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STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of **BRUNO SCHERRER CORPORATION** 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-2.	**ORDER NO. WQ 93-2-UST**

BY THE BOARD:

The Bruno Scherrer Corporation (petitioner) seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) which rejected a claim filed by the petitioner requesting reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

For the reasons hereafter stated, we conclude that 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[1], commencing with Section 25299.10, authorizes the State Water Resources Control Board (State Water Board) to conduct a

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

program to reimburse certain owners and operators of petroleum underground storage tanks for corrective action costs incurred by such owners and operators. Section 25299.77 of this chapter authorizes the State Water Board to adopt regulations to implement the program. On September 26, 1991, the State Water Board did adopt such regulations. The regulations, hereafter referred to as Cleanup Fund Regulations or 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 staff of the State Water Board and for appeal of any discretionary staff decisions to the State Water Board.

Petitioner submitted a reimbursement claim to the State Water Board. The material background of the claim is set forth immediately below.

The site in question is located at 25991 Crown Valley Parkway, Laguna Niguel, California. At all material times prior to November of 1989, the site was owned by Mr. and Mrs. Blair (hereafter Blair).

In 1977, three new 10,000 gallon, single-walled, steel underground storage tanks were installed at the site. These tanks were used for storage of regular, unleaded, and super unleaded gasoline. The site was thereafter operated as a Mobile Service Station for a number of years by Blair.

On October 9, 1986, the three gasoline tanks were precision tested and an apparent leak in the 10,000 gallon regular gasoline tank was discovered. The apparent leak was reported to the appropriate local agency and0Htothe San Diego Regional Water Quality Control Board (Regional Water Board), both of whom eventually issued corrective action orders. On November 25, 1986, the 10,000 gallon regular gasoline tank was removed, and it was determined that the soil beneath this tank was highly contaminated. It was subsequently determined that the unauthorized release from this tank had impacted both ground water and Oso Creek. Studies, planning, and remediation work commenced in December of 1986 and have continued since that date. Material in the claim application file indicates that the other two 10,000 gallon gasoline tanks were removed in 1987. There is no indication at this time that any contamination was associated with these two tanks.

Bruno and Grace Scherrer acquired the site in question from Blair on April 28, 1988. It appears that the purchase price for the property was $1.7 million. As part of the purchase arrangements, Bruno and Grace Scherrer assumed the duty of completion of site cleanup to the satisfaction of the Regional Water Board, such work to be completed at the expense of the purchasers. The site was then leased to the petitioner which assumed the cleanup obligation as part of the lease. At some time, petitioner obtained an assignment from Blair of all the Blair rights to claim against the Fund. Petitioner eventually

filed a claim with the Division seeking reimbursement for $115,000 in corrective action costs which the petitioner claims to have expended at the site.

Petitioner's claim was rejected by the Division on the grounds that petitioner was not an eligible claimant against the Fund. The Division concluded that access to the Fund was limited to owners or operators of tanks and that, since the tank which was involved in the unauthorized release was removed prior to petitioner's acquisition of the site, petitioner had never in fact owned the tank in question and was therefore not an eligible claimant. Petitioner thereupon sought State Water Board review of the Decision rejecting its claim.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that the Cleanup Fund Regulations permit claims by "de facto" owners of petroleum underground storage tanks, that petitioner qualifies as such an owner, and that petitioner is therefore entitled to file reimbursement claims against the Fund. We find this contention to be without merit.

Finding: The Fund is not available to all parties who are responsible for cleanup of sites which have been contaminated by unauthorized releases of petroleum. Access to the Fund was legislatively limited to owners and operators of tanks. This much is clear from the fact that Section 25299.54 limits access to the Fund to "owners and operators" who are defined by Sections 25299.20 and 25299.21 to be persons who own and operate

"an underground storage tank containing petroleum". The legislative intent to exclude other responsible parties from access to the Fund is also made apparent by a comparison of Sections 25299.37 and 25299.54. Section 25299.37 requires that "each owner, operator, or other responsible party" take corrective action in the event of an unauthorized release of petroleum. Yet Section 25299.54, which controls access to the Fund, specifically limits such access to "owners and operators". The words "or other responsible party" which are contained in Section 25299.37 are glaringly absent from Section 25299.54. Clearly, as indicated by Section 25299.37, the Legislature knew that persons other than owners and operators could become responsible for site cleanup, but persons other than owners and operators of tanks are excluded from participation in the Fund under the language of Section 25299.54. Under these circumstances, we can draw no other conclusion except that participation in the Fund was intentionally limited by the Legislature to owners and operators of tanks, and that other responsible parties were intentionally excluded from access to the Fund. Essentially, the State Water Board has no discretion in this area because the limitation is legislatively imposed and the language imposing the limitation is clear.

The State Water Board is the administrative agency charged with interpretation and implementation of the legislation which is involved, and the State Water Board does have some discretion in determining what circumstances will qualify one as the "owner" of a tank. In formulating and adopting the Cleanup

Fund Regulations the State Water Board did, as the petitioner contends, expand the concept of "ownership" to include "de facto" owners of tanks.

The term "de facto owner" is not defined in the Cleanup Fund Regulations and consequently we must at this time amplify on the meaning of that term and the persons who were intended to be encompassed within that term. In this regard, the circumstances which gave rise to opening the Fund to "de facto" owners of tanks are somewhat instructive.

During the course of development of the Cleanup Fund Regulations, it was brought to our attention that, in a number of cases, tanks had been installed on site by tenants who retained legal title to these tanks, but who thereafter abandoned both the tank and site leaving the landowner, who might not be the legal owner of the tanks, faced with responsibility for tank removal and site cleanup. Under the circumstances indicated, it seemed clear to us that characterizing such a landowner as a "de facto" owner and allowing such an owner access to the Fund was well within our power and was in fact consistent with legislative intent as we perceived it. In the cases that we were looking at, the landowner had actual physical possession and control of the tank and was being charged with responsibility for both removal and cleanup. In these circumstances, it involves no great stretch of language to hold that such a person is an "owner" of a tank for purposes of participation in the Fund.

At the same time, however, it was clear that the concept of "de facto" ownership for purposes of access to the

Fund had a somewhat limited application. The term was never intended to encompass within it a person who never had some sort of physical or legal possession of or control over the tank involved in the unauthorized release, such as a person who acquires a contaminated site after the tank in question had been removed. We thought we made this clear during the process of development of the Cleanup Fund Regulations.

During development of these Regulations, the State Water Board received a number of comments on the issue of tank ownership as a condition of participation in the Fund. Eventually, on August 21, 1991, the State Water Board disseminated a group of responses to the comments being received. The responses were intended to advise the public of the State Water Board's attitude regarding the comments being received and anticipated changes to the Regulations resulting from such comments. Comment 3 and the response thereto relate directly to the issue being raised by petitioner.

> "Comment 3. The definition of "owner" should be modified to make it clear that the owner of property which contains abandoned tanks can participate in the Fund. Owners of property where tanks have been removed and where there is residual pollution also ought to be able to participate.
>
> "Response. We have concluded that, to the extent possible, those persons who are legally responsible to remediate a site and who take the necessary action to do so should be permitted to participate in the Fund. We, therefore, propose to expand the definition of "owner" to include "de facto" owners of tanks. The revised definition adds the following to the definition of owner:
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> 'The term includes any person who has legal title to an underground storage tank and any owner of real property who is a de facto owner of an underground storage tank located on such property'.

"However, the Fund cannot cover every potentially responsible party. By definition, participation in the Fund is limited to owners and operators of 'an underground storage tank'. In those situations where the tank has already been removed leaving residual pollution which must be remediated, the owner of the site may be a responsible party, but such an owner cannot participate in the Fund. This appears to be the legislative intent. Article 4 of Chapter 6.75, commencing with Section 25299.36 of the H&SC, which deals with corrective action, clearly speaks only to participation in the Fund by owners and operators of underground storage tanks. We have no reason to believe that the limitation of Fund participation to owner and operators of tanks (thereby excluding participation of other responsible parties) was restricted in error or done inadvertently." (Emphasis partially supplied.)

It is clear from the response just quoted that the concept of "de facto" ownership was not intended to include persons, such as the petitioner, who acquires contaminated property after removal of the tank or tanks which were involved in the unauthorized release.

2. Contention: The petitioner contends that Blair would have been an eligible claimant against the Fund, and that the assignment of the Blair rights to the petitioner gives the petitioner the absolute right to proceed in the footsteps of Blair and to file claims against the Fund. We find this contention also to be without merit.

Finding: Whether Blair would or would not have been an eligible claimant in this case is not really an issue at the present time, although we will remark that Blair could not be an eligible claimant for any corrective action costs which were actually expended by petitioner. Only the petitioner can claim these costs. [Cleanup Fund Regulations, Section 2810.1(a)(6)].

The precise situation in this case is that petitioner purchased a contaminated piece of property with full knowledge that the site was contaminated and would have to be remediated. As a part of the purchase arrangements, petitioner agreed to cleanup the site at the expense of the petitioner. At some subsequent time, the approximate date being undisclosed by the petitioner, petitioner successfully obtained an assignment of rights against the Fund from the seller of the property who at one time had been the owner of the leaking tank. The precise issue in this case is whether, under the circumstances indicated, the purchaser/assignee is eligible to file a claim against the Fund for remedial action costs paid by the purchaser.

As we have indicated above, it is clear that access to the Fund is limited to owners and operators of tanks. Other persons, even if they are legally responsible for cleanup of a site, cannot participate the Fund. Consequently, the issue under consideration boils down to the question of whether the petitioner in this case can and should be considered to be an "owner" of the leaking tank by virtue of the subsequent assignment of rights obtained by the petitioner.

As we have also indicated above, we have some discretion to determine what circumstances will qualify a person as the "owner" of a tank. We have already exercised that discretion in one instance--to allow a "de facto" owner of a tank to qualify as an "owner" for purposes of Fund access. Should we allow the petitioner to qualify as an "owner" for purposes of

access to the Fund under the particular circumstances of this case. We think not for many reasons, including the following:

1. We should not lightly disregard the clear legislative intent that access to the Fund is limited to owners and operators of tanks, and that other responsible parties, including those who purchase contaminated property after removal of any leaking tanks, are not eligible for the Fund. While we are not presently prepared to hold that in all cases a person must at some time have had physical possession or control over the tanks in question in order to qualify as the "owner" of a tank for purposes of access to the Fund, we do not believe that the circumstances of this particular case.[2]

2. Allowance of claims against the Fund by persons in the position of petitioner carries with it some considerable potential for unjust enrichment of some claimants. Buyers in the position of petitioner who undertake to pay costs which otherwise must be borne by the seller normally obtain an adjustment in the price which would otherwise be charged to the buyer. If there is such an adjustment in price, and claims against the Fund by the purchaser are allowed, the result appears to involve a double benefit to the purchaser who receives both a reduced purchase price and reimbursement for the costs which

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2 Specifically, we do not decide at this time the issue of possible access to the Fund by persons who bargain for and obtain an assignment of rights from a seller who was a tank owner during the process of purchase of the contaminated property. Such a situation involves considerations which are somewhat different than those involved in this case.

occasioned the reduced purchase price. In this case, for example, it appears that the petitioner purchased the property at a price of $1.7 million knowing that substantial sums were going to have to be expended by the petitioner in remedial work at the site. If we assume that petitioner contemplated an approximate expenditure of $100,000 for necessary remedial work, it would seem that the petitioner judged the site to have a real fair market value of $1.8 million. If we now allow petitioner to access the Fund, it would seem that petitioner obtains a piece of property worth $1.8 million at a cost of $1.7 million and, in addition, thereafter obtains and additional $100,000 + payment from the Fund. We do not believe that it is appropriate to interpret the statutory limitations imposed by the Legislature in a manner which would promote this type of possible result.

3. The approach suggested by petitioner makes access to the Fund dependent on whether a purchaser of contaminated property after tank removal can at some subsequent time obtain an assignment of rights from a prior tank owner. Some like the petitioner will be able to do so. Many others, in virtually the same situation, will not be able to do so for a variety of reasons. For example, the seller/tank owner may be deceased and no longer capable of providing an assignment or unwilling to provide the assignment for various reasons. It does not seem appropriate to us to interpret the statutes involved in a

manner which allows access to the Fund by those who are fortunate enough to be able to obtain a piece of paper from a previous tank owner but to deny access to others in basically the same situation who for reasons beyond their control cannot obtain the assignment.

By way of a final comment, we recognize that while the present claim of the petitioner must be rejected 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 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. The only persons authorized to file claims against the Fund are owners and operators of petroleum underground storage tanks, including "de facto" owners of such tanks.

2. The concept of "de facto" ownership of a petroleum underground storage tank does not include persons who have not at some time had physical or legal possession of or control over the tank or tanks in question.

3. Persons who purchase contaminated property after removal of the tank or tanks which were involved in an unauthorized release are not "de facto" owners of tanks for the purpose of filing claims against the Fund.

4. Persons who purchase contaminated property after removal of the tanks involved in the unauthorized release do not become an "owner" of the tank for purposes of filing claims against the Fund through acquisition of a subsequent assignment of rights for a previous rank owner.

IV. ORDER

IT IS THEREFORE ORDERED that the Final Decision of the Division rejecting the present claim of petitioner, Claim No. 3375, 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