

ROGERS JOSEPH O'DONNELL

415.956.2828 (t)
415.956.6457 (f)

Robert Dollar Building
311 California Street, 10th Flr.
San Francisco CA 94104

202.777.8950 (t)
202.347.8429 (f)

Victor Building
750 9th Street, NW, Suite 710
Washington DC 20001

www.rjo.com

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California's New Low-Threat Underground Storage Tank Case Closure Policy

By Robert C. Goodman and Ann M. Blessing

For those involved in cleaning up leaking underground fuel tank sites in California, the path to “closure” – a letter from a regulatory agency saying that no further work at a site is required – has just become clearer. On July 30, 2012, California’s Office of Administrative Law approved a new “Low-Threat Underground Storage Tank Case Closure Policy,” which for the first time establishes a clear road map to cleaning up petroleum release sites. The Policy can be found at http://www.swrcb.ca.gov/ust/lt_cls_plcy.shtml.

Background

Cleaning up contaminated fuel sites in California is notoriously complicated. Ultimately, the State Water Resources Control Board, a part of the California Environmental Protection Agency, has authority over the cleanups. But cleanup oversight is delegated to nine Regional Water Quality Control Boards across the State, and then further delegated to twenty-two “Local Oversight Programs” and over ninety “Local Implementing Agencies.” Someone cleaning up a leaking fuel tank site is therefore often dealing with a County Health Department or Fire Department, with little clear accountability to the State Water Resources Control Board. As a result, cleanup standards and approaches to leaking fuel tank sites have traditionally varied widely throughout the State, often dependent on which regulatory agency – or specific regulator – is overseeing the cleanup. The Low-Threat Closure Policy (the “Policy”) is designed, in part, to insure consistency across the State. The Policy was adopted by the State Water Resources Control Board in May of this year, and its approval by the Office of Administrative Law means that it is now official policy, although there is a limited window during which the Policy could be subject to legal challenge.

Policy Highlights

The Policy sets specific statewide closure criteria. The Policy provides that petroleum underground storage tank (“UST”) sites that meet specific criteria will be deemed to pose a low threat to human health, safety or the environment, will not require further corrective action, and will be issued a closure letter consistent with California’s Health & Safety Code. The Policy identifies eight general criteria that must be satisfied:

- (1) the unauthorized release is located within the service area of a public water system;
- (2) the unauthorized release consists only of petroleum;
- (3) the unauthorized (“primary”) release from the UST system has been stopped;
- (4) free product has been removed to the maximum extent possible;
- (5) a conceptual site model that assesses the nature, extent and mobility of the release has been developed;
- (6) any secondary source has been removed to the extent practicable;
- (7) soil or groundwater has been tested for methyl tert-butyl ether (“MTBE”); and
- (8) “nuisance” as defined in the State Water Code does not exist at the site.

Additionally, there are three “media-specific” criteria that require a candidate site to show that it presents a low threat of affecting human health and the environment through three pathways: (1) groundwater; (2) petroleum vapor intrusion to indoor air; and (3) direct contact and outdoor air exposure. A site that meets all of these criteria will be eligible for closure under the Policy.

In its resolution adopting the Policy, the State Water Resources Control Board directed all Regional Water Quality Control Boards and local agencies to review all cases in the petroleum UST Cleanup Program using the framework provided in the Policy. This review, which must be done no later than 365 days from the effective date of the Policy (i.e., by July 30, 2013), must determine whether each case meets the criteria in the Policy, or otherwise can be closed based on site-specific evaluation. If a case does not satisfy the Policy criteria, impediments to closure must be identified, and these reviews are to

be posted on the State Water Resources Control Board’s Geotracker website (<http://geotracker.waterboards.ca.gov>). Among other things, this ensures an active review of all low threat UST sites statewide.

The specific criteria and clear guidelines of the Policy can also be used for closure of non-UST sites. The Policy preamble includes specific language making it available to non-UST sites. The preamble states that “[w]hile this policy does not specifically address other

petroleum release scenarios such as pipelines or above ground storage tanks, if a particular site with a different petroleum release scenario exhibits attributes similar to those which this policy addresses, the criteria for closure evaluation of these non-UST sites should be similar to those in this policy.” Thus, the anticipated greater consistency and efficiency of the new Policy can be applied to eligible *non*-UST sites, as well.

The Road Ahead

As with many things, the “devil will be in the details.” Many in the regulated community believe that regulators, whose livelihood depends on overseeing the cleanup of petroleum release sites, may be reluctant to implement a policy that may significantly reduce their caseload. In addition, regulators who previously required cleanups to certain standards may be reluctant to issue a closure letter for a site that allows petroleum to remain in the subsurface at higher levels than had previously been allowed. The regulated community must be prepared to educate the regulator overseeing the site, and also, possibly, be prepared to appeal the denial of a closure request to the State Water Resources Control Board.

At a minimum, anyone who is faced with investigating or cleaning up a petroleum release site in California – whether it involves a storage tank or some other source – should evaluate whether the Policy applies, and if so, what steps should be taken to obtain site closure.

How We Can Assist

If you have any questions about this subject, please contact Robert C. Goodman (rgoodman@rjo.com) or Ann M. Blessing (ablessing@rjo.com) or another member of the Environmental Law Practice Group (all of whom are listed at <http://www.rjo.com/environmental.html>).

The content of this article is intended to provide a general guide to the subject matter, and is not a substitute for legal advice in specific circumstances.