

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WQ-2007-0011-EXEC**

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In the Matter of the Petition of

**MURRAY KELSOE**

For Review of a Decision  
Of the Division of Financial Assistance,  
State Water Resources Control Board,  
Regarding Eligibility of a Claim to the  
Underground Storage Tank Cleanup Fund

**SWRCB/OCC FILE UST-208**

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ORDER PARTIALLY VACATING ORDER WQ 2004-0015-UST

BY THE EXECUTIVE DIRECTOR<sup>1</sup>:

By this order, the Executive Director partially amends State Water Resources Control Board (State Water Board) Order WQ 2004-0015-UST (*In the Matter of the Petition of Murray Kelsoe or Kelsoe Order*). The amendment establishes a narrow exception to the general rule regarding the availability of underground storage tank (UST) permit waivers for purposes of accessing the UST Cleanup Fund (Fund). This order also directs the State Water Board's Division of Financial Assistance to consider Kelsoe's eligibility for a permit waiver.

The State Water Board issued the *Kelsoe Order* on October 21, 2004. In the *Kelsoe Order*, the State Water Board found that Kelsoe had not complied with permitting requirements because the USTs had not been properly permitted at all times, beginning from when the local agency began issuing UST permits. The *Kelsoe Order* also held that permit waivers authorized under Health and Safety Code section 25299.57, subdivision (d)(3)(B) may only be used to excuse permit noncompliance that occurred before January 1, 1990. Since the permit waiver could not be used to excuse Kelsoe's permit noncompliance that continued until 1994, Kelsoe would not be eligible for the Fund even if he sought a permit waiver. Kelsoe had

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<sup>1</sup> State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to set aside a State Water Board order, in whole or in part, as commanded by a preemptory writ of mandate issued to the State Water Board.

argued that he satisfied permitting requirements by obtaining a permit before applying to the Fund and that a permit waiver was not necessary.

Kelsoe filed a petition for writ of mandate in Alameda County Superior Court (Superior Court) challenging the *Kelsoe Order*. The Superior Court denied the petition for writ of mandate, and Kelsoe filed an appeal with the California Court of Appeal, First Appellate District (Court of Appeal). The Court of Appeal issued a decision that authorizes consideration of permit waivers under fact patterns similar to Kelsoe. In other words, the Court of Appeal's decision allows Fund claimants like Kelsoe (i.e, claimants whose violations began before 1990 and continued beyond January 1, 1990, but who later paid thousands of dollars into the Fund over a period of substantial compliance) to seek a permit waiver to excuse permit noncompliance that began before January 1, 1990, and that continued after that date. The Court of Appeal reversed the trial court decision and remanded the matter for the limited purpose of determining whether Kelsoe satisfies the requirements for a permit waiver.

On September 27, 2007, the Superior Court directed the State Water Board to vacate its October 21, 2004, *Kelsoe Order* for the limited purpose of determining whether Kelsoe satisfies the requirements for a permit waiver. The Superior Court directed that this determination be made in a manner consistent with the holding of the Court of Appeal. In all other respects, Kelsoe's petition for writ of mandate is denied.

#### ORDER

IT IS HEREBY ORDERED that WQO 2004-0015-UST is partially vacated for further proceedings consistent with this order.

The Division of Financial Assistance is directed to comply with the Superior Court's order by considering whether Kelsoe qualifies for a permit waiver under Health and Safety Code section 25299.57, subdivision (d)(3)(B).

Dated: DEC 13 2007

  
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Dorothy Rice  
Executive Director