed the permit requirements of Section 25284(a) of the Health and Safety Code and the genesis and meaning of pertinent Cleanup Fund Regulations in a number of prior orders, including an order

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commonly referred to as the Lloyd Order. (See In the Matter of the Petition of Lloyd Properties, Order No. WQ 93-1-UST.)

The Lloyd Order is determinative as to a good number of the arguments made by the petitioner. The Lloyd Order directly holds that lack of actual knowledge of the permit requirements of Section 25284(a) of the Health and Safety Code is not sufficient justification for waiver of the permit requirement. The Lloyd Order further holds that governmental agencies had no legal obligation to notify tank owners and operators of the permit requirements of Section 25284(a), and that lack of actual notice from any governmental agency of the permit requirements is generally not adequate to support waiver of the permit requirement. If all we had in this case was a claim by the petitioner that he did not know and was not told of the applicable permit requirements, there is no question that the precedent laid down by the Lloyd Order would call for dismissal of the present petition. This would be true even though it seems apparent from the available facts that the petitioner acted in good faith and was in fact unaware of the permit requirements of Section 25284 prior to June of 1990.

However, in this case we have at least one critical fact which is different than the factual pattern which resulted in the Lloyd Order. That fact is that the site in question was apparently actually inspected by representatives of Fresno County in 1984 and every year thereafter. Information in the files relevant to this petition indicates that Fresno County

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implemented the local permitting program in 1987 and that from 1987 onwards Fresno County was itself the permitting agency for Section 25284 permits. Yet, petitioner was apparently never advised of the applicable permit requirements by County representatives.

The Lloyd Order also discusses Section 2811(a)(2) of the Cleanup Fund Regulations, which in essence provides for waiver of the permit requirement where it would be unreasonable or inequitable to impose the permit requirements on a particular claimant. The Lloyd Order discusses a number of situations which have been held sufficient to justify relief from the permit requirements.

One of the situations identified in the Lloyd Order as sufficient to justify relief from the permit requirements is a situation where the Section 25284 permitting agency actually inspected a claimant's tank but failed to advise the claimant of the requirement to obtain a Section 25284 permit. The concept behind this rule is that, while a local permitting agency may not be under a legal duty to provide general notice of the permitting requirements where it actually undertakes to inspect the tanks in question, it does have an equitable duty to advise owners and operators of the legal requirements which apply to those tanks. The Division has limited waiver in such a case to situations where the inspection was done by the actual department in charge of issuance of the Section 25284 permit. In this particular case, the permit issuing agency was the Fresno County Department of Health, while the inspecting agency was the Fresno County

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Department of Weights and Measures. In other words, if the tank inspections in 1987, 1988, and 1989 had been performed by the Fresno County Department of Health, the permit requirement would have been waived by the Division. However, since these inspections were actually conducted by the Fresno County Department of Weights and Measures, in the eyes of the Division, relief from the permit requirement is not justified.

In the estimation of the State Water Board, the Division has drawn too fine a line. The County's right hand ought to be aware of what the left hand is doing, particularly where both of the County departments in question are dealing with regulation of underground storage tanks. If it would be appropriate to waive the permit requirement where the inspection was conducted by the County Department of Health as the Lloyd Order indicates, it is just as appropriate to waive the requirement when the inspections were conducted by the County Department of Weights and Measures.

Our conclusion that the facts of this case make it unreasonable or inequitable to disallow the claim for failure to obtain a permit is not altered by the printed notification included in the Hazardous Substance Storage Statement filed by petitioner. The notification does not expressly refer to the requirement for a permit. It merely notifies the claimant that underground storage tanks are subject to local regulation, and that the claimant should check with your local county government for further information. In this case, the local county government had been in contact with petitioner, through annual

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inspection of the tanks. Furthermore, in 1984, when the petitioner executed the form and submitted it to the State, Fresno County apparently did not have a permit program in existence. It was not until 1987 that the County implemented its permit program. It is not realistic to expect the petitioner to recall the printed provisions of the Hazardous Substance Storage Statement which he executed in 1984 some three years later.

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III. SUMMARY AND CONCLUSIONS

1. Where a permit or permits are required pursuant to Chapter 6.7, Division 20, of California Health and Safety Code, access to the Fund is limited to those claimants 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.

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2. In this case, where Fresno County was the agency authorized to issue the permits required by Section 25284 of the Health and Safety Code and where a department of this agency

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actually inspected the tanks in question prior to January 1, 1990, and failed to advise the petitioner of obligation to obtain Section 25284 permits, it would be inequitable to preclude access to the Fund on the ground of permit noncompliance.

IV. ORDER

IT IS THEREFORE ORDERED that the final Decision of the Division rejecting the present claim of the petitioners, Claim No. 549, is reversed and this matter is remanded to the Division for further proceedings not inconsistent with this order.

CERTIFICATION

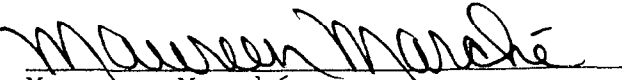
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 17, 1993.

AYE: John Caffrey
Marc Del Piero
James Stubchaer

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant
to the Board