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I. STATUTORY, REGULATORY, AND FACTUAL 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 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.

Both the statutes which authorize the reimbursement program and the Cleanup Fund Regulations address the issue of prioritization of reimbursement claims.

Section 25299.52(b) of the Health and Safety Code provides in relevant part that:

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

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"In awarding claims pursuant to Section 25299.57 or 25299.58, the Board shall pay claims in accordance with the following priorities:

"(1) Owners of tanks who are eligible to file a claim pursuant to subdivision (e) of Section 25299.54.

"(2) Owners and operators of tanks who meet the requirements of subdivision (a) of Section 15399.12 of the Government Code" D

Subdivision (a) of Section 15399.12 of the Government Code refers to a "small business" as defined by subdivision (c) of Section 14837 of the Government Code. Subdivision (c) of Section 14837 of the Government Code defines a "small business". R
That definition in relevant part reads as follows:

"`Small business' means a business in which the principal office is located in California, and the officers of such business are domiciled in California, which is independently owned and operated, and which is not dominant in its field of operation.

"In addition to the foregoing criteria the director [of the California Department of General Services], in making a detailed definition, shall use dollar volume of business as a criterion. The maximum dollar volume which a small business may have under the definition shall vary from industry to industry to the extent necessary to reflect differing characteristics of such industries. In addition, when the character of any given industry so requires, the director may consider financial ... arrangements of any applicant seeking classification under the definition [T]he director may take account of other relevant factors as determined by regulation." F
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The general thrust of the statutes just referenced is that second priority in reimbursement of claims from the Fund, which corresponds with Priority Class B under the Cleanup Fund Regulations, is to be given to small businesses as defined in regulations promulgated by the California Department of General Services, Office of Small and Minority Business (OSMB). OSMB has

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promulgated regulations which define those entities which qualify as small businesses. (Chapter 8, Title 2, California Code of Regulations.) In relevant part, Section 1896(n)(3) of the OSMB regulations provides:

"`Small Business', when used in reference to a service firm, means:

"A business concern in which the principal place of business is located in California and the owners (or officers in the case of a corporation) of such business are domiciled in California, which is independently owned and operated and which is not dominant in its field of operation; and which has been classified by Office of Small and Minority Business in one of the following industry groups, and does not have, together with any affiliates, annual receipts for the preceding three years, exceeding the maximum receipts specified below for the applicable industry groups

<u>Industry Group</u>	<u>Maximum Receipts For Prior Three Years</u>

(ix) Business Services	

(l) Accountants, Auditors and Appraisers.....	\$3,000,000
(m) Business Services Not Elsewhere classified.....	\$3,000,000
(x) Automobile Rental and Leasing	
(a) Automobiles.....	\$5,600,000

(xxv) Misc. Services Not Elsewhere Classified.....	\$1,100,000"

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On the subject of "small business", the Cleanup Fund Regulations provide in pertinent part:

" 'Small Business' means a business which complies with all of the following conditions

"(a) The principal office is located in California;

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"(b) The officers of the business are domiciled in California;

"(c) The business is independently owned and operated;

"(d) The business is not dominant in its field of operation; and

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"(e) Gross revenues from the business do not exceed the limits established by Section 1896 of Title 2 of the California Code of Regulations." (Cleanup Fund Regulations, § 2804.)

Early on, the Division decided that in determining what constituted a "small business" for purposes of assignment to Priority Class B, the Small Business Priority Classification, the Division would apply both the regulations and the regulatory interpretations and practices of OSMB as closely as possible. In substance this means that, insofar as possible, an application to the Division seeking the Small Business Priority Classification will be treated by the Division in the same manner that OSMB would treat an application for small business certification by the same applicant.

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Unfortunately, in at least one instance, due to an apparent misunderstanding between the Division and staff at OSMB, Division practices are not entirely consistent with those of OSMB. The discrepancy arose in this manner. When the Division

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developed its draft application for claims against the Fund, the Division included a listing of industry groups and three-year, maximum receipts drawn from the OSMB regulations. Applicants were instructed to use the industry group designated "(xxv) Miscellaneous Services Not Elsewhere Classified" in the OSMB regulations if the applicant's type of business was not identified in the industry group listing. As a result of the public workshops and other input received during development of the Cleanup Fund Regulations, it became apparent that many applicants to the Fund would be engaged in real property investment and operation and that these applicants were confused as to which industry group they belonged. Also, prior to preparation of the final application package, the Division obtained a copy of a booklet prepared by OSMB entitled "A Guide to State Contracting". The booklet contained industry group listings apparently used by OSMB which varied slightly from those set forth in the OSMB regulations, including a group entitled "Real Estate Operators and Business Services Not Elsewhere Classified". This industry group carried with it a three-year, maximum-receipts limitation of \$3 million. The Division checked with staff at OSMB to determine whether it would be appropriate to use this booklet industry group for real estate operators and investors, and the Division understood OSMB staff to indicate that it would be appropriate. Although no such industry group was listed in the OSMB regulations, the OSMB regulations, as indicated above, did contain an industry group covering "Accountants, Auditors and Appraisers" and a second group

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covering "Business Services Not Elsewhere Classified", both of which industry groups carried with them three-year, maximum-receipts limits of \$3 million. When the final Fund application package was prepared by the Division, the Division combined all three industrial groups just mentioned into one classification to derive an industry group designated as "Real Estate Operators, Accountants, Auditors, Appraisers and Business Services Not Elsewhere Classified" and established a three-year, \$3 million maximum-receipts limitation for this entire industry group. D

Subsequently, the Division again checked with OSMB staff to determine whether the booklet industry group, "Real Estate Operators and Business Services Not Elsewhere Classified", was the proper fit for real estate investors. OSMB staff responded that this industry group was normally reserved for hotel/convention facility type operators. OSMB staff indicated that real property investors would normally be assigned to the industry group designated in the OSMB regulations as "(xxv) Miscellaneous Services Not Elsewhere Classified". As indicated above, under OSMB regulations, this industry group is subject to a three-year, maximum-receipts limitation of \$1.1 million. At this point, since the intent of the Division had been widely publicized and presumably was being relied upon by various applicants, the Division decided to stay with the industry group that had been promulgated as part of the final application package, to wit, the combined industry group of "Real Estate Operators, Accountants, Auditors, Appraisers, and Business R F T

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Services Not Elsewhere Classified" with its three-year, \$3 million maximum-receipts limitation.

Petitioners submitted a reimbursement claim to the Division relating to a site located at 4648 East Waterloo Road, Stockton, California. The claim requested placement in Priority Class B, the Small Business Priority Classification. After review, the Division determined that the claim qualified for reimbursement from the Fund, but that the claim properly belonged in a lower priority class, Priority Class C, to which the claim was eventually assigned.

The factual situation which resulted in the Division's Decision is as follows. Petitioners, doing business as Marlowe Properties, own and lease various real properties, including the Waterloo Road site which was improved with a 550-gallon gasoline tank. In 1988 this tank was removed and residual contamination was discovered. Petitioners have since undertaken remedial action at the site. Petitioners indicate that approximately \$30,000 in corrective action costs have been incurred to date, and that it is anticipated that an additional \$500,000 will be needed to complete remedial action.

In addition to income from the real properties handled in the name of Marlowe Properties (Marlowe Properties receipts), the petitioners individually receive revenue from other property and other assets. During the three-year period from 1988 through 1990, the Marlowe Property receipts amounted to \$2,931,817. During the same period, the petitioners received

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some \$463,877 in additional receipts from their other assets, thereby increasing petitioners' total gross receipts for the three-year period to \$3,395,694.

As can be seen from the foregoing statutory and regulatory analysis, eligibility for the Small Business Priority Classification primarily depends on the industry group to which an applicant's business is assigned and the three-year, maximum-receipts limitation which applies to that industry group. The Division eventually determined that the petitioners' primary business activity was that of a real property investor and belonged within the industry group designated "Real Estate Operators, Accountants, Auditors, Appraisers, and Business Services Not Elsewhere Classified". As previously indicated, under the Cleanup Fund Regulations, this industry group is subject to a maximum-receipts limitation of \$3 million for the three-year period prior to filing of the claim. In view of the fact that the petitioners' receipts for this three-year period, at least as viewed by the Division, amounted to almost \$3.4 million, the Division determined that the petitioners' claim did not qualify for Priority Class B and assigned the claim to Priority Class C. It is this decision from which petitioners appeal.

II. CONTENTIONS AND FINDINGS

Contention: Petitioners contend that Marlowe Properties should have been assigned to an industry group with a higher maximum-receipts limitation than the \$3 million limitation

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applied by the Division, thereby entitling their claim to Priority Class B, the Small Business Classification. They base this contention on two arguments.

First, they argue that there is no existing OSMB industry group that clearly fits the type of business activity conducted by Marlowe Properties. Consequently, they assert that a new industry group should be established that does fit the business and normal receipts of real estate owners and investors. The petitioners suggest that a three-year, maximum-receipts limit of \$10 million would be appropriate for this new industry group.

Second, the petitioners argue that since there is no OSMB industry group which clearly fits the business done by Marlowe Properties, this business should be assigned to the established industry group which "best fits" the actual type of business being conducted by Marlowe Properties. In their view, the industry group which "best fits" Marlowe Properties would be the "Automotive Renting and Leasing (a) Automobiles" industry group (automotive leasing industry group) mentioned in the OSMB regulations. The petitioners contend that this industry group is the closest OSMB industry group in structure, function, and capital outlay to the Marlowe Properties type of business activity. The automotive leasing industry group is subject to a three-year, maximum-receipts limit of \$5.6 million. If this approach were taken, the three year total receipts of petitioners from all sources would fall with the \$5.6 million limit and the petitioners' claim would belong in Priority Class B.

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Finding: For purposes of reimbursement from the Fund, the Legislature intended that Priority Class B would be limited to those persons and entities who would qualify as "small businesses" under OSMB regulations. This was also the intent of the Cleanup Fund Regulations adopted by the State Water Board. While perhaps not compelled to do so, the Division went a step further, determining that, to the extent practicable, the Division would utilize the regulatory interpretations and practices used by OSMB in implementation of the OSMB program. The State Water Board approves of the Division's approach in this regard. Treatment of applicants for Priority Class B in the same general manner as OSMB would treat such applicants if they applied to OSMB for small business certification is the approach most likely to carry out the legislative intent expressed in Section 25299.52(b)(2).

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OSMB regulations and regulatory interpretations will not provide a complete answer to all issues which arise in the Cleanup Fund Program. As will be discussed hereafter, in certain areas at least, there is some apparent disagreement at various levels of OSMB staff on how certain regulations should be interpreted and applied. This leaves both the State Water Board staff and the Board itself in a position where they can, and in some cases must, develop and apply their own interpretation of OSMB regulations.

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Discussions with OSMB staff have indicated that in all cases where an applicant to OSMB does not fall within any specific industry group established by OSMB regulations, the

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applicant is assigned to one of the miscellaneous industry groups, either the Business Services Not Elsewhere Classified group with its \$3 million gross-receipts limit or the Miscellaneous Services Not Elsewhere Classified group with its \$1.1 million receipts limit. No new industry group is created in such circumstances, nor is such an applicant assigned to a specific category to which the applicant does not otherwise belong. This result flows from the fact that OSMB is itself bound by its own regulations which establish the miscellaneous groups for those applicants which do not fit within any of the specific groups designated in the OSMB regulations.

The Division's treatment of the petitioners' claim was generally consistent with the manner in which an application by the petitioners to OSMB for a small business certification would have been treated by OSMB. The petitioners' claim was assigned to an industry group which included Business Services not Elsewhere Classified with an applicable \$3 million receipts limit, which is consistent with the manner in which OSMB would have handled the situation. The State Water Board therefore finds the first contention of the petitioners to be without merit.²

² The State Water Board notes in passing that the Division's establishment of a combined industry group which includes Real Estate Operators, Accountants, Auditors, Appraisers, and Business Services Not Elsewhere Classified may tend to confuse issues. The Division ought to use the industry groups established by the OSMB regulations as those regulations stand without augmentation or modification. In the future, real estate operators and investors ought simply to be assigned to the Business Services Not Elsewhere Classified industry group so that the State Water Board practices are consistent with those of OSMB.

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Contention: Petitioners contend that the Division cast too wide a net in calculating the maximum receipts of the petitioners. Specifically, they assert that the maximum receipts of petitioners should be based solely on the Marlowe Properties receipts and should not include other incidental income of the petitioners. If this were done, the three-year, maximum-receipts figure would be \$2,931,817, which is below the \$3 million limitation applied to the petitioners' claim, and the claim would belong in Priority Class B.

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Finding: In this particular case, in determining whether the applicable \$3 million receipts limit has been exceeded, the Division ought to have looked only to Marlowe Properties receipts and ought not to have included other incidental income attributable to the petitioners individually.

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The petitioners argue that Marlowe Properties is in fact a classic type of small business. It owns and manages a limited number of rental properties, the majority of which are residential rather than commercial. It has only a small number of employees, generally less than 12, all but two of whom are part-time. It operates out of a small business office in San Rafael, utilizing a part-time bookkeeper for purposes of keeping separate books of account for the business operations. Mr. Marlowe works full time in the business, and is unsalaried. Profits from the business for the years 1988 through 1990 are modest. Under the particular circumstances of this case, and after review and consideration of the OSMB regulations and practices, the State Water Board believes that, for purposes of

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priority classification in this case, restricting consideration of gross receipts to the receipts shown on the books of account of Marlowe Properties would be consistent with both OSMB practices and regulatory interpretations.

OSMB regulations provide in relevant part that "annual receipts" means all pecuniary receipts entered on the applicant's regular "books of account". The regulations do not define what specific "books of account" are to be considered in any particular case, and the State Water Board understands that there is some disagreement between OSMB reviewing staff and OSMB hearing officers on how this regulation should be interpreted and applied in various circumstances. In this particular case, the State Water Board believes that it would be appropriate to consider the relevant "books of account" to be the "books of account" of Marlowe Properties. The operations of that business are conducted separate and apart from the personal affairs of Mr. and Mrs. Marlowe. The business has its own definable set of assets, separate "books of account" are maintained for the business operations, and the type of business operations and the amount of profit produced by the business operations would generally be considered to involve a "small business" operation.

Accordingly, the State Water Board finds, upon the specific facts of this case, that for purposes of determining priority classification for the petitioners' claim, the relevant "books of account" which ought to be considered consist of the "books of account" of Marlowe Properties alone.

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III. SUMMARY AND CONCLUSIONS

1. Priority Class B, the Small Business Priority Class, was intended to and shall be limited, insofar as practicable, to those persons and entities who would qualify for small business certification by OSMB under the regulations, interpretations, and practices of OSMB.

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2. The petitioners are not entitled to creation of a new industry group for real property operators and investors nor should their claim be assigned to any group other than the miscellaneous industry group designated Business Services Not Elsewhere Classified.

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3. Under the particular facts of this case, the relevant books of account for determination of maximum receipts for purposes of priority determination are the "books of account" of Marlowe Properties. Maximum receipts shown by these books of account for the relevant three-year period do not exceed \$3 million and petitioners' claim should be assigned to Priority Class B.

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IV. ORDER

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IT IS THEREFORE ORDERED that the final Decision of the Division placing the claim of the petitioners, Claim No. 43, in

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Priority Class C is set aside and this matter is remanded to the Division with instructions to place petitioners' claim in Priority Class B.

CERTIFICATION

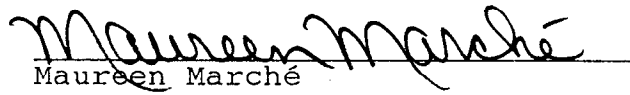
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 17, 1993.

AYE: John Caffrey
 Marc Del Piero
 James M. Stubchaer

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant
to the Board