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February 13, 2012

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Re: **Comment re: Low-Threat UST Closure Policy**

Dear Ms. Townsend:

The following comments on your Draft Low Threat UST Closure Policy and Draft Substitute Environmental Document (SED) are hereby submitted:

I. The Low Threat Underground Storage Tank Case Closure Policy If Implemented, Will Violate the Long Standing Anti-Degradation Policy of the Water Board As Set Forth in Resolution No. 68-16

Pages 16 and 27 of the Low Threat UST Closure Policy Draft Substitute Environmental Document states that existing petroleum in the subsurface at petroleum impacted UST sites are part of the "baseline" of generally existing physical environmental conditions. Water Board Resolution 68-16 enacted in 1968 as an Anti-Degradation Policy specifies that the quality of some waters of the state is higher than that established by adopted policies and that it is the intent and purpose of the Board that such higher water quality shall be maintained to the maximum extent practicable.

The Low Threat UST Closure Policy pertains to occurrences of specific instances of man made pollution. The Low Threat UST Closure Policy and Anti-Degradation Policy are irreconcilable. Low Threat UST Closure Policy criteria are ambiguous and cannot guarantee that background water quality will ever be achieved through natural attenuation. In fact implementation of the policy may spell the beginning of the end for use of California groundwater for any legitimate purpose. The following ambiguities of the Low Threat UST Closure Policy are listed for example:

- i. What constitutes the mitigation of a "substantial fraction" of a petroleum contaminant mass? What facts will the Water Board require to make this assessment? Is the Principal Responsible Party required to estimate total contaminant mass in the subsurface and total contaminant mass recovered through its "reasonable" remediation efforts? Will 25% removal of original contaminant mass constitute a "substantial fraction"?
- ii. What standard will the Water Board use to determine whether a principal responsible party has implemented secondary source

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State Water Resources Control Board
February 13, 2012
Page Two

removal to the extent practicable? Will a brief pilot test suffice to enable a PRP to meet its burden of proof that secondary source removal has been conducted to the extent practicable?

iii. What level of certainty is required to establish that natural attenuation will achieve water quality objectives within a reasonable time? Is a 20 year upper confidence limit for plume attenuation a reasonable time? What about a 250 year upper confidence limit for plume attenuation to background water quality?

iv. How does the Water Board intend to plug the monitoring loophole created by the Low Threat Closure Policy? Who decides when petroleum impacted UST sites are beyond active remediation and are in the monitoring phase? The incentives of the PRP to shortcut active remediation in order to gain early entry to the closure track (monitoring phase) are considerable. What is the Board's answer to a PRP who submits a Corrective Action Plan for monitored natural attenuation, claiming that its sloppy pilot remediation tests were ineffective in removing secondary source contaminant?

By implementing the Low Threat UST Closure Policy the Water Board is embracing a dangerous precedent through which the waters of the State will be degraded over successive generations. Every recalcitrant groundwater contaminant that is expensive to remove will result in the establishment of a new "baseline" through policy directives.

The enactment of the Low Threat UST Closure Policy is essentially a capitulation by the Water Board to political and economic pressures. In 2011 the Governor signed Assembly Bill AB291 which added \$180 million to the UST Cleanup Fund for 2012 and 2013. AB291 was originally opposed by both the California Independent Oil Marketers Association (CIOMA) and Western States Petroleum Association ((WSPA) because they were concerned that extending the gasoline tax fee increase would reduce the pressure for passage of the Low Threat UST Closure Policy under consideration by the State Water Board. A legislative compromise was reached and CIOMA and WSPA eventually supported AB291 when it was double joined with its Bill AB358 that streamlined regulatory authority and policies for case closure. The Senate and Assembly then passed the compromise bills by over 2/3 majority.

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State Water Resources Control Board
February 13, 2012
Page Three

II. The Proposed Low Threat UST Closure Policy Lacks a Soil MTBE Specification

The proposed policy lacks soil MTBE concentration criteria to preclude further groundwater contamination from MTBE remaining in subsurface soil. Appendix 2 of the Draft Low Threat UST Closure Policy specifies that total soil TPH shall be less than 100 mg/kg throughout the entire depth of the bioattenuation zone. The federal Clean Air Act Amendments of 1990 required geographic areas that exceed air quality standards for carbon monoxide to use oxygenated gasoline containing a minimum of 2.7 percent oxygen by weight. MTBE has been used in gasoline in the United States since 1979, at concentrations as high as 10% by weight in gasoline. Due to variability in the length of time MTBE reformulated gasoline was used at UST sites in California, the variable concentrations of MTBE used in reformulated gasoline, and the unique physicochemical characteristics of MTBE (low Henry's Law Constant), it is not possible to predict soil MTBE concentrations based on prevailing soil TPH concentrations.

The Water Board Guidance for Petroleum Impacted Sites May 1996, promulgates soil screening levels for TPH (gasoline and diesel), MTBE and BTEX compounds based on soil type and distance above groundwater. In order to protect against adverse impacts to groundwater the UST Closure Policy should specify the maximum allowable concentration of MTBE in soil throughout the entire depth of the bioattenuation zone.

Respectfully Submitted,

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