

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
VOLLMAN/CLARK RANCH PARTNERSHIP)
)
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-38.)
_____)

ORDER NO. WQ 93-15-UST

BY THE BOARD:

Vollman/Clark Ranch Partnership, a general partnership, (petitioner) seeks review of a Final Division Decision (Decision) by the Division of Clean Water Programs (Division) regarding a claim filed by the petitioner seeking reimbursement from the Underground Storage Tank Cleanup Fund (Fund).

The ultimate issue involved in this petition is the Priority Class to which the petitioner's claim ought to be assigned. Petitioner sought placement of its claim in Priority Class B, commonly referred to as the Small Business Priority Classification. If the claim were determined to be ineligible for this Priority Class, petitioner sought placement of the claim in Priority Class C. The Division assigned petitioner's claim to a lower Priority Class, Priority Class D. For the reasons hereafter stated, this Order determines that petitioner's claim should be placed in Priority Class C.

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.

The Cleanup Fund Regulations provide that if the State Water Board does not act on a petition within 270 days after receipt, the petition shall be deemed to be denied. This time limit may be extended for a period not to exceed 60 calendar days by written agreement of the State Water Board and the petitioner. (Cleanup Fund Regulations, Section 2814.3(d).) The State Water

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

Board did not take action on this petition within either the 270-day period or 60-day extension period. The State Water Board has the discretion to waive any nonstatutory requirements pertaining to processing payment or approval of claims. (Cleanup Fund Regulations, Section 2813.3(e).) The State Water Board hereby exercises its authority to hear the petition, notwithstanding expiration of the time limits set by the Cleanup Fund Regulations. (See also Cleanup Fund Regulation, Section 28114.2(b) (authorizing the State Water Board to hear petitions on its own motion).)

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:

"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....

(3) Owners and operators of tanks, if the owner or operator owns and operates a business which employs fewer than 500 full time and part-time employees, is independently owned and operated, is not dominant in its field of operations, the principal office is located in California, and all of the officers of the business are domiciled in California.

(4) All other tank owners and operators."

Insofar as reimbursement from the Fund is concerned, under applicable Cleanup Fund Regulations, claims by tank owners and operators who fulfill the requirements of Section 25299.52(b)(1) of the Health and Safety Code are placed into Priority Class A. Claims by tank owners and operators who do not qualify for Priority Class A but who do meet the provisions of Section 25299.52(b)(2) are placed in Priority Class B. Claims by tank owners and operators who do not qualify for Priority Class B but who do meet the provisions of Section 25299.52(b)(3) are placed in Priority Class C. All other eligible claims go into Priority Class D.

Section 25299.52(b)(2) of the Health and Safety Code refers to Section 15399.12(a) of the Government Code. Section 15399.12(a) of the Government Code in turn 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". 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."

Subdivision (c) of Section 14837 further provides that these factors are "criteria" to be used by the Director of General Services in making a "detailed definition".

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 (hereafter OSMB).

OSMB has 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...." (Emphasis supplied.)

On the subject of qualification as a "small business", the Cleanup Fund Regulations were intended to and for the most part do mirror the OSMB regulations. 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;

(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

(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, Section 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 OSMB interpretations and applications of those regulations as closely as possible. In substance this means that, insofar as possible, a claim against the Fund seeking the Priority Class B will be treated by the Division in the same manner that OSMB would treat an application for small business certification by the same applicant.

Turning to the factual situation involved in this petition, the site in question is located in Walnut Grove, California (County of Sacramento). The site has been owned by the Vollman family since the 1870s. The site is mostly agricultural in nature, its primary use being that of a pear orchard. The frontage portion of the site has been developed to support commercial use. The file indicates that the commercial portion of the site over the years had as many as seven underground petroleum storage tanks located on it. When

the tanks were removed in May of 1990, extensive contamination was discovered. Petitioner undertook and is in the process of site remediation. As of the filing of its application with the Fund, petitioner had expended over \$17,000 in corrective action costs and estimated that expenditure of an additional \$170,000 would be required to complete site cleanup.

As indicated, the petitioner is a general partnership. This partnership, the Vollman/Clark Ranch Partnership, is comprised of two general partners, each of whom owns 50 percent of the partnership. One of the partners is Mrs. Elaine Vollman Clark. Mrs. Clark is domiciled in California. The other general partner in the Vollman/Clark Ranch Partnership is another general partnership entitled the Vollman Family Partners. This second partnership, the Vollman Family Partners, has four general partners. These partners, their percentage of ownership (their share of the Vollman Family Partners divided by two to reflect the Vollman Family Partners' ownership of one half of Vollman/Clark Ranch Partnership), and their domicile at the time of filing of the application for reimbursement from the Fund were as follows:

<u>Name of Owner</u>	<u>Percentage</u>	<u>Domicile</u>
Dennis Vollman	1/8 interest	California
Thomas Vollman	1/8 interest	Maryland
Joanne Vollman Booth	1/8 interest	Oregon
Patricia Vollman Morey	1/8 interest	Oregon

In summary, as far as domicile of the owners of the Vollman/Clark Ranch Partnership is concerned, the owners of five-

eights of this partnership are domiciled in California while the owners of the remaining three-eighths of the partnership reside outside of California.

As far as operation of the Vollman/Clark Ranch Partnership is concerned, Mr. Dennis Vollman is the Managing General Partner. Under the partnership agreement, he essentially has sole control over all business operations of this partnership.

As previously indicated, the petitioner requested placement of its claim in Priority Class B, or in the event that the claim was determined to be ineligible for Priority Class B for placement of the claim in Priority Class C. The Division determined that in order to be eligible for either Priority Class B or C, all owners of the business involved must be domiciled in California. Since the owners of three-eighths of the Vollman/Clark Ranch Partnership were domiciled outside of California, the Division determined that the petitioner's claim was not eligible for either Priority Class B or C, and the claim was placed in Priority Class D.

II. CONTENTIONS AND FINDINGS

Contentions. The petitioner contends that the Division's Decision was improper for a number of reasons. This contention is based on several arguments, but the basic thrust of petitioner's arguments can be reduced to two propositions. First, petitioner contends that the OSMB regulations pertaining to qualification as a small business go beyond the statutory

definition of a "small business" contained in Section 14837 of the Government Code and are therefore improper. Essentially, the gist of this argument is that Section 14837(c) of the Government Code speaks only to domicile of the "officers" of a business and that the OSMB regulations have improperly enlarged the statutory provisions to speak to the domicile of the "owners" of a business as well as to "officers" of a business. Assuming the validity of this argument, petitioner then argues that Mr. Dennis Vollman should be considered to be the sole "officer" of the Vollman/Clark Ranch Partnership since he has sole control over the business operations of the partnership.

Findings. The critical issues in this matter as the State Water Board sees them are as follows. Was OSMB authorized to promulgate regulations which define those entities which qualify as small businesses? Should the State Water Board follow the OSMB regulations in determining which claims against the Fund qualify for Priority Class B? In order to qualify for Priority Class C, must all of the owners of a partnership be domiciled in California? We conclude that OSMB was authorized to promulgate the regulations, and that the State Water Board should follow those regulations in determining which claims qualify for Priority Class B. We also conclude, however, that in the circumstances presented here, a partnership which is controlled by California residents may qualify for Priority Class C, even though a portion of the partnership is owned by persons who do not reside in California.

Clearly, as the agency authorized to administer the small business certification program authorized by the Government Code, OSMB has authority to adopt those regulations which are necessary to carry out that program. (Government Code Sections 14839(g) and 14843.) While Section 14837(c) of the Government Code may speak explicitly only to "officers" of a business, many of the businesses which would apply to OSMB for small business certification would not have "officers" per se. In common terminology, one generally speaks of "officers" of a business only in connection with corporate operations. One does not generally speak of an "officer" of a partnership, or an "officer" of a sole proprietorship, or other business association. It was certainly not unreasonable for OSMB to conclude that the basic intent behind the domicile requirement of Section 14839(c) was to limit small business certification to those unincorporated businesses which were owned by California domiciliaries as well as to those corporations whose officers were domiciled in California.

As has been pointed out above, the enabling statutes which control reimbursement from the Fund specifically limit Priority Class B to those claimants who could qualify for small business certification under the pertinent OSMB regulations. In adopting this approach, the Legislature must have been aware of the nature of the OSMB regulations then in effect and the fact that, where unincorporated businesses were concerned, the applicable OSMB regulations limited small business certification

to those unincorporated businesses whose owners were domiciled in California. Since the Legislature apparently intended to limit Priority Class B to those unincorporated businesses which were owned by California domiciliaries, the Board should adhere to and enforce the limitations which were legislatively imposed.

The statutory limitations with respect to Priority Class C also include requirements that the business be located in California and controlled by California residents. Aside from the limitation to businesses with less than 500 employees, which applies instead of the gross revenue limitations set by OSMB regulations, Section 25299.52(b)(3) uses essentially the same language in defining eligibility for Priority Class C as is used in Section 14837 of the Government Code to define "small business". In particular, both sections establish requirements that "the principal office is located in California" and "the officers of [the] business are domiciled in California". Unlike the definition of "small business" in Section 14837 of the Government Code, however, the qualifications for Priority Class C set by Section 25299.52(b)(3) of the Health and Safety Code do not refer to OSMB regulations establishing a "detailed definition". (Compare Cal. Gov. Code Section 14837(c) with Cal. Health & Saf. Code Section 25299.52(b)(3).) Nor do the qualifications for Priority Class C established by Section 25299.52(b) make any express reference to any statutes administered by OSMB.

The State Water Board therefore has some flexibility in applying the limitations on eligibility for Priority Class C that it does not have in determining eligibility for Priority Class B. Because the statutory limitations on eligibility for Priority Class C are patterned after the definition of "small business" in a statute administered by OSMB, OSMB's interpretation of the definition of "small business" are persuasive authority as to how the limitations on eligibility for Priority Class C should be interpreted. But the State Water Board is not bound by OSMB regulations in determining eligibility for Priority Class C. Indeed, in setting the criteria used in determining eligibility for Priority Class C, the Legislature intended to establish a priority group which would apply to some businesses which, although they are relatively small, do not satisfy all the criteria for qualification as a "small business".

We conclude that in the circumstances presented here, where the principal office of the business is in California, where 50 percent or more of the partnership interest is held by persons domiciled in California, and where the managing general partner, who under the partnership agreement has control over all business operations, is domiciled in California, the requirements for eligibility for Priority Class C have been satisfied insofar as they relate to the location of the business and its control by

California residents. Petitioner clearly satisfies all other applicable requirements for Priority Class C. Petitioner's claim should be placed in Priority Class C.

III. SUMMARY AND CONCLUSIONS

1. With respect to reimbursement from the Fund, under the priority structure chosen by the Legislature, Priority Class B is limited to incorporated businesses where all corporate officers are domiciled in California and to unincorporated businesses where all owners are all domiciled in California.

2. Where 50 percent or more of the partnership interest is held by persons domiciled in California, and where the managing general partner, who under the partnership agreement has control over all business operations, is domiciled in

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California, a partnership may be eligible for Priority Class C even though a portion of the partnership is owned by persons who are not domiciled in California.

IV. ORDER

IT IS THEREFORE ORDERED that this matter be remanded to the Division for placement of petitioner's claim in Priority Class C.

CERTIFICATION

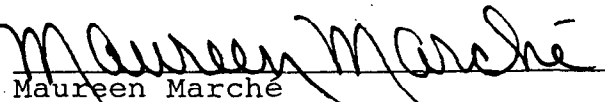
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 18, 1992.

AYE: John Caffrey
Mary Jane Forster
John W. Brown

NO: None

ABSENT: Marc Del Piero
James M. Stubchaer

ABSTAIN: None


Maureen Marché
Administrative Assistant
to the Board