STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2009-0081

DIRECTING ADDITIONAL ACTIONS TO IMPROVE ADMINISTRATION OF THE UNDERGROUND STORAGE TANK (UST) CLEANUP FUND AND UST CLEANUP PROGRAMS

WHEREAS:

1. Resolution No. 2009-0042 was adopted by the State Water Resources Control Board (State Water Board) on May 19, 2009;
2. Resolution No. 2009-0042 directed numerous actions to improve the administration of the UST Cleanup Fund (Cleanup Fund) and UST Cleanup Programs, in response to a reduction in revenues and increased payment demand experienced by the Cleanup Fund, and a finding that UST cleanups are taking too long to complete;
3. Resolution No. 2009-0042 directed the creation of a task force to:
    a. Make recommendations for improvements to Cleanup Fund administrative procedures and response to the current Cleanup Fund cash shortage.
    b. Make recommendations to improve the UST Cleanup Program, including additional approaches to risk-based cleanup.
    c. Identify, by September 1, 2009, issues to be addressed in an independent audit of the Cleanup Fund.
    d. Bring items requiring immediate board action to a regularly scheduled meeting of the State Water Board.
4. Two task forces were created in June 2009 to complete the work directed in Resolution No. 2009-0042, one to address Cleanup Fund issues (Cleanup Fund Task Force) and the other to address the regulatory program issues (Regulatory Program Task Force.) Each task force has its own membership, with some individuals serving on both task forces;
5. The task forces have met approximately twice monthly since July 2009;
6. Both task forces have submitted recommendations to the State Water Board for short-term or immediate actions;
7. The Cleanup Fund continues to experience a cash shortage that makes it unable to pay all Reimbursement Requests that are currently in house;
8. Over 1,300 Letters of Commitment remain suspended due to the cash shortage;
9. On November 4, 2009, the Governor signed Assembly Bill (AB) 1188, which has several measures that impact the Cleanup Fund. These measures include a temporary fee increase of $0.006 per gallon of petroleum stored in USTs for a two-year period from January 1, 2010 through December 31, 2011. The temporary fee increase will provide a total of approximately $192 million of additional revenues for the Cleanup Fund during the specified period;

10. Resolution 2009-42 also directed the Division of Water Quality (DWQ) to complete development of an updated Leaking Underground Fuel Tank (LUFT) manual by January 2010;

11. Many of the LUFT Manual Revision Committee members are also task force members. While this dual service is beneficial to the state because of the members' expertise, this is creating a strain on their ability to meet the January 10, 2010, deadline for both work products;

12. The Regulatory Program Task Force provided comments, which can be summarized as follows:

    a. Regional Boards, Local Oversight Program (LOP) agencies, and Local Implementing Agencies (LIAs) when acting pursuant to Health and Safety Code Section 25296.10, hereafter referred to collectively as Agencies, are responsible for overseeing and approving the investigation, cleanup and eventual closure of sites impacted by UST releases. The State Water Board has primary authority to establish appropriate guidelines, regulations, and policies that govern corrective action at UST release sites.

    b. Owners and operators of USTs and other responsible parties have the right to petition the State Water Board for review of their case if they believe the corrective action plan for their site has been satisfactorily implemented, but closure has not been granted by Agencies. Also, when specified criteria are met, the Cleanup Fund manager may make a recommendation to the State Water Board for UST case closure. Under either process, the State Water Board may close or require the closure of a UST case that is under the jurisdiction of a regional water board or an LOP agency.

    c. Since 1998, the State Water Board has adopted fourteen orders directing closure of UST cases. These orders articulate how the corrective action (including appropriate levels of investigation and remediation) conducted ensures protection of human health, safety and the environment and how the corrective action complies with applicable state policies for water quality control (specifically State Water Board Resolution No. 1992-0049), and water quality control plans. (http://www.waterboards.ca.gov/water_issues/programs/ust/publications/closure_orders.shtml).

    d. State Water Board Resolution No. 1992-0049 does not require that the requisite level of water quality be met at the time of UST case closure. Instead, State Water Board Resolution No. 1992-0049 specifies compliance with cleanup goals and objectives within a reasonable period. In UST closure orders, the State Water Board has concluded that the determination of what constitutes a reasonable period must be based on evaluation of all relevant factors and that although the time required meeting the requisite level of water quality may be lengthy, it may be reasonable considering all the relevant facts of the particular case.

e. In the orders issued by the State Water Board regarding UST case closure, several factors relevant to the particular UST case were considered, such as: (1) whether remaining petroleum constituents would migrate beyond the limited spatial extent, (2) the presence and location of drinking water wells in the area, (3) the likelihood that the impacted groundwater will be used as a source of drinking water in the reasonably foreseeable future, and (4) the protective nature of standard well-construction practices.

f. In addition to the factors identified in (e) above, the State Water Board orders also considered whether appropriate corrective action, including appropriate source removal, was performed at the site.

g. When considering whether to close UST cases, many Agencies have not used the analytical framework established under Resolution No. 1992-0049 and the aforementioned State Water Board UST closure orders. As a result, a significant number of cases that otherwise should be closed remain open, unnecessarily burdening responsible parties, Agency staff resources, and the Cleanup Fund; and

13. The State Water Board has the authority to review and close petroleum UST cleanup cases under its own authority, pursuant to Health and Safety Code 25296.10.

THEREFORE BE IT RESOLVED THAT:

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

1. When considering whether a UST cleanup case should be closed, Agencies shall apply the decisional framework established in previous State Water Board UST closure orders. Consistent with the decisional framework in the State Water Board UST closure orders, after appropriate corrective action is performed, a UST case should be closed not only where cleanup goals and objectives are currently met, but also where they will be met in a reasonable period. Further, what constitutes a reasonable period must be based on an analysis of all relevant factors including, but not limited to, whether the residual contamination poses a threat to human health or safety and is localized and unlikely to migrate beyond the current spatial extent, and if the affected groundwater will be used as a source of drinking water or other designated beneficial use in the timeframe required to meet cleanup goals and objectives;
2. When conducting claim reviews pursuant to Health and Safety Code Section 25299.39.2 (Five Year Review) the Division of Financial Assistance (Division) shall apply the decisional framework established in previous State Water Board UST closure orders;
3. State Water Board staff shall institute a case review procedure similar to the Five Year Review process for all petroleum UST cases that have been open for five years or more and that do not have an active Letter of Commitment from the Cleanup Fund, and bring cases to the State Water Board with a recommendation for closure as appropriate;
4. DWQ shall postpone completion of the final LUFT Manual Revision until June 30, 2010, to allow persons on both the task force and LUFT manual committee to first focus on the task force effort and then incorporate the task force findings into the LUFT manual;

5. The Division and the Division of Administrative Services shall take all reasonable actions, including examination of the full Cleanup Fund business process and necessary modifications to procedures and personnel assignments, to disburse Cleanup Fund funds as quickly as possible following quarterly deposits of fees by the Board of Equalization, with a goal of disbursing all available funds to claimants within 45 days of deposit;
6. The Division shall take all reasonable actions to review and make modifications to the business process functions and personnel assignments, to process Reimbursement Requests as quickly as possible and issue letters to inform the claimant of the amount of the Reimbursement Request that was approved for payment and that will be paid at an unspecified future date when funds become available, with a goal of completing review within 60 days of receipt of the Reimbursement Request;
7. The Division shall report on the progress in meeting the goals established in resolves 5 and 6 as part of the regular six month reporting required under Resolution No. 2009-0042;
8. The Division shall take the necessary steps to reactivate the suspended Letters of Commitment for Priority Class C claims by January 1, 2010. The notification to the affected claimants shall explain the latest cash flow projections and estimated reimbursement request processing times.

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 Board held on November 17, 2009.

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

Jeanine Townsend
Clerk to the Board