STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2009-0042

ACTIONS TO IMPROVE ADMINISTRATION OF THE
UNDERGROUND STORAGE TANK (UST) CLEANUP FUND AND
UST CLEANUP PROGRAM

WHEREAS:

1. The State Water Resources Control Board (State Water Board) is authorized to administer the petroleum UST Cleanup Program, which was enacted by the Legislature in 1984 to protect health, safety and the environment, and the petroleum UST Cleanup Fund (Fund), which was enacted by the Legislature in 1989 to assist UST owners and operators in meeting federal financial responsibility requirements and to provide reimbursement to those owners and operators for the high cost of cleaning up contamination caused by leaking USTs.

2. The Regional Water Quality Control Boards (Regional Water Boards), County Local Oversight Progam agencies (LOP agencies), and other local agencies direct corrective actions to cleanup soil and groundwater contamination at petroleum UST sites that have had unauthorized releases.

3. It is the responsibility of Regional Water Boards, LOP agencies, and other local agencies to close UST cases that are ready for closure. State Water Board Resolution No. 92-49 directs that water affected by an unauthorized release attain either background water quality or the best water quality that is reasonable if background water quality cannot be restored. Any alternative level of water quality less stringent than background must be consistent with the maximum benefit to the people of the state, not unreasonably affect current and anticipated beneficial use of affected water, and not result in water quality less than that prescribed in the water quality control plan for the basin within which the site is located. Resolution No. 92-49 does not require, however, that the requisite level of water quality be met at the time of site closure. Resolution No. 92-49 specifies compliance with cleanup goals and objectives within a reasonable time frame. Therefore, even if the requisite level of water quality has not yet been attained, a site may be closed if the level will be attained within a reasonable period. In previous decisions, the State Water Board, when determining a reasonable period, has considered all relevant factors including, but not limited to, existing and anticipated beneficial uses of water. If, for example, it will take 50 years to meet the requisite level of water quality, that may be a reasonable period if neither existing nor anticipated beneficial uses would be impacted during that time.

4. Of over 11,000 statewide active petroleum UST cleanup cases, approximately 8,900 are eligible for reimbursement of corrective action costs through the Fund.

5. Of over 11,000 active UST cleanup cases, 7,000 have been open for over ten years.

6. The Fund's revenues are generated by a storage fee (currently 1.4 cents) for every gallon of petroleum products placed into USTs. The State Board of Equalization collects the fee quarterly from owners of active USTs.

7. Since 1992, the Fund has expended over $2.5 billion reimbursing cleanup costs at approximately 11,000 sites, of which 6,700 have been cleaned up and closed, and 4,300 remain active or suspended.

8. In recent years, the Fund has received up to $250 million annually from storage fees, of which up to $200 million was available to reimburse eligible claimants for the costs of ongoing UST cleanup at 4,300 sites.

9. In Fiscal Year (FY) 2008-2009 and subsequent FYs, the projected revenue to the Fund is $230 million, of which $150 million is available for cleanup reimbursements. The annual projected reimbursement payment demand from 4,300 claims is now $240 million.

10. Because of the projected reduction in revenues, increased payment demand and depletion of a long-standing cash reserve, the Fund has suspended one-third, or 1,300, of its active status claims in FY 2008-2009. The Fund currently has 3,000 claims with active Letters of Commitment (LOCs), 1,300 claims with suspended LOCs, and 4,600 claims on its Priority List.

11. Priority Class C claimants are most affected by the reduced availability of funds and suspensions. The best current estimate is that the backlog of payments for Priority Class C claimants at the end of the current FY will be between $80 and $100 million, which represents four to five years worth of available revenue for Priority C under current projections (+$20 million/year).

12. Claimants whose LOCs have been suspended have requested the immediate reactivation of their LOCs. The suspension of LOCs is a hardship for claimants and consultants who relied on Fund reimbursements to pay for cleanup costs and has negatively impacted their ability to arrange for interim financing.

13. Claimants with active LOCs have an expectation that they can submit a reimbursement request and expect to receive a check within some reasonably defined timeframe.

14. Health and Safety Code section 25299.57, subdivision (i) requires the State Water Board to pay for corrective action invoices within 60 days of receipt. The Fund has not consistently met the requirement to pay within 60 days but, until FY 2008-2009, payments have generally been issued within three to six months following receipt. At the current time, Priority B claimants are expected to receive reimbursement within 18 months of submission of a reimbursement request.

15. Reactivating suspended LOCs for Priority C claims in the short term would not allow the Fund to reliably project a reasonable payment timeframe for a new reimbursement request from reactivated Priority C claims.

16. Of the 4,300 claims with active or suspended LOCs in the Fund, over 43 percent have been open for ten years or more.

17. There is a significant financial burden to the Fund as well as a financial and time burden to UST owners in keeping UST cleanup cases open where there is little or no environmental benefit associated with continued investigation, remediation, or monitoring.

18. To protect health, safety and the environment, limited Fund resources should be focused on higher priority UST cleanup cases where there is a threat to water quality and sensitive receptors and not on cases where little or no environmental benefit of continued investigation, remediation, and monitoring can be demonstrated.

19. Health and Safety Code section 25299.39.2 authorizes the manager of the Fund to review the case history for all claims that have been active for five years or more and to make a recommendation to the State Water Board for closure (five year review). Upon receiving a recommendation, the State Water Board may close a case under the jurisdiction of a Regional Water Board or LOP agency.

20. Fund staff has completed reviews of over 1,400 claims and recommended closure on over 20 percent of the cases reviewed. Regional Water Board and LOP agency staffs have issued case closures for approximately one third of the cases identified for closure.

21. Regional Water Board Executive Officers have agreed to timely five-year review closure recommendations.

22. The Fund annually expends approximately $80 million for quarterly monitoring activities. With rare exceptions, changing the monitoring frequency to semiannual would save $40 million annually without harm to the environment or risk to health and safety.

23. Review of all UST cleanup cases should be conducted to ensure that high priority cases receive appropriate regulatory attention.

24. Numerous recommendations for actions to reduce the financial impact of the cash shortage in the Fund on claimants and their consultants and for overall improvement to the UST Cleanup Fund and UST Cleanup Program were submitted at a public workshop held by the State Water Board in Sacramento on March 9, 2009.

THEREFORE BE IT RESOLVED THAT:

The State Water Board directs all of the following measures be undertaken to protect health, safety and the environment and improve the administration of the UST Cleanup Fund and UST Cleanup Program:

1. The Regional Water Board and LOP agencies shall immediately begin to review all cases in the petroleum UST Cleanup Program using the general framework provided below.

    a. The order of case reviews shall be determined by the Regional Water Boards and LOP agencies. Consideration should be given to reviewing first those cases with an active or suspended LOC with the Fund.

    b. These case reviews shall, at a minimum, include the following for each UST case:

        (1) Determination of whether or not the case is ready for closure.

(2) If the case is not ready for closure, determination of the following:

(a) The impediments to closure.
(b) The specific environmental benefits of any additional work to be performed at the site.
(c) The existing sensitive receptors that are likely to be impacted by contamination at the site and the probable timeframe for those impacts to occur.

c. Each case review shall be made publicly available on the State Water Board's GeoTracker web site within 30 days of when it is completed in a format acceptable to the Executive Director.

d. Regional Water Board and LOP agencies shall, within 90 days, close cases identified as ready for closure in the case review.

e. No new directives for additional corrective action shall be issued until all site reviews have been completed unless site-specific needs warrant otherwise.

f. The above listed tasks shall be accomplished within existing budgets and not later than June 30, 2010.

2. The Division of Water Quality (DWQ) shall compile the results of the case review effort and post its findings and conclusions on the State Water Board website. The report shall be posted beginning January 2010 and updated every six months until January 2011.

3. Regional Water Board and LOP agencies shall reduce quarterly monitoring requirements to semiannual or less frequent monitoring at all sites unless site-specific needs warrant otherwise and shall notify all responsible parties of the new requirements no later than August 1, 2009. If more than semiannual monitoring is required for a case, the responsible party and State Water Board shall be notified of the rationale and the notice shall be posted on GeoTracker.

4. The Fund Manager shall annually review each claim with an active LOC for five or more years consistent with Health and Safety Code section 25299.39.2 and make a finding that: 1) the case should be considered for closure, 2) the current course of corrective action is appropriate, or 3) a change in the course of corrective action is recommended. These findings shall be reported to regulatory staff for consideration and response. The claimant shall also be notified of the finding. In completing the five year review, the Fund Manager shall consider any results of the Regional Water Board or LOP agency case review on GeoTracker (Item 1 above.) and shall post the results of the five year review on GeoTracker.

5. For cases where the five year review finding is that the case should be considered for closure and the regulatory staff has not responded or provided a reasonable basis for keeping the case open, the Fund Manager shall within one month, elevate the case to the Regional Water Board Executive Officer or LOP agency director for a thirty day review.

a. If the Regional Water Board Executive Officer or LOP agency director agrees to close the case, he or she shall send a No Further Action letter consistent with Health and Safety Code section 25296.10 within 90 days.

b. For cases where there is continued disagreement about whether the case should be closed, the Fund Manager shall within six months recommend the case to the State Water Board for consideration of closure.

6. The Division of Financial Assistance (DFA) shall, by August 2009, enhance the Fund's web page to improve the transparency of the payment request queue and approvals and to allow claimants to better estimate when payments are likely to occur.

7. DFA shall at the earliest possible time, notify claimants in writing who have a suspended LOC of the expected date that the LOC will be reactivated.

8. DFA shall, by July 2009, develop forms and procedures necessary to facilitate options for claimants to assign anticipated Fund reimbursements to a financing program to help meet claimants' cash flow needs.

9. DFA and DWQ shall, by July 2009, create a taskforce composed of State and Regional Water Board staff, LOP and other local agency staff, consultants and tank owners and operators to make recommendations for improvements to Fund administrative procedures and response to the current cash shortage. The taskforce shall also make recommendations to improve the UST Cleanup regulatory program, including additional approaches to risk-based cleanup. The first meeting of this taskforce shall be held no later than July 15, 2009 and there shall be meetings held at least every other month from that point forward. The initial focus of the taskforce will be to identify issues to be addressed in the independent audit required by Resolved no. 11. The taskforce shall provide input for the audit by September 1, 2009. Further, State Water Board staff shall report on progress of taskforce activities as required by Resolved no. 13, and, by January 1, 2010, the taskforce shall make final recommendations to the State Water Board. As the taskforce identifies issues, staff shall bring items requiring immediate board action to a regularly scheduled meeting of the State Water Board. Nothing in this Resolved no. 9 shall provide a basis for not (1) implementing other actions required by this resolution or (2) requiring compliance with existing precedential decisions regarding closures.

10. DFA and DWQ shall pursue all available Federal economic stimulus money to make funds available for claim reimbursements.

11. The Division of Administrative Services shall, by July 2009, initiate an independent program and fiscal audit of the Fund and shall annually thereafter complete a fiscal audit. Additional programmatic audits shall be undertaken at an interval to be determined by the Executive Director. Program audits shall include input from the taskforce created in Resolved no. 9. Program audits shall include a review of Fund policies and procedures to detect and follow-up on suspected waste, abuse and fraud. The results of the initial program audit shall be posted on the State Water Board's web site no later than March 1, 2010.

12. DWQ shall, by January 2010, complete development of an updated Leaking Underground Fuel Tank (LUFT) manual.

13. DWQ and DFA shall report on progress toward completion of these activities every six months at a meeting of the State Water Board.

14. The issues identified in this resolution are of an ongoing nature and the State Water Board will take further appropriate action to address the funding shortfall and improve program effectiveness.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 19, 2009.

AYE:	Chairman Charles R. Hoppin Vice Chair Frances Spivy-Weber Board Member Arthur G. Baggett, Jr. Board Member Tam M. Doduc
NAY:	None
ABSENT:	None
ABSTAIN:	None

Jeanine Townsend
Clerk to the Board