

State Water Resources Control Board

NOV 28 2011

Assembly Committee on Environmental Safety and Toxic Materials
The Honorable Bob Wieckowski, Chairman
1020 N Street, Room 171
Sacramento, CA 95814

Dear Assembly Member Wieckowski:

UNDERGROUND STORAGE TANK PROGRAM AND UNDERGROUND STORAGE
TANK CLEANUP FUND INFORMATION

Thank you for your November 7, 2011 letter requesting information regarding the Underground Storage Tank Program and the Underground Storage Tank Cleanup Fund (Fund). This information was requested in conjunction with a planned oversight hearing by the Assembly Committee on Environmental Safety and Toxic Materials concerning state and local agency programs to clean up underground storage tanks in California. The following information is being provided in response to the specific questions in your letter. For clarity, I have restated your questions below, followed by a brief answer in bold. Data referenced in this letter are current as of November 15, 2011.

1. What is the current balance for the Fund and the anticipated Fund condition for the years from FY 2010 to the scheduled termination of the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 on January 1, 2016?

The cash balance for the Fund as of July 1, 2011 was \$69.8 million. This includes the prudent cash reserve that the Fund retains, as well as the amount that the State Water Resources Control Board (State Water Board) maintains and uses as a clearing account. In general, revenues received quarterly by the Fund are disbursed as reimbursements to claimants as soon as practical, so that the current balance of the Fund fluctuates daily based on the timing of the revenues and the reimbursements. In general, however, the revenue is dispersed to claimants within the same quarter that it is received. The State Water Board is anticipating fee revenues of the following for the fiscal years from FY 2010 to the scheduled termination on January 1, 2016:

- FY 10-11: \$323 million
- FY 11-12: \$320 million
- FY 12-13: \$320 million
- FY 13-14: \$271 million
- FY 14-15: \$223 million
- FY 15-16: \$111.5 million

By placing claimants on annual budgets, all revenues are anticipated to be utilized. In general, the Fund anticipates revenues will be expended dollar for dollar, to avoid the cash shortage that occurred in 2008.

2. What is the current inventory of active claims for payment from the Fund and the State Board's anticipated new cases in future years until the 2016 sunset date for the Act?

Active (Funded) Claims by Priority

Priority	Claims	Reimbursement to Date
A	46	\$12,099,118
B	1753	\$891,470,450
C	1148	\$601,800,254
D	437	\$255,246,453
Total	3384	\$1,760,616,275

Estimate of Future Claims through 2015

Priority	Claims	*Estimated Reimbursement
A	36	\$3,942,648
B	208	\$50,454,560
C	56	\$11,844,336
D	356	\$116,022,180
Total	808	\$182,263,724

Estimated reimbursements are based on the following averages of the last three years of reimbursements for each priority class to bring the case to site/claim closure:

- Priority A – \$106,876
- Priority B – \$276,480
- Priority C – \$230,299
- Priority D – \$382,123

3. Does the State Board have a schedule for payment of the existing and new claims as well as insuring timely closure of the sites associated with the backlogged claims?

No, the State Water Board does not have a set schedule for payment of existing and new claims. Although the Fund has moved to a proactive budgeting model for allocating resources to specific claims on the front-end, as a reimbursement program we remain reactive on the back-end to only paying costs actually incurred and invoiced to the Fund. In other words, as cleanup work is performed, costs are incurred and invoiced to the Fund by claimants. The Fund then evaluates the claims and reimburses the claimant for all reasonable and necessary costs. The Fund does not have any mechanism to dictate to claimants a schedule when these costs should be incurred, or

any mechanism to dictate an overall cleanup schedule for sites. The regulatory agencies can set cleanup schedules through enforcement orders, but it would be largely impractical to issue cleanup and abatement orders to all of the sites currently in the Fund.

In general, reimbursements are made based on the priority class of the claim, the date the reimbursement request was received, and the amount of money available to the Fund for reimbursements. The Fund has taken measures to balance the expenditures with the revenues for each fiscal year, and put all active priority A, B, and C claims on a budget. These measures are intended to ensure that the Fund is able to pay for all budgeted costs that are incurred by claimants in any given year.

4. In September of 2011, the US Environmental Protection Agency, Office of Underground Storage Tanks completed a review of the national leaking UST clean-up backlog. That report, *The National LUST Cleanup Backlog: A Study of Opportunities*, examined California's backlog of UST clean-ups and made a series of recommendations for program efficiencies and actions. What steps has the State Board taken to review and implement these recommendations to address the backlog of UST cases in California?

The US Environmental Protection Agency's (USEPA) backlog study recommended several general ways to identify cases that are ready for closure including review of site-specific cleanup standards, consideration of institutional or engineering controls, using targeted backlog reduction efforts, and reviewing current remedial plans at sites. The State Water Board is anticipating that the adoption and implementation of the proposed Low-Threat UST Closure Policy will address these and many other backlog reduction strategies that the USEPA identifies. In addition, State Water Board staff will continue to work with staff at regulatory agencies to balance caseloads between agencies and look for agency specific strategies as identified in the USEPA backlog Study.

USEPA's backlog study also suggested several recommendations in the category of "Cleanup Financing", which broadly covers the activities of the Fund. State Water Board staff have reviewed the backlog study, and are addressing the recommendations as follows. In a nutshell, the State Water Board was already implementing most of the USEPA recommendations in some fashion, and will continue to implement them in the future.

- *"SWRCB should consider exploring opportunities to address more releases with the state cleanup fund such as employing cost-cutting measures. For example, open-market competitive bidding for cleanup work could increase the amount of funds available per cleanup."*

Claimants are already required to perform open-market competitive bidding for cleanup work, in the specific example cited by the report. The Fund also is

already evaluating and employing cost-cutting measures as part of its overall efforts to reduce fraud, waste and abuse against the Fund. For example, the Fund is statutorily mandated to reimburse all corrective action costs that are reasonable and necessary. However, Fund staff have found that certain claimants and consultants were routinely taking advantage of this broad mandate by submitting inflated costs for certain items. In order to clarify the Fund's expectations of what is reasonable and necessary, the Fund has scheduled an update this year of the longstanding cost guidelines that the Fund has for certain tasks. The Fund issued a letter on August 15, 2011 (*Designation of Reasonable and Necessary Reimbursable Costs and Upcoming Additional Changes*) which further clarifies to claimants' reasonable and necessary costs for such things as mileage reimbursement rates and per diem rates that were routinely being overcharged by claimants and consultants. Lastly, the Fund is reviewing possible additional cost-cutting measures that may require changes in either regulation or statute to implement, and will be pursuing statutory or regulatory changes as appropriate.

- *"Another opportunity SWCRB could investigate is the availability of additional funding sources through public/private partnerships such as petroleum brownfields grants for low priority releases without a viable RP. If some of the releases are ineligible for the state fund, then SWCRB should consider options such as enforcement to help move these cleanups toward remediation and closure."*

For orphan sites without a viable responsible party, funding for cleanup is available to various parties such as government agencies and private development firms through the Orphan Site Cleanup Fund (OSCF) Program. Fund staff administer this program, and routinely coordinate with both the Department of Toxic Substances Control and the USEPA brownfields staff to ensure that recipients of OSCF grants also are aware of other funding opportunities, such as the petroleum brownfields grants mentioned in the backlog study recommendation. Fund staff encourage OSCF grant recipients to "piggyback" these various funding sources available for orphan site cleanup to maximize the opportunities for cleanup of these orphan sites. Also, the State Water Board encourages Regional Water Boards and local regulatory agencies to pursue the appropriate enforcement actions for all recalcitrant sites.

- *"State-funded cleanups in the Remediation stage make up 21 percent of California's backlog (2,151 releases), and the median age of these releases is 16.6 years old (Figure 5). SWCRB should explore opportunities to move these releases toward closure, thereby freeing up resources to address additional releases. The releases in the Remediation stage might be complex and difficult to remediate, but also might remain open for other reasons, such as very slow reduction in contamination from existing remedial systems. If a thorough*

evaluation determines that active remediation is ineffective in reducing contamination, lower-cost cleanup technologies such as MNA could be considered as an appropriate remedy. If used appropriately and results could be achieved in a similar time frame, this could free up state funds for use at other cleanups and could increase the number of releases that California oversight agencies are able to address and move toward closure. If additional releases could be closed through the use of institutional or engineering controls where protective and appropriate, SWCRB could also use the resources slated for those releases to work on reaching closure at other releases."

Evaluations of this nature have been ongoing at the Fund since 2007. The Fund has a 5-Year Review Unit whose function is to conduct reviews of claims older than five years to determine if cleanup actions being conducted at the site are moving the site toward closure. Since its inception in 2007, the 5-Year Review Unit has conducted approximately 5,000 reviews of appropriate claims. Typically, the Fund staff find that: 1) the regulatory agency is taking appropriate action in about one-third of the cases reviewed; 2) the regulatory agency should be implementing additional regulatory actions to expedite the cleanup and move the site toward closure in about one-third of the cases reviewed; and 3) sufficient cleanup actions have occurred such that the site is ready for closure under the existing decisional framework in about one-third of the cases, and the Fund recommends that the regulatory agency consider the site for closure.

The Fund, through the upfront budgeting process for each claim, is also conducting these reasonable and necessary evaluations for all claims to help determine if the work requested is necessary and reasonable. These reviews are especially focusing on those sites in the remediation phase of cleanup, as these sites are usually the most cost-intensive, as the backlog study correctly points out. The Fund agrees with USEPA that evaluations of these expensive remediation systems are necessary on an ongoing basis to help identify those sites where the remedial system has reached its economic and technical feasibility limitations, and some other form of cleanup or closure is warranted, freeing up money for the cleanup activities at other sites.

5. The State Board is currently developing A Draft Low-Threat UST Closure Policy. Please explain the purpose of the proposed policy and the operational effects if this policy is adopted by the State Board.

A group of nine individuals from several different California UST stakeholder groups including two Regional Water Boards, a Local Oversight Program agency, a Water District, responsible party representatives from the Western States Petroleum Association and California Independent Oil Marketers Association, two participants from Non-Government Organizations, and a UST consultant have developed a proposed Low-Threat Underground Storage Tank Closure Policy (Policy) that establishes closure

criteria for certain types of sites with unauthorized releases of petroleum from leaking USTs (LUSTs) that present a low threat to human health, safety, and the environment. State Water Board staff are circulating the proposed Policy for informal comment, have completed an initial CEQA review, and will be sending the proposed Policy for scientific peer review. State Water Board staff will make any necessary revisions to the proposed Policy based on the informal comments received, the final CEQA analysis, and the scientific peer review. The revised Policy will be formally circulated for public comment before consideration for adoption by the State Water Board.

The purpose of the proposed Policy is to provide consistent criteria for Regional Water Boards and local agencies to use in making closure decisions on USTs in order to help expedite the closure of UST sites that pose a low threat to human health, safety, and the environment, and are appropriate for case closure. The proposed Policy is not intended to prematurely terminate work at sites, but rather to identify sites that pose a low threat, which meet state laws and existing State Water Board policies, and are ready for closure. The proposed Policy contains an exception for cases with site specific conditions that demonstrably increase the threat associated with residual petroleum constituents.

The proposed Policy is designed to be consistent with existing statutes, regulations, State Water Board policies, and is intended to provide direction to responsible parties, their service providers, and regulatory agencies. The proposed Policy seeks to increase UST cleanup process efficiency. This would help free up resources to address the mitigation of UST releases that pose a greater threat to human and environmental health. If adopted, the proposed Policy would allow a significant number of active claims in the Fund to be closed as low-threat sites. This would allow the money currently being spent on those sites to be diverted to other higher priority sites for cleanup. This transition of regulatory resources and attention from low-threat to higher-threat sites would apply to non-Fund sites as well.

In addition to the Policy, State Water Board staff have collaborated with stakeholders and updated the Leaking Underground Fuel Tank (LUFT) manual. This updated manual provides technical guidance on the latest technologies to investigate and remediate sites. The LUFT manual was updated through an open process that included a wide range of participants such as site owners, consultants and regulators. This manual is intended to be "evergreen" and additional updates will be provided periodically.

6. This year the legislature passed and the Governor signed into law two related pieces of legislation dealing with the State's UST law. AB 291 (Wieckowski) and AB 358 (Smyth) provided increased funding and program streamlining for the UST program. What steps has the State Board taken to implement the provisions of AB 291 and AB 358?

State Water Board staff have discussed implementation of AB 291 and AB 358 with Regional Water Board staff and local agency regulatory staff at recent roundtable meetings. State Water Board staff are preparing a letter to the regulatory agencies documenting these conversations and providing links to GeoTracker websites that will allow agencies to provide the required reports on UST sites.

In addition, the Fund staff are currently preparing "frequently asked questions" factsheets to inform claimants how the Fund is implementing the provisions of both AB 291 and AB 358. Additionally, the Fund is implementing the following:

- AB 291
 - Reallocating funding to accommodate the increased revenues from the fee extension. The Fund is determining how much of the revenue augmentation will be necessary to pay off the "old costs" (costs incurred prior to July 1, 2011) that the Fund had committed to paying this fiscal year. As of October 2011, these old costs continued to be invoiced at a rate of approximately \$10 million per month. It is anticipated that this rate will drop, however, additional data from November and December 2011 is required to validate this trend analysis. If these old costs diminish as anticipated, the additional revenue from AB 291 will be used to augment the claim budgets already established for this fiscal year. In the fiscal out-years, it is anticipated that most or all of the revenue augmentation from AB 291 will be used for claim budgets.

- AB 358
 - As required by the statute, the Fund is reducing budgets for claims that have been recommended for closure by the Fund manager through the 5-year review process to the maximum of \$10,000. The Fund is in the process of notifying affected claimants of this change.

 - The Fund will begin expanding the 5-year review process to sites overseen by Local Implementing Agencies. Previously, the State Water Board could only recommend that Local Implementing Agencies close sites if the State Water Board found that closure was appropriate. The 5-year reviews will now incorporate these Local Implementing Agency sites into our routine 5-year reviews, with the intention of the Fund manager elevating these sites to the State Water Board for closure consideration where Fund staff disagree with the local agency staff on closure.

 - The Fund will work with the State Water Board UST Program staff, claimants, and the staff from the various Local Implementing Agencies to ensure that site data is uploaded to the appropriate electronic database as required by the statute. Claims that fail to do this risk being out of

regulatory compliance, which may jeopardize their reimbursement from the Fund.

7. What new steps does the State Board recommend to insure the long-term viability and effectiveness of the UST cleanup in California?

Low-Threat Policy: As described above, the State Water Board is preparing a Low-Threat UST Closure Policy for consideration early next year. This policy, if adopted, will provide consistent criteria for Regional Water Boards and local agencies to use in making closure decisions on USTs and thereby help expedite the closure of UST sites that pose a low threat to human health, safety, and the environment, and are appropriate for case closure.

Fraud, Waste and Abuse Prevention: The State Water Board has initiated efforts to deter, investigate, and prosecute fraud against the Fund. As part of these efforts, the State Water Board has formed a fraud investigation unit in the Office of Enforcement to investigate historical fraud against the Fund. Efforts of this group have been on-going for the last year, with the goal of taking 10 to 15 cases of fraud to the Attorney General for prosecution in the next two years. In conjunction with this, the Fund has been improving efforts to prevent fraud, waste and abuse currently and in the future, based on the results of the ongoing investigations. As part of these efforts, the Fund also has been evaluating various cost containment and cost control measures, such as evaluating and clarifying the levels of corrective action costs that are reasonable and necessary.

Administrative Efficiency Implementation: The Fund continues to evaluate internal administrative processes to improve both effectiveness and efficiency. The audit of the Fund identified some specific areas for improvement. The Fund has largely implemented these changes, but continues to monitor these improvements, and make further refinements based on the results of the original implementation. Fund staff continue to focus on improvements in payments processing and claim closures.

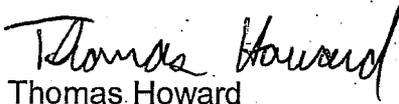
Cleanup Fund Sunset: The Fund currently is scheduled to sunset on January 1, 2016. The State Water Board staff have begun initial planning to ensure an orderly drawdown and closeout of the Fund. Internal discussions between the UST Regulatory Program staff and the Fund staff are ongoing. The sunset of the Fund will have widespread impacts upon regulatory agencies, claimants, and stakeholders alike. It should be noted that far fewer new leaking USTs are being discovered each year, in large part because the design, construction, operation and inspection of new UST systems is so much better than in historic times. Coupled with the continued cleanup and closure of existing sites, this leads to an ever decreasing backlog of UST cleanup sites. This trend will continue in the near future and ultimately lead to fewer agencies and staff being needed to manage and enforce UST cleanup statewide.

NOV 28 2011

It should be noted, however, that the composition and challenges associated with remaining sites is uncertain. It is likely that a larger percentage of remaining sites will be technically or procedurally difficult as the case load diminishes. Technically difficult sites tend to have larger releases in tight soils with physical impediments that limit the remedial options available. Procedurally difficult cases are orphan sites, those without funding for cleanup, those with offsite access issues, etc. State Water Board staff will be working to plan over the coming years for a "soft landing" for the program so that funding and staffing levels are matched in an appropriate relation to the decreasing backlog of cases.

If you or your staff would like additional information regarding this information, or the Fund or UST Program in general, please contact me at (916) 341-5603, or Robert Egel, Legislative Director, at (916) 341-5255.

Sincerely,


Thomas Howard
Executive Director

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