

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
CALDO OIL 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.)
OCC File No. UST-4.)

ORDER NO. WQ 93-10-UST

BY THE BOARD:

Caldo Oil Company (petitioner) seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) regarding two claims filed by the petitioner seeking reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

For the reasons hereafter stated, we determine that the Division's Decision ought to be affirmed.

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

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

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 two reimbursement claims to the Division, Claim Nos. 3351 and 3352. Claim No. 3351 concerns a site located at 2266 Senter Road, San Jose, California (Parcel 1). Claim No. 3352 concerned an abutting site at 2276 Senter Road (Parcel 2).

For a number of years both sites have been owned by the petitioner. Parcel 1 is used as a bulk petroleum tank site. A possible unauthorized release at this site was discovered in December 1987, eventually leading to removal of 13 underground petroleum storage tanks at this site by March 30, 1988. Remedial action at the site has continued since that date. Petitioner's claim indicates that a total of \$882,000 has been spent on eligible corrective action at Parcel 1 and estimates that an additional \$50,000 will be required to complete the work which is currently underway.

Parcel 2 is used as a cardlock gasoline site. An unauthorized release was discovered at this site in April 1987, eventually leading to removal of four underground petroleum storage tanks and subsequent remedial action. The release eventually led to letters from the San Francisco Bay Regional Water Quality Control Board and the Santa Clara Valley Water District, the local enforcement and oversight agency, in January 1988, which required remedial action at Parcel 2. Petitioner's claim indicates that a total of \$832,000 has been spent on eligible corrective action at Parcel 2 and estimates that an additional \$75,000 will be required to complete the work which is currently underway.

The Fund generally provides that unauthorized releases caused by several sources but which require only a single site investigation shall be considered to constitute as one "occurrence". (Cleanup Fund Regulations, Sections 2804). The pertinent regulation reads as follows:

"'Occurrence' means an accident which results in an unauthorized release of petroleum from an underground storage tank. Unauthorized releases caused by several sources but which require only a single site investigation shall be considered as one occurrence. An unauthorized release subsequent to a previous unauthorized release at the same site shall only be considered a separate occurrence if site investigation and corrective action, exclusive of verification monitoring, have been completed for the prior unauthorized release."

State law limits reimbursement from the Fund to \$990,000 per "occurrence". (Health and Safety Code Sections 25299.57(a) and 25299.58(a) and (d)). Both Parcel 1 and Parcel 2

were the subject of a single site investigation which was conducted by Delta Environmental Consultants, Inc. The site investigation resulted in a single site investigation report for both parcels. After some confusion concerning the manner in which petitioner's two claims should be handled, the Division determined that only one "occurrence" had taken place, that the two claims should be combined, and that total reimbursement to the petitioner on the combined claims would be limited to \$990,000. It is from this determination that petitioner appeals.

In addition to seeking reversal of the Division's Decision, the petitioner, pursuant to Section 11347 of the Government Code, seeks partial repeal that of the regulatory definition of "occurrence". We will consider both of the petitioner's requests in this order.

II. CONTENTIONS AND FINDINGS

Contentions. Petitioner states that two separate sites are involved, that two separate releases of petroleum are involved, and that the releases took place at different times. Petitioner argues that under these circumstances two "occurrences" took place. Petitioner contends that under the circumstances of this case, the Division's determination that only one "occurrence" is involved, thereby limiting potential total reimbursement to \$990,000 rather than \$1,880,000, is arbitrary, capricious, and unreasonable. Petitioner argues that the approach of the Division could easily be carried to unreasonable extremes. As an example, petitioner postulates

that there could be a situation involving two releases miles apart with one investigator hired to investigate both sites. Petitioner argues that under these circumstances the Division's approach would mean that there was only one "occurrence" with potential total reimbursement thereby limited to \$990,000, which petitioner characterizes as an absurd result.

With respect to the regulatory definition of "occurrence" contained in Section 2804 of the Cleanup Fund Regulations, petitioner requests partial repeal of the current regulation. The repeal sought by petitioner is as follows:

"`Occurrence' means an accident which results in an unauthorized release of petroleum from an underground storage tank. *Unauthorized releases caused by several sources but which require only a single site investigation shall be considered as one occurrence. An unauthorized release subsequent to a previous unauthorized release at the same site shall only be considered a separate occurrence if site investigation and corrective action, exclusive of verification monitoring, have been completed for the prior unauthorized release.*"²

Petitioner contends that the portion of the definition in question ought to be repealed because it is inconsistent with itself and with the statutory definition of "occurrence" which is contained in Section 25299.19 of the Health and Safety Code.

² With regard to the present petition, the relevant language is that contained in the second sentence of the regulatory definition, i.e., the language which pertains to releases from several sources which require only a single site investigation. In the event that we were to repeal the second sentence of the definition in question, the third sentence might come into play in this case. Since we uphold the validity of the provisions contained in the second sentence, we will limit our subsequent discussion to the provisions of the second sentence.

For the reasons hereafter indicated, we find the contentions of the petitioner to be without merit.

Findings. Section 25299.19 of the Health and Safety Code defines an "occurrence" as follows:

"`Occurrence' means an accident, including continuous or repeated exposure to conditions, which results in an unauthorized release of petroleum from an underground storage tank."

For purposes material to this petition, this statutory definition is substantially contained in the first sentence of the regulatory definition contained in Section 2804 of the Cleanup Fund Regulations. The regulation, however, goes on to provide that:

"Unauthorized releases caused by several sources but which require a single site investigation shall be considered as one occurrence."

The added language represents a State Water Board interpretation of the statutory definition of "occurrence". The State Water Board, as the administrative agency charged with implementation of the Underground Storage Tank Cleanup Fund, has authority to interpret the statutory language which controls the Fund where there is any ambiguity or uncertainty in the statutory language or where interpretation is appropriate or necessary to carry out the legislative intent involved in creation of the Fund. Of course, any interpretation superimposed by the State Water Board on the statutory language must be reasonable.

Does the statutory definition of "occurrence" need interpretation and, if so, is the State Water Board's interpretation as set forth in the Cleanup Fund Regulations reasonable? In our estimation, the answer to both of these questions is in the affirmative.

The statutory definition of "occurrence" refers to an unauthorized release from an underground storage "tank". This reference does not preclude interpretation of the definition of "occurrence" to apply to a situation involving multiple tanks, however. Section 13 of the Health and Safety Code, which speaks to interpretation of the provisions of the Health and Safety Code, provides that the "singular number includes the plural and the plural the singular". Taking this provision into account, Section 25299.19 may properly be interpreted to define "occurrence" as the unauthorized release of petroleum from an underground storage tank or tanks.

This being the case it becomes necessary for the State Water Board to formulate an interpretation of the word "occurrence" in order to clarify those circumstances where releases from multiple tanks will be deemed to constitute one "occurrence" as opposed to those circumstances where releases from multiple tanks will be deemed to involve multiple "occurrences". To clarify the situation, the State Water Board adopted the regulatory language to which petitioner objects.

The approach taken by the regulation is reasonable. All the language says, at least as we intended it, is that

releases from multiple sources will be considered an "occurrence" when the facts and circumstances of the case are such that it would be feasible, reasonable, and logical to conduct a single site investigation covering all of the releases. Obviously, under this approach, whether one or more "occurrences" is deemed to have taken place will depend on the facts and circumstances of each case.³ Among other possible considerations, the result could depend on the nature of ownership of the sources, the time or times of discovery of the releases, the nature of the releases, the sites involved, the nature and sites of adverse impact from the releases, and the nature of the investigation which would be necessary.

Turning then to the facts of this particular case, was it feasible, logical, and reasonable to conduct a single site investigation of the multiple releases which were involved in this case? It obviously was feasible because that is in fact what occurred. Was it logical and reasonable? It seems to us to be so. Abutting parcels are involved. These parcels are owned by the same company, which uses both parcels in combined business activities. The releases on both parcels involve petroleum

³ Any regulation dependent on the facts and circumstances of each case, although reasonable on its face, can be carried to unreasonable extremes if applied to inappropriate circumstances. In the example postulated by the petitioner, releases at multiple sites miles apart, would it be appropriate to hold that only one "occurrence" took place if one consultant was hired and covered both sites by a single investigation and report? The answer obviously would depend on the facts and circumstances of the particular case. One can theorize a set of circumstances where it would be quite appropriate to hold that only one "occurrence" was involved even though multiple sites miles apart are involved, and a different set of circumstances can be theorized where such a result would indeed be arbitrary, capricious, and unreasonable.

products. The releases were discovered within a time frame which permitted a single site investigation. While petitioner alleges that the releases took place at different times, given the nature of the circumstances and the magnitude of the cleanup required, we would be very surprised if at least some significant portion of the releases on both parcels did not take place concurrently. Furthermore, unless the circumstances are somewhat unusual, we suspect that the impact from the releases on one parcel probably cannot be clearly distinguished from the impact of the releases on the other parcel. Given the particular facts and circumstances of this case, in our estimation, it is not only reasonable to find that only one "occurrence" took place, it would be illogical to hold otherwise.

III. SUMMARY AND CONCLUSIONS

1. The statutory definition of "occurrence" requires clarification and the State Water Board is authorized to adopt a regulation which reasonably interprets that term.

2. The State Water Board's interpretive regulation provides that unauthorized releases from several sources shall be considered as one "occurrence" if the releases require only a single site investigation. This interpretive regulation means that an unauthorized release from multiple sources will be deemed to constitute but one "occurrence" if it is feasible, logical, and reasonable to conduct a single site investigation of all releases. The interpretive regulation involves a reasonable construction of the statutory definition of "occurrence".

3. Under the particular circumstances of this case, only one "occurrence" took place and total reimbursement to petitioner on Claim Nos. 3351 and 3352 is limited to \$990,000.

IV. ORDER

IT IS THEREFORE ORDERED that the Division's Decision combining Claim Nos. 3351 and 3352 and limiting total reimbursement on both claims to a maximum of \$990,000 is affirmed.

CERTIFICATION

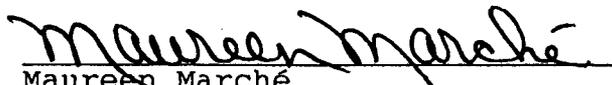
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 22, 1993.

AYE: John Caffrey
Marc Del Piero
James M. Stubchaer
Mary Jane Forster
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant
to the Board