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STATE WATER RESOURCES CONTROL BOARD
Attn: Charles R. Hoppin, Chair
1001 I Street
Sacramento, CA 95812-0100

RE: Low Threat UST - Gold Standard case closure or Provisional case closure?

Dear Mr. Hoppin:

I have previously written to the SWRCB to express my concerns in regards to the detrimental effects of the proposed Low Threat UST Closure Policy ("Policy") on the rights of the affected Real Property Stakeholders. Historical safeguards are soon to disappear.

SECOND-CLASS CLOSURES

The Policy, if adopted as proposed, will create a two tiered case closure system.

1) The traditional classification is the "**Gold Standard**" case closure as documented by an unfettered No Further Action Letter.

2) The second, or brand new, classification would be the "**Provisional**" case closure in which residual contamination is left in place to supposedly naturally attenuate as documented by some form of notification to "land use" agencies. This secondary class, under certain circumstances, includes a recorded Deed Restriction.

RECOMMENDATIONS

The creation of this second-class "**Provisional**" closure is problematic for the Real Property Stakeholders. My intent is to suggest reasonable "Alternatives" to certain aspects of the proposed Policy, as seen through the eyes of Real Property Stakeholders in order to mitigate some of the adverse effects of the second-class closure. The suggestions are as follows:

1) <u>Retain a limited, reasonable number of groundwater monitoring wells to verify the natural attenuation rate of the residual contamination</u>. For example, three (3) monitoring wells could be sampled every two (2) years for verification purposes. The

balance of the monitoring wells could be decommissioned. This will lead to a No Further Action letter without land use limitations. This mitigation measure will allow verification monitoring of the rate of natural attenuation without undue reimbursements from the USTCF. It is a scenario where both economic and environmental considerations are balanced.

2) In the event a land use limitation and/or restriction is imposed as a condition of Low Threat UST Closure, there should be a fixed, reasonable "expiration" date included in the document. For example, if a plume is truly "stable" and "decreasing", five (5) years should be the maximum time frame to be subjected to a Provisional closure. This will limit the "period of impairment". It will reduce and/or eliminate restrictions and/or limitations of property rights.

3) Establish a cost-effective process of appeal for a Property Owner to request a case closure without limitations. This may serve to limit the need for costly litigation and recognize the fact that limitations can sometimes be erroneously imposed on sites.

4) To facilitate future inquiries, the Primary Responsible Party, should be required to register on GeoTracker to enable future interested parties access to discuss the history of a given site or to request information on the site. Absent a contact agent, a Property Owner, innocent adjacent Property Owner, lender, governmental agencies or interested parties would be forced to expend resources to find the Primary Responsible Party. A "tracking system" for Responsible Parties is only fair in the event unacceptable levels of contamination sourced with the Responsible Party is discovered in the future.

PROJECT DESCRIPTION ISSUES

As stated in the proposed Policy, the SWRCB intends "to provide direction to responsible parties, their service providers, and regulatory agencies." Absent from the discussion are entire classes of Property Owners, who will be described below. CEQA, section 15064 (c) states "In determining whether an effect will be adverse or beneficial, the lead agency shall consider the views held by **members of the public in all areas affected** as expressed in the whole record before the lead agency."

CURRENT CASE CLOSURE PROCEDURES

After appropriate investigation, remediation, and monitoring, a Primary Responsible Party can be expected to request a case closure based upon a history of the site that documents the then existing contamination levels as measured against published scientific standards. If the governmental agency having environmental jurisdiction concurs, the site is issued a No Further Action letter that is widely recognized by the community and is accepted as the **Gold Standard** that the site is environmentally in compliance with the published standards. This

enables a Property Owner to sell/lease, develop/redevelop, or finance/refinance the Premises without facing any form of "stigma" from the historical contamination.

PROPOSED CASE CLOSURE PROCEDURES

Under the proposed Low Threat UST Closure Policy, there will be residual contamination left in place to naturally attenuate. This creates a secondary classification, or **Provisional** classification, of case closure in that unverifiable contamination, potentially in excess of existing water quality standards, is left in place.

In the event all monitoring wells are destroyed, there is no way to verify if or when the contamination actually naturally attenuates. As such, there will be a "stigma" attached to the Premises based upon notification to land use governmental agencies that will "flag" the Premises in the event of future activity. Will the planning department or building department impose arbitrary conditions, particularly in the form of a Conditional Use Permit, to enable a Property Owner to develop his site? Will a lender offer the same terms and conditions to a Property Owner with residual contamination or will the lender extract a high rate of interest or tighter terms and conditions in order to approve the financing? It is common sense that a proposed purchaser, given a "clean property" or a "property with a stigma" will not pay the same price for both properties. This is, in the real estate community, described as diminution of value.

The land use limitations could include a Deed Restriction, which, once recorded, may not easily be removed from the public record absent a fixed expiration date. Given the potentially long term projections for natural attenuation, the Property Owner will be faced with the difficult task of identifying and negotiating with a governmental agency with authority to execute a recordable document to extinguish the land use limitation or Deed Restriction.

It should be acknowledged that there is a significant cost factor to the Real Property Stakeholder to impose either engineering controls (short term out of pocket costs such as a vapor barrier) or institutional controls (long term costs such as diminution of value and loss or limitation of property rights).

VERIFICATION MONITORING

There will be no practical way for a Property Owner to verify the end of the contamination cycle. It shifts the burden form a Primary Responsible Party of the Property Owner, to include Innocent Adjacent Property Owners, to "prove" their Premises is no longer contaminated in excess of the then existing governmental standards. Proving that acceptable levels of contamination are present at some future undetermined point in time may be extremely hard to achieve. The Primary Responsible Party may be long gone or is claiming limited or contractual protections from liability. This is particularly true when such historical retail brands such as Texaco, Unocal, Amoco, ARCO, Phillips 66, and Sunoco have been acquired by other players in the gasoline business. It is not too much of a reach to project that a Property Owner

may have to resort to litigation to obtain a reasonable remedy to the issue of lifting land use restrictions.

Interestingly, Dr. Elizabeth A. Edwards, a member of the scientific Peer Review panel, opined "The ability to clearly and sufficiently accurately delineate a given plume, with appropriate measurement and sampling strategy, is absolutely key."

The task of proving future levels of contamination absent verification monitoring wells becomes even more daunting if we consider the potential for the composition of motor fuels to change over time and/or the potential that governmental standards become more restrictive.

REAL PROPERTY STAKEHOLDERS

There are different circumstances associated with the term "Property Owner"; i.e., there are different classifications of Real Property Stakeholders.

NOTE: A careful distinction needs to be made between a "Responsible Party" and a "Property Owner". They are not necessarily one and the same.

1) There is the Property Owner who owns the land and owns/operates underground storage tanks ("UST") as part of his/her business. This group of Property Owners is often represented by sole proprietorships of service station Dealers who purchased their sites from a major oil company. In many cases, there exists a contractual relationship whereby the Primary Responsible Party, the major oil company, has shifted the burden of responsibility to the Property Owner as a condition of the sale of the Premises to the Dealer. In the alternative, the responsibility of the Primary Responsible Party has been significantly limited. This creates a de facto, contractual, non-governmental, Secondary Responsible Party, who may or may not have the financial ability to fund a UST cleanup. In the event a Secondary Responsible Party is unable to affect the UST Cleanup, bankruptcy and/or abandonment is the ultimate consequence of the shift of the burden.

2) There is the more traditional Property Owner that has held the Premises in the family for generations and leased the Premises to a major oil company, who, in turn, owned and operated the UST. In certain of these cases, particularly older Leases, there was no written provision for environmental liability. Despite the lack of written obligations, the collective system of governmental oversight served to identify Primary Responsible Parties to effectuate corrective action for contaminated sites.

3) There is the Innocent Adjacent Property Owner, who is simply unlucky enough to own downgradient Premises contaminated by a plume originating from another site. Absent any form of obligation with the Primary Responsible Party, the Innocent Adjacent Property Owner is dependent upon appropriate governmental oversight or the Superior Court for a remedy to contamination totally unrelated to their ownership of their Premises. Property rights are

limited by the inability to perform tasks such as development (such as construction of subterranean parking or storage) or utility (such as installing a private water well).

NOTE: The SED report, on page 39 in the section on Redevelopment, stated that "Many petroleum-impacted UST sites that are subject to the proposed Policy are developed parcels of land, so closure of cases on these sites will not lead to redevelopment." Unfortunately, after decades in the sale and leasing of service station properties, I can state with certainty that this is an incorrect statement. The number of "prime" real estate parcels that are converted to non-service station use is dramatic. The number has fallen from approximately 9,000 stations in 2000 to 7,500 stations in 2010. This represents that 1 out of 6 stations are now used for some other use; i.e., they have been redeveloped and would likely be redeveloped at a higher rate absent the "stigma" of residual contamination.

CEQA/STATUTORY COMPLIANCE CONCERNS

The "improved efficiency" of the UST Cleanup Fund administration, while an important and urgent goal of the SWRCB, does not consider the consequences of the proposed Policy in the secondary indirect physical economic and social impacts to property owners. As defined in CEQA 15064 (e), "Economic or social changes may be used, however, to determine that a physical change shall be regarded as a significant effect on the environment."

In addition, the proposed Policy does not address the "cumulative effects" under CEQA 15064 (h) (1). "When assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact is significant and whether the effects of the project are cumulatively considerable."

Next, 23 CCR, 3777, subd. (b)(3) requires "an analysis of reasonable alternatives to the project and mitigation measures to avoid or reduce any significant or potentially significant adverse environmental impacts."

CONCLUSION

I urge the SWRCB to ensure balance between the needs of the UST Cleanup Fund and the needs of the stakeholders served by the UST Cleanup Fund.

The recommendations offered are common sense mitigation measures.

I thank you your time to review my comments. Should you wish to follow up on these concepts, please feel free to contact me at 805-493-0746 or lsturner@verizon.net.

Larry S. Turner, J.D., M.B.A.

Cc: Frances Spivey-Weber, Vice Chair
Tam M. Doduc, Member
Thomas Howard, Executive Director
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Kevin Graves, UST Program Manager