STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of **QUAKER STATE 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. SWRCB File UST-103.	ORDER: WQ 97-06-UST

BY THE BOARD:

Quaker State Corporation (petitioner), a copayee on an Underground Storage Tank (UST) Cleanup Fund (Fund) claim submitted by Fullerton Manufacturing Company (Fullerton), seeks review of the Division of Clean Water Programs (Division) Final Division Decision (Decision) concerning Fullerton's claim.

The issue presented by this petition is whether approximately $550,000 in costs that petitioner incurred cleaning up contamination from a petroleum UST were incurred on behalf of Fullerton and, therefore, should be reimbursed under Fullerton's priority B claim, rather than petitioner's own claim. A claim filed by petitioner would be ranked priority D. The Division rejected petitioner's argument that the costs were incurred on behalf of Fullerton for two reasons. First, petitioner and Fullerton had not expressly agreed prior to incurring the costs

that they would be incurred on Fullerton's behalf. Second, an agency relationship did not exist between the two entities at the time the costs were incurred. On the grounds set forth below, the Division's Decision is affirmed.

I. STATUTORY, REGULATORY, FACTUAL, AND PROCEDURAL BACKGROUND

The Fund, administered by the State Water Resources Control Board (SWRCB), was created by the Barry-Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (Act) (Health & Saf. Code §§ 25299.10-25299.83). Owners and operators of petroleum USTs who meet certain statutory requirements may request reimbursement from the Fund for costs that they incur cleaning up contamination from petroleum USTs. (Health & Saf. Code §§ 5299.54, 25299.57.)

The Act provides that claimants to the Fund are to be ranked and reimbursed in accordance with their placement in one of four priority classes. (Health & Saf. Code § 25299.52.) The two priority classes relevant to this order are priority classes B and D. Small businesses are placed in priority class B. Fund claimants with substantial resources and over 500 employees are placed in priority class D.

On September 26, 1991, the SWRCB adopted regulations implementing the Act pursuant to the SWRCB's statutory authority contained in section 25299.77 of the Health and Safety Code. Fund regulations limit reimbursement to "[a]n owner or operator

who has paid or will pay for the costs claimed." (Cal. Code Regs., tit. 23, § 2810.1, subd. (a)(6).) The regulations also provide, however, that "costs incurred by or on behalf of a claimant shall be reimbursable from the Fund." (Cal. Code Regs., tit. 23, § 2812.2, subd. (b), emphasis added.) This petition concerns the proper interpretation of this last provision.

Turning to the facts of this case, on February 20, 1985, petitioner signed a purchase agreement with Fullerton to buy the property that is the subject of Fullerton's claim, located at 336 East Santa Fe Avenue in Fullerton, California. Subsequently, petitioner learned that a petroleum UST was located on the property. Fullerton removed the tank and presumably discovered contamination at that time since the parties amended the purchase agreement. The amendment provided that, as a condition to the close of escrow, Fullerton would remove and dispose of the contaminated soil surrounding the former UST to the satisfaction of the regulatory agency with jurisdiction over the site. Fullerton removed some contaminated soil and by letter dated April 11, 1985, the Santa Ana Regional Water Quality Control Board (RWQCB) notified Fullerton that, though some hydrocarbons remained, the RWQCB did not believe that a threat to water quality existed.

Escrow closed and petitioner operated a warehouse storing motor oil on the site for a number of years. (The motor oil was not stored in USTs.) Then, in 1991, petitioner

discovered gasoline contaminated soil in the vicinity of the former UST during an investigation performed in connection with the prospective sale of the property. Petitioner demanded that Fullerton assume responsibility for the cleanup.

According to petitioner, Fullerton refused to assume responsibility, so petitioner began the cleanup itself. Ultimately, petitioner filed suit against Fullerton in July of 1992. Petitioner alleged, among other things, breach of contract and breach of warranty, and later added a claim under the Resource Conservation and Recovery Act (42 U.S.C. §§ 6921-6939e). The parties settled the lawsuit for $100,000 and agreed to cooperate in filing a claim with the Fund. (Petitioner explained that it agreed to settle because Fullerton was on the verge of filing bankruptcy.) Pursuant to their settlement agreement, the parties also entered into an agency agreement dated January 28, 1994. The agency agreement appoints petitioner as Fullerton's special agent for purposes of conducting and paying for ongoing cleanup at the subject site.

In January of 1994, Fullerton filed a claim with the Fund, naming petitioner as a copayee. Fund staff placed Fullerton's claim in priority class B. Staff accepted Fullerton's and petitioner's contention that costs incurred by petitioner after the parties entered into the agency agreement were incurred on behalf of Fullerton and, therefore, could be reimbursed under Fullerton's claim. Staff also determined,

however, that petitioner would have to file its own claim for costs it incurred prior to the agency agreement. The rationale for staff's determination was that the parties had not expressly agreed before incurring those costs that they would be incurred on behalf of Fullerton.[1] If petitioner were to file its own claim, it would be placed in priority class D.

On appeal, the Division rejected petitioner's argument that because Fullerton was responsible for the cleanup pursuant to the purchase agreement, petitioner had incurred the costs in question on behalf of Fullerton. The Division reasoned that Fullerton's agreement to conduct the cleanup to agency satisfaction was a condition to the close of escrow and did not address payment of costs incurred at a later date. The Division also pointed out that the purchase agreement did not provide that Fullerton would indemnify petitioner for future costs incurred, nor did it create an agency relationship between the parties. Those scenarios, if true, would support the argument that costs were incurred on Fullerton's behalf. Finally, the Division explained that the Fund did not want to get involved in disputes over responsibility for cleanups.

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[1] Although Fullerton removed the UST before legal title to the subject site transferred to petitioner at the close of escrow, Fund staff determined that petitioner became an equitable UST owner eligible to apply to the Fund when petitioner entered into the purchase agreement and equitable title to the site passed to petitioner.

II. CONTENTION AND FINDINGS

Contention: Petitioner contends that the costs that it incurred before entering into the agency agreement with Fullerton were incurred on behalf of Fullerton and should be reimbursed under Fullerton's priority B claim. In support of its position, petitioner claims that Fullerton was obligated to conduct the cleanup pursuant to the purchase agreement and that petitioner is entitled to equitable indemnification from Fullerton for the costs of that cleanup. Petitioner also claims that an agency relationship was created between the parties by virtue of Fullerton's subsequent ratification of the cleanup conducted and paid for by petitioner. Finally, petitioner argues that equitable considerations weigh in petitioner's favor.

Findings: Petitioner's arguments lack merit. The costs at issue were not incurred on behalf of Fullerton because petitioner and Fullerton did not expressly agree that petitioner would do so on Fullerton's behalf. In addition, Fullerton's alleged ratification of the cleanup performed by petitioner is insufficient to establish that petitioner incurred the costs of that cleanup on behalf of Fullerton. Finally, equitable considerations favor requiring petitioner to file its own claim.

The requirement that an express agreement between a claimant and another person be in place before the person can incur costs "on behalf of" the claimant is reasonable and consistent with legislative intent. The regulatory language

permitting reimbursement of costs incurred "on behalf of" a claimant stems from the Fund's expectation that insurance companies would advance money to claimants, and then exercise their subrogation rights to recover the money advanced when the claimants received reimbursement from the Fund.[2] In those cases, costs would be incurred by insurance companies "on behalf of" their insureds, the claimants.

Though the Fund only contemplated advances by insurance companies when it drafted section 2812.2, subdivision (b), the Fund has, in past decisions and in this case, permitted persons other than insurance companies to advance money to claimants for cleanup.[3] Where the person advancing funds is not an insurance company, however, the Fund has required that an express agreement be in place before costs are incurred. In both instances, the

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[2] See Public Hearing on Underground Storage Tank Cleanup Fund Proposed Emergency Regulations held by the State Water Resources Control Board, Division of Clean Water Programs on July 31, 1991, pp. 10-11, pp. 37-40 (discussing the Fund's intent, later expressed in section 2812.2, subdivision (b) of the regulations, to reimburse claimants who had received advances from their insurance companies, so long as the claimants repaid the insurance companies and so did not receive a "double payment").

[3] The Fund has not, however, permitted other responsible parties to advance money to claimants when doing so would have constituted a clear circumvention of eligibility requirements or the priority scheme. Thus, for example, the Fund did not permit a major oil company that had owned and operated USTs on a site for many years to advance money to the subsequent owner of the USTs. The subsequent owner was a small business which had owned the USTs for a few months and had never operated them. In that case, the major oil company was without question primarily responsible for the cleanup, and the Fund did not accept the company's argument that it was incurring costs on behalf of an entity other than itself. In the instant case, by contrast, a genuine dispute existed concerning petitioner's and Fullerton's responsibility relative to one another, so Fund staff permitted petitioner to advance money to Fullerton pursuant to the agency agreement between the two.

insurance company or other person funding the cleanup does so in the expectation that they will be repaid, and it is clear that they are acting on behalf of the claimant in this respect.

The requirement that a claimant and another person expressly agree that the other person will incur costs on behalf of the claimant is also consistent with the plain meaning of the phrase "on behalf of." One meaning of "on behalf of" is "[a]s the agent or representative of [another]; in the name of." (The New Shorter Oxford English Dictionary (1993) p. 207.) An agent is a person who is authorized by another (the principal) to act on his behalf. (Rest.2d Agency § 1, com. a.) An express agreement, then, demonstrates that a claimant has authorized another to incur costs on the claimant's behalf.

In addition to being consistent with legislative intent and the plain meaning of the regulatory language, the requirement that an express agreement be in place avoids the administratively burdensome task of determining who is most responsible for site cleanups. Were the SWRCB to accept petitioner's contention that costs are incurred "on behalf of" the person most responsible for cleanup, the Fund would be faced with difficult determinations of paramount responsibility in complex cases that typically involve multiple parties and tangled site histories.[4] Such a

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[4] The instant case serves as a good example of the difficulty entailed in determining responsibility even in cases that appear to be relatively straightforward. Despite petitioner's assertion to the contrary, Fullerton had a fair argument that it had not breached the purchase agreement. Fullerton had *(Continued)*

determination would be especially difficult in cases where responsibility is disputed.

Petitioner argues vigorously that Fullerton was responsible for and should have performed the cleanup, but it does not follow from Fullerton's alleged responsibility that petitioner incurred the costs on behalf of Fullerton. The critical question is whether petitioner incurred costs pursuant to an agreement with Fullerton.

For the same reason, another of petitioner's arguments is unavailing. The Division gave as an example of the requisite express agreement, an indemnity agreement, a claimant's agreement to reimburse another person for costs incurred. In response, petitioner argues that it was entitled to equitable indemnity from Fullerton. Petitioner misses the point. The critical difference between an indemnity agreement and equitable indemnity is that the former evidences that the parties to the agreement proceeded with a common understanding. The latter concerns only whether one person may, in retrospect, be entitled to recover from the other. And, as explained above, that petitioner may be

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removed some soil, apparently in good faith, and had received a clean bill of health from the RWQCB. Arguably, petitioner assumed the risk that contamination remained; the RWQCB's letter did state that the soil still contained hydrocarbons. In fact, far from conceding to responsibility, Fullerton denied the allegations in petitioner's complaint. And, before settling the case, Fullerton conducted extensive discovery in preparation for its defense. In short, it is often unclear who is most responsible for site cleanups.

entitled to recover its costs from Fullerton does not mean that petitioner was acting on Fullerton's behalf.[5]

Petitioner also points to the purchase agreement in support of its contention that it incurred the disputed costs on Fullerton's behalf. This argument, too, is unpersuasive as the purchase agreement provided that Fullerton would clean up the site as a condition to the close of escrow and did not address future clean-up costs. The purchase agreement may support petitioner's argument that Fullerton should have conducted the later cleanup, but it does not support its argument that it conducted that cleanup on Fullerton's behalf.

Petitioner also claims that an agency relationship was created between the parties by virtue of Fullerton's subsequent ratification of the cleanup conducted and paid for by petitioner. But the existence of an agency relationship is only significant to the extent that it indicates that petitioner acted on behalf of Fullerton. As explained earlier, an agent is a person authorized by another (the principal) to act on the principal's behalf; so, by definition, petitioner would have been acting on behalf of Fullerton if petitioner had acted as Fullerton's agent. In this case, petitioner cannot possibly have been acting on behalf of Fullerton because, prior to settling the lawsuit and

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[5] Moreover, a hearing before the SWRCB is not the proper forum for determining whether petitioner may be entitled to equitable indemnity from Fullerton. That matter should be resolved in a court of law.

appointing petitioner as its special agent, Fullerton denied any responsibility whatever for the cleanup.

The possibility that an agency relationship may have been created by subsequent ratification is unhelpful to petitioner. Ratification is a legal concept whereby the unauthorized act of a purported agent is treated as though it had been authorized. (Rest.2d Agency § 82, com. b; 2 Witkin, Summary of Cal. Law (9th ed.) Agency and Employment, § 87, p. 88.) The fact that Fullerton may have ratified petitioner's actions after-the-fact,[6] however, does not mean that petitioner acted on behalf of Fullerton within the meaning of the Fund's regulation.

Moreover, petitioner has presented no compelling reason why the SWRCB should treat petitioner as though it had been acting on behalf of Fullerton. The fundamental issue here is whether the costs incurred by petitioner should be treated as though they were incurred by a small business, in view of the legislative policy that small businesses should have higher priority for reimbursement because they are less able to defray the costs of cleanup. Fullerton's alleged ratification has no bearing on petitioner's ability to defray the costs of cleanup, and does not change the fact that at the time the costs were

[6] Because creation of an agency relationship by subsequent ratification is insufficient to establish that petitioner acted on behalf of Fullerton, the SWRCB need not address the question whether Fullerton has in fact ratified petitioner's actions.

incurred they were incurred on behalf of petitioner, not Fullerton.

Petitioner's final argument is that processing payment of the disputed costs under Fullerton's claim would be equitable in light of petitioner's prompt response to RWQCB directives and would encourage such a prompt response in similar cases. But, again, the proper focus should be on petitioner's ability to defray the costs of cleanup, not on who by rights should have conducted that cleanup. Irrespective of Fullerton's responsibility, petitioner incurred the costs at issue on its own behalf as the current property owner required to comply with RWQCB directives. To permit petitioner to be reimbursed for those costs under Fullerton's claim would constitute circumvention of the priority scheme. That would be unfair to claimants in priority classes B and C who are also waiting for reimbursement and whose financial resources are more limited than those of petitioner. In sum, contrary to petitioner's assertion, equity favors requiring petitioner to file its own claim.

III. SUMMARY AND CONCLUSIONS

1. Otherwise eligible corrective action costs incurred by or on behalf of a claimant are reimbursable from the Fund.

2. In order for a person to incur costs on behalf of a claimant, the person and the claimant must expressly agree before

incurring those costs that they will be incurred on the claimant's behalf.

3. A claimant's alleged responsibility for a given site cleanup does not establish that the costs of that cleanup are incurred on the claimant's behalf.

4. A claimant's subsequent ratification of a cleanup conducted and paid for by another person is likewise insufficient to establish that the person incurred the costs of that cleanup on behalf of the claimant.

5. Prior to the agency agreement between petitioner and Fullerton, the two parties had not expressly agreed that petitioner would incur costs on behalf of Fullerton. Consequently, petitioner did not incur the costs at issue on behalf of Fullerton.

IV. ORDER

IT IS THEREFORE ORDERED that the Division's Decision holding that petitioner did not incur clean-up costs on behalf of Fullerton

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before the two parties entered into the agency agreement 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 June 19,1997.

AYE: James M. Stubchaer
Marc Del Piero
Mary Jane Forster

NO: John W. Brown

ABSENT: John Caffrey

ABSTAIN:

Maureen Marché
Administrative Assistant to the Board