

County of Santa Clara

Department of Environmental Health

1555 Berger Drive, Suite 300
San Jose, California 95112-2716
(408) 918-3400
www.EHinfo.org

Public Comment
Low-Threat UST Case Closure Policy
Deadline: 03/19/12 by 12:00 PM



March 16, 2012

Ms. Jeanine Townsend (commentletters@waterboards.ca.gov)
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, California 95814

Subject: Comments Re: Proposed Low-Threat UST Closure Policy

Dear Ms. Townsend:

Thank you for the opportunity to comment on the documents prepared by the State Water Resources Control Board (State Board) related to the proposed Low-Threat UST Closure Policy. The following documents are addressed in this letter:

- Draft Underground Storage Tank (UST) Low-Threat Site Closure Policy (Draft Policy) dated January 31, 2012;
- Low-Threat UST Closure Policy Scoping Document (CEQA Document) dated January 31, 2012; and
- Low-Threat UST Case Closure Policy Draft SED (Draft SED) dated January 31, 2012.

The County of Santa Clara, Department of Environmental Health (DEH) is concerned because the Draft Policy allows for soil, groundwater, and vapor with elevated concentrations of contaminants to remain in place which we believe do not adequately protect human health and the environment. Technical comments addressing the Draft Policy have been provided to the State by other agencies. The DEH is in agreement with the technical comments provided to the State by our neighboring Counties and stakeholders including San Mateo County, Alameda County and the Santa Clara Valley Water District. Rather than repeat these comments in this letter, the DEH will instead provide comments on the overall impact of the Draft Policy.

The DEH supports statewide guidelines to assist regulatory agencies and responsible parties in defining case closure criteria. Defining these criteria is intended to streamline case closures by providing a set of criteria that can be used statewide. The DEH feels that these criteria are more appropriately contained in the revised Leaking Underground Fuel Tank (LUFT) Manual, which is currently under revision by the State Board, as opposed to the current statewide policy. The DEH supports closure of low risk fuel leak sites, but is concerned that this Draft Policy does not provide for sufficient investigation and clean-up to be protective of groundwater and human health. The Draft Policy attempts to establish closure criteria consistency at the expense of water quality. In particular the policy would allow higher concentrations of contamination in vadose zone soils and groundwater. This appears to be in conflict with the apparent increasing demands

for potable groundwater supply throughout the State, as well as the increasing development of formerly contaminated properties for residential use.

Impact to Groundwater Resources

The DEH believes that the cumulative impact posed to groundwater by the Draft Policy has not been adequately evaluated. Section 4 of the Draft SED states that “the analysis identified no reasonable foreseeable significant adverse environmental impacts associated with the methods of compliance.” In addition, item 9a in the CEQA document states that the petroleum impacted groundwater at contaminated sites is part of a baseline condition and that water quality objectives will be met within a reasonable time frame. The Draft Policy defines the existing contamination and reasonable time frame to reach water quality goals as an acceptable level of risk in the view of the State Board. We understand from discussions with State Board staff that the definition of a reasonable time can be decades to hundreds of years.

The Draft Policy will allow groundwater contamination to remain at concentrations which may not be allowed today in our County, because it is not considered an acceptable risk to us or our residents. In some cases the Draft Policy would allow for free product to remain and in other cases dissolved concentrations exceeding the drinking water standard by up to three thousand times would be permitted.

A report prepared for the California Legislature (State Water Resources Control Board, Report to the Legislature (Draft) 2012) estimates that 85 percent of California’s community public water systems, supplying more than 30 million residents, rely on groundwater for at least part of their drinking water supply. The Report states:

“Changes in surface water availability resulting from global climate change may further increase groundwater’s role in California’s future water budget. Due to California’s significant reliance on groundwater, and because many communities are entirely reliant on groundwater for their drinking water supply, contamination of this resource can have far-reaching consequences.”

Many of the groundwater basins throughout California are contaminated and a State reliant on groundwater as a major supply of drinking water should require polluters to clean up their releases. The DEH is concerned that the Draft Policy will cause further harm to the basins because remediation is less likely to be required which generally decreases the length of time required to meet cleanup goals and decreases risk. Allowing higher levels of contamination to remain for longer periods of time does not preserve or restore the quality of California’s water resources. Where engineering solutions to groundwater contamination are required to provide safe drinking water, the costs are significant and are usually passed onto the rate payers. Letting polluters walk away from their responsibility does not seem equitable and is inconsistent with the State Board’s mission to preserve, enhance, and restore the quality of California’s water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations.

In Santa Clara County, the Santa Clara Valley Water District provides water to nearly two million residents. Nearly half of the water used in the County comes from groundwater, and in the southern portion of the County, it is the sole source of drinking water supply (Ahmadi, 2011). Allowing higher levels of contamination to remain in groundwater over longer periods of time will place the aquifers at increased risk and potentially expose the rate payers to financial liability for wellhead treatment of their drinking water supply. Performing effective cleanup now, will benefit future generations and require polluters to pay their fair share.

Reliance on aquifers is likely to increase in the future as populations increase along with water demand. According to Jason Gurdak (co-leader of the United Nations sponsored group studying conservation measures on groundwater and author of Climate Change Effects on Groundwater Resources), as precipitation becomes less frequent due to climate change, lake and reservoir levels will drop and people will increasingly turn to groundwater. He states that “it is clear that groundwater will play a critical role in society’s adaption to climate change. California is leading the way in developing solutions” (National Groundwater Association, 2012). Leaving higher levels of contamination in groundwater over longer periods of time puts the beneficial use of aquifers at greater risk.

The Draft Policy assumes that impacted water that is not within a prescribed distance of an existing water production well will not be used, which disregards the possibility of new water production wells being installed within that prescribed distance. In Santa Clara County it is permissible for residents to install water production wells and remove groundwater. In addition, according to the San Francisco Bay Regional Water Quality Control Board’s (Water Board) Water Quality Control Plan (Basin Plan) unless otherwise designated by the Water Board, all groundwater is considered suitable, or potentially suitable, for municipal or domestic water supply. Writing this resource off for decades to hundreds of years is not wise with our increasing reliance on groundwater supplies for drinking water.

The cumulative impact to groundwater resources does not appear to have been adequately evaluated. The interests of water utility customers and utilities should be taken into consideration when determining “acceptable risk.” In addition, increasing water demand and associated aquifer usage, increasing population, and the effects of climate change should be evaluated.

Impact to Property

The Draft Policy will allow for higher concentrations of petroleum hydrocarbons and fuel oxygenates to remain in soil and groundwater both on the site where the release occurred and on neighboring properties. A stakeholder representing property owner interests correctly stated that land owners, developers, tenants and lenders were not represented by the group chosen by the State Board to write the Draft Policy (Turner, 2011). Competing interests between those responsible for contamination and others including innocent property owners must be fairly and reasonably balanced. The Draft Policy shifts the burden from those responsible for contamination to innocent neighbors and future owners of the property where the release occurred.

It is not difficult to imagine a scenario where an innocent property owner located down gradient of an UST release discovers contamination beneath his property. This will impact the resale value of the property and cause the innocent property owner to decide if hiring expensive legal and technical experts to recover costs from a long absent Responsible Party is likely to result in financial relief. This scenario is more likely to occur if the Draft Policy is passed because higher levels of contamination and larger plumes will be allowed to remain in place. In addition, if the State Board defines the allowable time to reach cleanup goals as decades to hundreds of years the impact will be felt for many generations.

By allowing higher levels of contamination to remain in soil and groundwater the Draft Policy prevents remedial actions which typically result in lower levels of contamination and decreased time to reach cleanup goals. Currently this regulating agency would require remediation of sites which the Draft Policy would consider a closable case. The decision to require action at a site is currently based on site specific characteristics including technical conditions, stakeholder concerns and feasibility.

Conclusion

The Draft Policy would place aquifers (drinking water resources) at greater risk, expose water utility rate payers to increased financial liability, and increase financial and potential human health liability to innocent property owners, while allowing polluters of our environment to walk away from their responsibility. The Draft Policy should be redrafted and all stakeholder groups should be represented so that the resulting government policy is reasonably balanced. Furthermore, the guidelines should be added to the LUFT Manual as opposed to a Statewide Policy and continued flexibility should be maintained for regulatory agencies, property owners, and responsible parties to utilize the funding source that is available to them now.

The Draft Policy is opposed by many regulatory agencies, consultants, and property owners. We support consistency throughout the LUFT program, as well as program guidelines such as the LUFT Manual. However, this is an attempt to streamline case closures by defining acceptable risk for all cases. The problem is that acceptable risk cannot be defined by a statewide policy. Acceptable risk is a local decision that should be made by local agencies and consultants on a case-by-case basis.

This policy appears to present criteria for "acceptable releases." Essentially any owner or operator of an UST will be allowed to pollute the environment as long as the release doesn't exceed the policy criteria established as "low risk." The policy sends the wrong message to owners, responsible parties, and local agencies implementing both leak prevention and cleanup programs. Again, guidelines of this type should be incorporated into the revised LUFT Manual as opposed to a Statewide Policy.

Lastly, the Draft Policy appears to be a direct result of the current financial status of the UST Cleanup Fund (USTCF) and proposed sunset date. The Program is unable to meet current fiscal demands and many claims are going unpaid. The USTCF has been spending money faster than it has been collecting for years. As a result this policy is being proposed to:

“...increase process efficiency of case closure for low-threat petroleum-impacted UST sites. A benefit of improved efficiency is the preservation of limited resources for mitigation of releases posing a greater threat to human and environmental health” (Draft SED).

Most local agencies require cleanup of releases regardless of how the cleanup is funded. We utilize various mechanisms to determine the feasibility of such corrective actions. The California Code of Regulations (CCR) requires that “unauthorized releases,” as defined in the Health & Safety Code Section 252819(x), from USTs must be investigated and cleaned up. There are no provisions within the CCR that exempts investigation and cleanup if there is no USTCF to pay for it. Not all responsible parties qualify for or apply to the USTCF for reimbursement. This is an important distinction because a policy such as this will have lasting effects on groundwater quality for decades to hundreds of years, well after the USTCF is scheduled to sunset in the year 2016.

Please contact Michael Balliet at (408) 918-1976 or Gerald O’Regan at (408) 918-1974, if you have any questions.

Sincerely,



Dennis J. Kalson
Acting Director

cc: Assembly Member Bob Wieckowski, Chairman, Environmental Safety and Toxic Materials (ESTM) Committee, 39510 Paseo Padre Parkway, Suite 280, Fremont, CA 94538
Matt Rodriquez, Secretary for Environmental Protection, California Environmental Protection Agency (MRodriquez@calepa.ca.gov)
Justin Malan, Executive Director, California Conference of Directors of Environmental Health (justin@ccdeh.com)
Katie Brown, Legislative Director, County of Santa Clara, Office of the County Executive (Katie.Brown@ceo.sccgov.org)

References:

- Ahmedi, Behzad. November 8, 2011. Santa Clara Valley Water District Letter to State Water Resources Control Board
- National Groundwater Association, Newszine. March 8, 2012. United Nations Scientists Warn of Increased Groundwater Demands Due to Climate Change
- State Water Resources Control Board, Report to the Legislature (Draft). February 2012. Communities that Rely on Contaminated Groundwater.
- Turner, Larry S. September 15, 2011. Letter to State Water Resources Control Board