

MEMORANDUM*

TO: State Water Resources Control Board – Division of Water Quality
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DATE: November 7, 2011

SUBJECT: Comment Letter - Low-Threat UST Site Closure Scoping Document

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I will first make comments on the public notice from the State Water Resources Control Board (SWRCB), since this announcement introduced the September 15, 2011, California Environmental Quality Act (CEQA) scoping document.

Review of September 28, 2011, Public Notice from SWRCB

Statement: *A Draft Low-Threat Underground Storage Tank (UST) Closure Policy (Policy) has been developed by a stakeholder group for consideration by the State Water Resources Control Board (State Water Board). The purpose of the proposed Policy is to establish consistent statewide closure criteria for low-threat leaking UST sites. The proposed Policy is intended to provide direction to responsible parties, their service providers, and regulatory agencies. The proposed Policy seeks to increase UST cleanup process efficiency. A benefit of improved efficiency is the preservation of limited resources for mitigation of releases posing a greater threat to human and environmental health.*

Comment 1: The use of the word “leaking” implies a current condition (i.e., leaks are of an on-going nature). During several CEQA scoping meetings, State Water Board employees stated unequivocally that active gas stations are no longer allowing petroleum hydrocarbons to enter soil and groundwater, mainly due to past requirements for double-walled tanks and leak detection systems. This logic is faulty – spills and leaks are common at active gas station sites within the various components of the UST system (i.e., leaking product lines, leaking dispensers, etc.) and not just USTs. Please explain why current fueling facility stations are not leaking contaminants to the environment.

Statement: *The adoption of policies for water quality control has been certified as an exempt regulatory program under the California Environmental Quality Act.*

Comment 2: Please explain this statement. Is this comment referring to the requirements of Article 18, Statutory Exemptions, of Title 14, Chapter 3 of the CCR (14 CCR § 15260 to 15285) or Article 19, Categorical Exemptions, of Title 14, Chapter 3 of the CCR (14 CCR § 15300 to 15333)? Or is the statement referring to Article 6, Exempt Regulatory Programs, of Title 23, Chapter 27 of the California Code of Regulations (23 CCR § 3775 *et seq.*)?

According to the State Board, for projects requiring the completion of a Supplemental Environmental Document (SED), “*The State Water Board’s approval of policies for water quality control is a regulatory program that has*

been certified as exempt from the requirements of the California Environmental Quality Act (CEQA) by the Secretary for Natural Resources.” For public agencies, there are two types of CEQA exemptions with different criteria; 1) statutory and, 2) categorical. Statutory exemptions, descriptions of the types of projects for which the California Legislature has provided a blanket exemption from CEQA procedures and policies, are found in several places of the California Code of Regulations (CCR), including Article 18, Section 15282 of the CEQA Guidelines. Categorical exemptions, descriptions of types of projects the Secretary of the Resources Agency has determined do not have a significant effect on the environment, are found in Article 19 of the CEQA Guidelines. Unlike statutory exemptions, categorical exemptions are not absolute, and there are exceptions depending on the nature or location of the project (Section 15300.2, CEQA Guidelines).

*Under Title 14, Article 18, Section 15263, Discharge Requirements, *The State Water Resources Control Board and the regional boards are exempt from the requirement to prepare an EIR or a Negative Declaration prior to the adoption of waste discharge requirements, except requirements for new sources as defined in the Federal Water Pollution Control Act or in other acts which amend or supplement the Federal Water Pollution Control Act. The term "waste discharge requirements" as used in this section is the equivalent of the term "permits" as used in the Federal Water Pollution Control Act.**

Under Title 14, Article 19, Section 15330, Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances:

- No cleanup action shall be subject to this Class 30 exemption if the action requires the onsite use of a hazardous waste incinerator or thermal treatment unit or the relocation of residences or businesses, or the action involves the potential release into the air of volatile organic compounds as defined in Health and Safety Code Section 25123.6, except for small scale in situ soil vapor extraction and treatment systems which have been permitted by the local Air Pollution Control District or Air Quality Management District.
- All actions must be consistent with applicable state and local environmental permitting requirements including, but not limited to, off-site disposal, air quality rules such as those governing volatile organic compounds and water quality standards, and approved by the regulatory body with jurisdiction over the site.

Please provide additional clarification on how the proposed project/policy is exempt under CEQA.

Statement: *The purpose of the scoping document and scoping meetings is to seek input from public agencies and members of the public on the range of project actions, alternatives, and reasonably foreseeable methods of compliance, potential environmental impacts, if any, and cumulative impacts, if any. Scoping may also assist in resolving concerns of affected federal, state, and local agencies and other interested persons.*

Comment 3: The SWRCB provided 45 days to review and comment on the scoping document. This review period is much too short, which is unacceptable for something as important as the proposed policy. In addition, there were no advertisements in newspapers, a common practice in CAL EPA for even small cleanup projects, which would have alerted the citizens of California to the proposal.

Please explain how the public was involved in the creation of the project/policy, and how the September 28, 2011, public notice conforms to the SWRCB's public participation policy.

Review of September 15, 2011 Low-Threat UST Closure Policy Scoping Document

GENERAL COMMENTS

- The term “low-threat” is used inconsistently throughout the document – sometimes it is hyphenated, many times it’s not.
- The policy (the project) pertains only to underground storage tanks (USTs) and their related components at retail stations that use refined gasoline products, correct? The policy does not apply to other petroleum hydrocarbon release scenarios to the environment, such as those from refineries, pipelines, bulk terminals, tanker trucks, and other sources, correct? Please explain.
 - **There should be an explicit statement within the Scoping Document (and the policy itself) that non-UST petroleum hydrocarbon sites were not considered during the preparation of the CEQA scoping document and are not a part of the project/policy.**

SPECIFIC COMMENTS

Comment 1: There’s a typo on Page 1, Paragraph 3 (Introduction section) – the word “a” before “several” should be removed.

Statement on Page 2, Paragraph 3: *The purpose of the project is to establish consistent statewide closure criteria for low-threat LUST sites.*

Comment 2: Please explain why the project is undefined. One is to assume the “project” is Attachment A, Proposed Low-Threat UST Closure Policy, but this is not specifically stated.

Statement on Page 3, Last paragraph: *In general, the proposed Policy will operate to end the environmental impacts associated with continued monitoring of site conditions such as waste disposal, greenhouse gas emissions due to traveling to and from the site, and traffic disruptions due to sampling wells located in the street. Adoption and implementation of the proposed Policy could, however, cause regulatory agencies to close cases with more petroleum left in place than with current practices. This would cause petroleum to remain in the subsurface subject to natural attenuation processes for a longer period of time.*

Comment 3: Please explain why the paragraph only discusses one aspect of climate change, greenhouse gas emissions, but fails to discuss other important environmental impacts, such as sea level rise along the coastal zones of California (where thousands of UST cases are located) and future changes to water resources. According to the USEPA,

The future effects of climate change on water resources in the U.S. and other parts of the world will depend on trends in both climatic and non-climatic factors. Evaluating these impacts is challenging because water availability, quality and streamflow are sensitive to changes in temperature and precipitation. Other important factors include increased demand for water caused by population growth, changes in the economy, development of new technologies, changes in watershed characteristics and water management decisions.

In addition to the typical impacts on water management, climate change introduces an additional element of uncertainty about future water resource management. Water resources in the United States are heavily managed and supplies are scarce in some regions of the country. Strategies have been developed and continue to evolve to address these issues. Implementation of adaptation measures, such as water conservation, use of markets to

allocate water, and the application of appropriate management practices will have an important role to play in determining the impacts of climate change on water resources.

Comment 4: This paragraph indicates the project “could” close cases with higher concentrations of petroleum hydrocarbons in soil and groundwater “than with current practices.” There is little doubt this will occur if the current draft policy is implemented (“could” becomes “would”), but the bigger question is this; wouldn’t petroleum hydrocarbon concentrations in groundwater actually increase due to a less stringent cleanup approach at UST sites?

Later on Page 10, the box for *Hydrology/Water Quality* was not checked. Why? Please explain why allowing higher concentrations of petroleum hydrocarbons to remain in soil (with a high future potential for leaching) and groundwater at the time of case closure, requiring much longer cleanup timeframes by natural processes, would not have a negative impact on future groundwater quality.

What if a local agency/government, mainly dependent upon a drinking water source from far away (i.e., Sierra Nevada mountains) but with overlying rights to groundwater, decided to use locally-available groundwater sources to water lawns, playing fields, golf courses, cemeteries, etc.? Does that entity, which serves the citizens of California, have the right to clean groundwater? What if that same agency decided to create a shallow groundwater recharge zone in an area of former and existing USTs? Wouldn’t it be good that petroleum hydrocarbon impacts to soil from formerly leaking gas station sites were properly identified and removed/remediated to the maximum extent practicable to better ensure the groundwater is usable in the future? Please answer these questions.

Page 4, V. Environmental Setting

Comment 5: This section is a strange and seemingly out of place discussion on California’s “bioregions.” The section contains a map of bioregions from CAL FIRE’s Fire and Resource Assessment Program (FRAP), a detailed report on California’s forests and rangelands (unlike the State Water Resources Control Board, CAL FIRE is part of the Natural Resources Agency). This section utilizes information from the California Biodiversity Council without saying so, and briefly touches on the biodiversity of California with a general emphasis on geography and topography. There is little to no discussion on biodiversity, which is defined as the diversity, or variety, of plants and animals and other living things in a particular area or region.

Why is this section important? How does presenting the bioregion data in the scoping document pertain to CEQA requirements and the proposed policy? Why are there no discussions on surface and groundwater resources and groundwater basins?

FRAP actually contains an excellent chapter titled *Water Quality and Quantity Protection and Enhancement*, which includes the statement, *Healthy urban and rural forested watersheds absorb rainfall and snow melt, slow storm runoff, recharge aquifers, sustain stream flows, and filter pollutants. Assessments should identify watersheds where continued forest conservation and management is important to the future supply of clean municipal drinking water, or where restoration or protection activities will improve or restore a critical water source. Resource strategies should include actions for managing and conserving these priority watersheds for water quality and supply, and other ecosystem services.*

Comment 6: Paragraph 3 under “UST Sites” presents the statement; *The average age of the open cases is over 15 years.*

Why is this comment important? Federal law and California regulations required mandatory upgrades and replacements of USTs at retail gas station sites that were installed before November 30, 1987. The deadline to complete the upgrade was December 22, 1998, approximately 13 years ago. Many UST owners/dischargers waited until the last minute to complete the costly upgrades, and then waited to be accepted into the UST Cleanup Fund. Many UST owners took their time in completing required site characterization and cleanup activities.

The average age of an open UST case has no direct relationship to the success of the UST Cleanup Program in California; contrary to the myth being perpetuated by a few, the program has been highly successful.

There has to be a proper understanding that regulated entities vary in their willingness and capacity to comply with UST regulations. There are “good apples”, those entities that use good-faith efforts to comply with the regulations. Perhaps the bar is set too high for these entities. There are “bad apples”, those entities to resist regulatory requirements, wholly on the basis of cost or convenience, and give the minimal amount of effort to comply with the UST regulations. The bar is set too low for these entities.

Page 10, V1. Environmental Impacts

Comment 7: This section includes a CEQA checklist listing environmental factors potentially affected by the project/policy. I will comment on several boxes that were not checked:

- ✓ Hydrology/Water Quality
- ✓ Land Use/Planning

Hydrology/Water Quality (Pages 20 to 22): This box should be checked. The proposed project/policy mandates that UST sites will be closed in the future without any restriction on groundwater use. Past cleanup policies have allowed UST cases to be closed with various levels of residual contamination remaining in groundwater, provided the groundwater was evaluated and found to be non-potable or of insufficient yield. Since the policy will allow contamination to remain in groundwater at levels much higher than previously allowed, groundwater will be more polluted under the policy.

Private water supply wells and irrigation wells – thousands of wells, many installed without regulatory oversight – have been impacted with petroleum hydrocarbons and MTBE throughout California. Such wells are usually located in shallow, less-protected aquifers where no formal regular monitoring is required.

Land Use/Planning (Page 22): This box should be checked. Groundwater has other beneficial uses besides being a source of drinking water. Petroleum production and processing facilities (i.e., refineries, bulk terminals) are often located close to the coastal regions, marshes, wetlands, and open surface waters (bays, streams, rivers, lakes, reservoirs, ponds) in California. These areas have highly complex ecosystems which are particularly vulnerable to the impact of petroleum contamination. In addition, the petroleum compounds can persist for many years. These sensitive habitats have impacted by fuel hydrocarbons and oxygenate releases which are not being considered in the project/policy.

The proposed project/policy mandates that UST sites will be closed in the future without any restriction on land use. This means that former UST sites could be redeveloped with houses or other sensitive uses, such as hospitals or day care facilities. Past cleanup policies have allowed UST cases to be closed with various levels of residual contamination, provided the land use (i.e., commercial/industrial) remained the same. Since the policy will allow contamination to remain in the subsurface at levels much higher than previously allowed, there is no justification to allow residential developments to proceed unless appropriate cleanup goals for soil, soil vapor, and groundwater are approved by the lead agency and actually achieved via remedial efforts.

Other Comments

Comment 9: The future beneficial uses of groundwater, considering climate change and pressures on existing water resources located considerable distances from major population centers, etc. were not considered in this project/policy. Why?

Comment 10: The following comment from the American Petroleum Institute's May 2007 report on MTBE, *Technical Protocol for Evaluating the Natural Attenuation of MtBE*, is very interesting:

“Resource protection may be a policy objective, and may have associated criteria, even if the resource has no current beneficial use.”

Was the protection of current and future groundwater resources from MTBE contamination, under current Federal and State laws, examined and evaluated during the preparation of the project? Please elaborate.

Comment 11: On Page 19, under, *d) Would the project be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code §65962.5 and, as a result, would it create a significant hazard to the public or the environment?*, the policy states there would be a “Less Than Significant Impact”. This section contains the comment:

- *Existing petroleum in the subsurface at these LUST sites are part of the baseline. This is the first time this concept is presented in the document, yet there is no explanation on the meaning. On Page 20, there's the statement, *Petroleum-impacted groundwater that exists at LUST sites is a part of the baseline condition.* On Page 28, there's another comment, *Existing petroleum-impacted LUST sites is the baseline condition and the proposed Policy does not authorize additional releases to the environment.**

Please explain the meanings of “baseline” and “baseline condition.”

Comment 12: Cumulative Impact Assessments

- **Have there been any noteworthy evaluations of the cumulative impacts to California groundwater basins from fuel hydrocarbon and oxygenate contamination? Please cite the references.**
- **How were the short- and long-term impacts to groundwater basins from fuel hydrocarbons and MTBE contamination evaluated? Please cite the references.**