

New Legislation Changes Eligibility to State Fund for Tank Cleanup

A new law, AB 1437, went into effect on January 1, 2008. This law significantly changes who is eligible to receive money under the California Underground Storage Tank Cleanup Fund. This office drafted the bill that was originally introduced to make these changes and worked closely with the bill's primary sponsor, Greg Aghazarain, in negotiating the final form of the bill.

Background: The Fund, Eligibility, and Permit Waivers

From 1994 until about 2004, environmental professionals throughout California regarded a state fund as a widely available source of money to clean up spills from underground fuel storage tanks. Then, without any changes in the regulations that governed the fund, applicants to the fund started getting turned down. Cleanups were delayed. Individuals and small businesses with contaminated properties were put in financial jeopardy. This newsletter is intended not only to describe the legislative response, but also to explain why new legislation was necessary.

In 1990, California adopted the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 (the "Act"). The Act imposed a fee on gasoline stored in underground tanks, and dedicated the proceeds to a fund to be used to clean up fuel spills from underground tanks. The fund is administered by the State Water Resources Control Board (the "Board"). Under the Act, as originally passed, an owner or operator of a tank could apply to the fund for reimbursement of costs to clean up spills from fuel tanks. But to establish eligibility to get money from the fund, the owner or operator had to show compliance with a law passed in 1984 that required all owners and operators to have a permit for their tanks (the "permit requirement").

Showing compliance with the permit requirement as a condition of access to the fund quickly became a problem for several reasons. The permit program was established by state law but was run by local governments, and many local governments were not able to put procedures in place to issue permits for several years after 1984. As a result, many tank owners could not get a permit for their tanks for several years after the state requirement became effective. Many underground fuel tanks were owned or operated by small businesses. Since many local governments did not aggressively educate the small business community about the permit law, many owners and operators were not aware of the need to get a permit for their tanks. As a result, many applicants to the fund got turned down because they had failed to obtain a permit when required.

In 1994, the Legislature addressed this problem of eligibility by inserting a "permit waiver" into the Act. The permit waiver provisions were complicated and poorly

drafted. Nonetheless, from 1994 until 2004 there was a widespread understanding, based on the Board's regulations and forms and on how the Board granted permit waivers, about what the permit waiver provisions meant. In summary, from 1994 until approximately 2004, the failure to have a permit before January 1, 1990 did not affect eligibility for the fund. No permit waiver was necessary. For those owners and operators who had a tank in the ground as of January 1, 1990 but did not have a permit after that date, they could get a permit waiver and be eligible to obtain money from the fund if they could show that (1) prior to January 1, 1990 they were unaware of the permit requirement, (2) there was no intent to avoid the permit requirement, and (3) they had, prior to submitting a completed application to the fund, obtained all currently required permits. This is how eligibility was determined for ten years.

The Problem: The Kelsoe Decision:

In 2004 the Board decided a case called In re Kelsoe. The Board denied Mr. Kelsoe access to the fund, and ruled that permit waivers could only excuse the failure to have a permit before January 1, 1990. In other words, anyone who had a tank in the ground as of January 1, 1990 and did not have a permit by that date could not get a permit waiver and was ineligible for the fund. This decision was in direct contradiction to the Board's own regulations and application forms.

As a result of the Board's decision, many tank operators, some of whom (like Mr. Kelsoe) had paid the storage fee into the fund for years, were barred from obtaining cleanup funds because of permit violations that were cured long ago. Without access to these funds, owners were often unable to proceed with cleanup. As a result, ground water at these sites remained contaminated and the effected individuals and small businesses were faced with financial ruin.

The Responses: Appellate and Legislative

Mr. Kelsoe's lawyer filed an action in Superior Court to challenge the Board's action. The Superior Court, finding the statute difficult to construe, deferred to the Board and ruled in the Board's favor in October 2005.

Mr. Kelsoe's lawyer appealed to the Court of Appeals. This office, representing a client who had applied to the fund for cleanup costs and who stood to be denied because of the Board's decision in Kelsoe, filed an amicus brief in support of Mr. Kelsoe.

However, this office recognized both that there were important factual differences between Mr. Kelsoe's position and that of its client, and that there was a distinct possibility that the Court of Appeals would be similarly confused by the dense language of the statute and defer to the Board. Accordingly, this office began pursuing a legislative solution. After a long search, Assemblymembers Greg Aghazarain (R-26) and Ted Lieu (D-53) agreed to sponsor AB 1437 in the 2007 session to address this problem.

The original bill, as drafted by this office, would have clearly stated that anyone who had obtained and paid for all necessary permits before applying to the fund was eligible, no matter when that compliance was achieved. That bill would also have made the fund available to address historic contamination caused by fuel tanks at most “brownfield” sites. However, the Board’s staff strongly opposed this approach, and used its influence with Legislative committees to insist on narrowing the bill. The gasoline dealer community, which had been a strong supporter of the original 1994 permit waiver provisions, did not participate in the debates, probably because many spills had already been cleaned up, and also because changes in the way gasoline is sold means that there are many fewer dealers today than there were in 1994.

The Legislative Answer: AB 1437:

The bill that finally passed has both good and bad provisions.

The bad news is that the bill provides that an applicant to the fund must have obtained a permit when the tanks were first subject to the permit requirement, or when the local agency first started issuing permits, whichever is later. For tanks that were in the ground prior to 1990, this means, in many cases, that the applicant must have had a permit before 1990. This is a more stringent rule than the one that applied between 1994 and 2004.

The good news is the new permit waiver. It is not linked to any particular date, nor is it linked to any finding of “intent” by the applicant. However, the applicant must have been unaware of the permit requirement and either applied for an operating permit or removed the tank pursuant to a closure permit within one year of learning of the permit requirement.

This new permit waiver is much simpler than the old one. While it remains to be seen how it will be administered, it should address most of the problems that have been seen since the Board changed its interpretation of the old permit waiver in 2004.

The statute also establishes a kind of “innocent purchaser” exemption to the permit requirement. Someone who buys real property and subsequently discovers an underground fuel tank on it can be eligible for cleanup money from the fund *IF* (a) the buyer exercised “reasonable diligence” before buying the property, and (b) the buyer obtains a permit for the tank within a reasonable time, not to exceed one year, after the buyer “should have become aware of the existence” of the tank. It is unlikely that many people who have bought properties in the last fifteen years will be able to take advantage of this provision, since it is unlikely (although not impossible) that someone who performed a Phase I investigation before buying a property would have been unaware of the presence of an old tank.

The Appellate Answer:

The appellate response, which was eclipsed by the legislation, is probably only of interest to those of you who are lawyers. On July 20, 2007, the First District Court of Appeals issued its decision in Mr. Kelsoe's appeal. Kelsoe v. California State Water Resources Control Bd., 153 Cal. App.4th 569, 63 Cal. Rptr.3d 156. In that case, the court specifically rejected the Board's 2004 position that the old permit waiver only applied to the failure to have a permit before January 1, 1990. It remanded Mr. Kelsoe's case to the Board for consideration of whether Mr. Kelsoe was entitled to a permit waiver. In doing this, the Court of Appeal adopted a position that was argued only by this office. However, in response to a motion for reconsideration by the Board, the Court of Appeals issued a modification of its opinion on August 17, 2007. In that modification, the Court of Appeals added a footnote emphasizing that its opinion was limited to the facts before it, including the fact that Mr. Kelsoe had paid thousands of dollars into the fund after coming into compliance. The Board seized on this footnote to assert that none of the Court's opinion applied to claimants who had not paid substantial money into the fund, including the portion of the Court's opinion that specifically held that permit waivers were not limited to the failure to have a permit by January 1, 1990, despite the fact that there was nothing else in the Court's opinion that linked this holding to Mr. Kelsoe's payments. The Board's bizarre interpretation of the Court's footnote meant that the Court's decision would not help the many claimants who removed their tanks as soon as they learned of either the existence of the tank or the permit requirement.

Summary:

The new permit waiver in AB 1437 should, if properly administered, make many more tank owners eligible to receive money from the fund. However, given the Board staff's history of changing its interpretations of the statutes it administers, and its apparent hostility to making the fund available to claimants with a less than perfect compliance history, only time will tell how much difference the new legislation will make.

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