Keith

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of RJW LUMBER COMPANY 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. Our File No. UST-5.	**WQ ORDER NO. 92-15-CWP**

BY THE BOARD:

RJW Lumber Company (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, 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[1] commencing with Section 25299.10, authorizes the 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.

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

Section 25299.77 of this chapter authorizes the State Water Resources Control Board (State Water Board) to adopt regulations to implement the program. On September 26, 1991, the State Water Board adopted 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 involved is located in Healdsburg, California. Early in 1986 an unauthorized release of petroleum from a 2,000 gallon gasoline tank was discovered at the site. At that time, and for some years prior, the site and the tank had been owned by Boise Cascade Corporation. At that time, and at least since 1984, Mr. Rick Browning, an employee of Boise Cascade, was operations manager at the site. As operations manager, he had control over and responsibility for the daily operation of the underground storage tank in question. Mr. Browning was listed as foreman or supervisor on the application to close the tank and on

February 27, 1986, he made the necessary arrangements for removal of the tank. The tank was removed in April of 1986. From subsequent events, it appears that no further remedial action took place at this time. All of Mr. Browning's activities at the site through removal of the tank were undertaken as an employee of Boise Cascade Corporation.

In November of 1987, ownership of the site passed from Boise Cascade Corporation to BMC West, Inc. On May 14, 1990, title to the site passed to the petitioner, which agreed as a part of the purchase to be responsible for any necessary environmental cleanup at the site. It is alleged that this commitment was made because of knowledge that Boise Cascade Corporation had already removed the tank which was involved in the unauthorized release. Petitioner, RJW Company, is partially owned by Mr. Rick Browning. Petitioner immediately transferred title to the site to Montmorency Crushing and Fermentation Company, the current owner of the site, with the petitioner retaining responsibility for site cleanup. The petitioner has been the operator at the site since May 14, 1990. The petitioner alleges that it was thereafter discovered that a leak report had not been filed with the North Coast Regional Water Quality Control Board in 1986 and that, upon discovery of this, a leak report was sent to the Regional Water Board in March of 1990. The Regional Water Board thereafter required further investigative and clean-up activities at the site. The petitioner alleges that it has spent in excess of $95,000 to date

in clean-up activities and estimates that another $110,000 will be required to complete these activities.

Petitioner's claim was originally rejected by staff of the Division on the grounds that the petitioner had never been the owner or operator of the tank which was involved in the unauthorized discharge, that tank having been removed years before the petitioner acquired an interest in the site. Petitioner then sought a Division decision, contending that, under the particular circumstances of this case, Mr. Browning individually should be considered an operator of the tank in question and that the existing claim, although filed on behalf of the petitioner, should be considered to be a claim filed on behalf of Mr. Browning. The Decision upheld the rejection of petitioner's claim on the grounds that Mr. Browning controlled operations of the tank only as an employee of Boise Cascade Corporation and was therefore not an "operator" of the tank either for liability purposes or for purposes of access to the Fund. Because of the determination that Mr. Browning was not an eligible claimant, the Division did not feel it necessary to reach the issue of whether the existing claim of the petitioner could be or ought to be considered as a claim filed on behalf of Mr. Browning. Petitioner thereupon sought State Water Board review of the Decision rejecting its claim.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that the existing claim of RJW Lumber Company ought to be accepted. We find this contention to be without merit.

Finding: It is clear that access to the Fund is legislatively limited to owners or operators of underground storage tanks. Section 25299.54 expressly 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 responsible parties, other than owners and operators of tanks, from access to the Fund is also made apparent by a comparison of Section 25299.37 with Section 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" present 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 or operators of tanks are excluded from participation in the Fund by the language of Section 25299.54.

Under these circumstances, we can draw no other conclusion than that participation in the Fund was expressly limited by the Legislature to owners and operators of tanks, and that other responsible parties were intentionally excluded from access to the Fund. In this particular case, the tank involved in the unauthorized release was removed in 1986, long before RJW

Lumber Company acquired the site. RJW Lumber Company never owned or operated the tank involved in the unauthorized release and is not an eligible claimant against the Fund.

2. Contention: Petitioner contends that Mr. Browning individually ought to be considered as the "operator" of the tank in question because of the special circumstances of this case. The circumstances alleged include an allegation that Mr. Browning, while employed by Boise Cascade Corporation, had control of and responsibility for the daily operation of the tank in question from 1984 to 1986, that he was the contact person for the site, that he was listed as the foreman or supervisor on the application for a permit to close the tank in 1986, that he arranged for removal of the tank as operations manager for Boise Cascade, and that on the UST Unauthorized Release Report made in 1990, Mr. Browning is shown as both the contact person and the operator.

Petitioner further contends that the Division has confused the concept of "liability" for site cleanup with "eligibility" for participation in the Fund, that there is a sharp distinction between "operators for the purpose of legal responsibility" for cleanup and "operators for purposes of eligibility to file an SB 2004 claim", and that a person such as Mr. Browning can be an "operator" for purposes of filing a claim against the Fund even if that person is not an "operator" for purposes of being responsible for site cleanup.

Finding: We find these contentions to be without merit. The issues presented by petitioner in these contentions, as we see them, essentially amount to this:

a. Is a person who is not legally responsible for site cleanup eligible for reimbursement from the Fund?

b. Where an underground storage tank is owned and operated by a corporation, is an employee of that corporation whose duties include supervision and control over the tank an "operator" of that tank for purposes of cleanup responsibility and access to the Fund?

The answer to the first issue seems obvious, at least to us. Throughout Chapter 6.75, the terms "owner" or "operator" clearly infer a person who is legally responsible for site cleanup, that is, a person who can be ordered to clean up a contaminated site or charged with clean-up costs incurred by governmental agencies if he refuses to do so. For example, Section 25299.37(c) provides that a "local agency may issue an order to the owner, operator, or other responsible party" requiring corrective action at a contaminated site. Are we to suppose that this section was intended to authorize issuance of a corrective action order to a so-called "owner" or "operator" who is not legally responsible for the cleanup required and who cannot legitimately be required to undertake clean-up activities? Section 25299.70(a) provides that:

> "Costs incurred and payable from the (F)und ... shall be recovered ... from the owner or operator of the underground storage tank which released the petroleum and which is the subject of these costs."

Are we to suppose that this section was intended to authorize recovery of clean-up costs from a person who is not legally obligated to do the cleanup in the first place?

The issue is laid to rest by Section 25299.54(a). That section limits access to the Fund to "owners or operators" who are "required to perform corrective action pursuant to Section 25299.37" or who are "undertaking corrective action in compliance with waste discharge requirements or other orders".

In the case before us, Boise Cascade Corporation was clearly both an owner and operator of the tank in question. Legally, of course, under appropriate circumstances, there can be more than one operator of a tank. The precise question before us, however, is whether, if you have a corporation which is both owner and operator of a tank, is a corporate employee in charge of the day-to-day operations of the tank also be considered to be an "operator" for purposes of clean-up liability and access to the Fund. While we think that environmental cleanup laws ought to be broadly construed in order to achieve their objectives, we do not think that the laws which are under consideration ought to be construed to attach liability to corporate employees whose only nexus to the tank involved is as an employee of the corporation which owns and operates the tank. A contrary holding would in effect mean that clean-up liability is so broad that it attaches to the college student who pumps gas two days a week at the corner gasoline station. This sort of result would be, in

our estimation, unwarranted and unreasonable. As we have just indicated, a person who is not legally obligated to undertake clean-up activities cannot access the Fund. It necessarily follows that a corporate employee, such as Mr. Browning, who is not subject to cleanup responsibility cannot access the Fund.

III. SUMMARY AND CONCLUSIONS

1. Access to the Fund is limited to the owner or operator of an underground storage tank containing petroleum. Since the petitioner never owned or operated the tank in question, the petitioner is not eligible to file a claim against the Fund for clean-up costs associated with the tank in question.

2. Access to the Fund is limited to persons (owners and operators of tanks) who are legally responsible for cleanup of the contaminated site; that is, access to the Fund is limited to those persons who can legitimately be compelled to clean up the site or to repay clean-up costs incurred by governmental agencies.

3. Where a corporation is the owner and operator of a tank, a corporate employee whose only nexus to the tank is as a corporate employee is not personally or individually responsible for unauthorized releases from the tank, is not responsible for cleanup of the contamination caused by such a release, and is not an eligible claimant against the Fund. Under the circumstances of this case, Mr. Browning individually is not an eligible claimant against the Fund.

4. Since neither the petitioner nor Mr. Browning individually is an eligible claimant against the Fund, it is not

necessary for us to reach the question of whether the claim, which was actually filed by RJW Lumber Company, ought to be treated as a claim filed by Mr. Browning.

IV. ORDER

IT IS THEREFORE ORDERED that the Final Decision of the Division rejecting the claim of the petitioner, Claim No. 1476, 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 November 19, 1992.

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

NO: None

ABSENT: W. Don Maughan

ABSTAIN: None

Maureen Marché
Administrative Assistant
to the Board