Petroleum Underground Storage Tank Release Compensation Board

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MINUTES OF THE 163rd MEETING OF THE PETROLEUM UNDERGROUND STORAGE TANK RELEASE COMPENSATION BOARD
March 16, 2016

BOARD MEMBERS IN ATTENDANCE

Jim Rocco
John Hull
Don Bryant
Scott Fleming
Tom Stephenson

EX-OFFICIO MEMBERS IN ATTENDANCE

Bill Hills, representing Director Jacqueline Williams, Ohio Department of Commerce
Chris Geyer, representing Director Craig Butler, Ohio Environmental Protection Agency
J.D. Pisula, representing Josh Mandel, State Treasurer of Ohio

OTHERS IN ATTENDANCE

Starr Richmond	Executive Director, PUSTRCB
Madelin Esquivel	Assistant Director, PUSTRCB
Don Leasor	Chief Fiscal Officer, PUSTRCB
Cindy Duann	Claims Supervisor, PUSTRCB
Jonathan Maneval	Administrative Coordinator, PUSTRCB
Shalonda Lee	Administrative Assistant, PUSTRCB
Jennifer Croskey	Assistant Attorney General
Howard Silver	Attorney at Law
Rob Oshenbauch	API Ohio
Brent McPherson	ATC Group Services LLC
Doug Darrah	ATC Group Services LLC
Sean Hetrick	BJAAM Environmental, Inc.

Minutes submitted by:

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Jonathan Maneval
Administrative Coordinator

Call to Order:

Chairman Rocco convened the one hundred sixty-third meeting of the Petroleum Underground Storage Tank Release Compensation Board on Wednesday, March 16, 2016.

The following members were in attendance: Jim Rocco; John Hull; Don Bryant; Scott Fleming; Tom Stephenson; Bill Hills, representing Director Jacqueline Williams, Ohio Department of Commerce; Chris Geyer, representing Director Craig Butler, Ohio Environmental Protection Agency; and J.D. Pisula, representing Josh Mandel, State Treasurer of Ohio.

Chairman Rocco announced that Steve Hightower had recently resigned from the Board, and four seats were now vacant. He noted that these vacant positions include the representatives of local governments and petroleum dealers; the environmental engineer that represents the interests of the public and is not associated with the petroleum industry; and the representative of businesses that own petroleum underground storage tanks and is not primarily engaged in the sale of petroleum. He invited the Board members to recommend individuals to fill the vacant seats. He noted that J.D. Pisula had been appointed to serve as designee for Josh Mandel, State Treasurer of Ohio.

Minutes:

Chairman Rocco asked if there were any comments or questions regarding the minutes from the January 13, 2016 Board meeting, and there were none. Vice-Chairman Hull moved to approve the minutes. Mr. Hills seconded. A vote was taken and the following members voted in the affirmative: Messrs. Bryant, Fleming, Geyer, Hills, Hull, Pisula and Rocco. Mr. Stephenson abstained. The minutes were approved as presented.

BUSTR Report:

Chairman Rocco called upon Bill Hills, Bureau Chief, to present the Bureau of Underground Storage Tank Regulations (BUSTR) report.

Mr. Hills said the third responsible party search program is underway, and 120 of the 200 petroleum underground storage tank (UST) release sites being researched through the program had been completed by the vendors. The program is used to identify UST owners and operators responsible for the investigation and cleanup of petroleum releases.

Mr. Hills said the State Fire Marshal, Ohio Environmental Protection Agency and Development Services Agency have established the guidelines for local government entities to obtain grant funding to be used for the cleanup of abandoned gas station sites. He said the grant application is now available on the Development Services Agency's website, and there had been many inquiries into the grant program. He noted that in order to be eligible for funding, the site must be classified by BUSTR as "Class C", meaning there is no viable owner able to pay for cleanup costs. He noted that $20 million is available through the program and highlighted that it is grant funding and not a loan.

Mr. Hills said the contract for the OTTER (Ohio Tank Tracking & Environmental Regulations) upgrade project had been awarded to a new vendor and not the vendor that had originated the system.

He said the work is progressing surprisingly smoothly, and it appears as though a lot of modifications are going to be made.

Mr. Hills said the proposed BUSTR administrative rule amendments had been drafted, and following their review and approval by the State Fire Marshal and the Director of the Department of Commerce, will be made available for stakeholder review and public comment. He said he anticipates the drafts to be made publicly available by the end of March.

Mr. Hills reported for the week ending March 5, 2016, there were 73 new inspections performed for a total of 7,249 inspections for the three-year inspection cycle ending June 30, 2016. He said even with the loss of a field inspector position, BUSTR expects to meet the inspection quota established by the U.S. EPA by the end of June. He said that eight NFAs (no further actions) were generated during the week ending March 5, 2016, for a total of 209 NFAs for the grant cycle ending September 30, 2016.

Mr. Hills stated that, as of March 5, 2016, there were 21,684 registered USTs and 3,665 owners of 7,360 registered facilities.

Financial Reports:

Chairman Rocco called upon Don Leasor, Chief Fiscal Officer, to present the financial reports.

Audit Update

Mr. Leasor said Kennedy Cottrell Richards submitted the audited financial statements to the Auditor of State prior to the January 29, 2016 extended deadline. He noted the audit report is subject to review and acceptance by the Office of the Auditor of State, and the report will be made publicly available when it is released by that office.

December and January Financials

Mr. Leasor said the December and January financials were emailed to each member. He asked if there were any questions or concerns regarding these reports, and there were none.

Mr. Leasor reported, as of March 15, 2016, the unobligated account balance is $24.5 million. He said this amount includes $10.5 million in STAR Ohio and the custodial account, and the $14 million invested in U.S. treasuries and U.S. agency callable bonds. He noted the $14 million invested in U.S. treasuries and U.S. agency callable bonds includes the additional $6 million of investments that had been approved by the Board at the January meeting.

Mr. Leasor said the claims expense for January was about $636,000, and to date, approximately $4.8 million had been paid for claims for fiscal year 2016.

Mr. Leasor reported that, as of January 31, 2016, approximately 101% of the budgeted revenues, net of refunds, had been collected. He said information on refunds and fee collections would be presented with the compliance and fee assessment report.

Mr. Leasor stated that the operating expenses for the month of January were approximately $117,000. He pointed out that, as of January 31, 2016, expenses should be around 58% of the amount budgeted for the fiscal year.

Mr. Leasor said, as of January 31, 2016, postage expenses were 75% of the amount budgeted. He said this was due to postage fees for the final quarter of fiscal year 2015 being paid in July of fiscal year 2016. He said these charges include fees for the annual fee statement mailing, which is sent by certified mail, as well as the mailing of the Notifications of Non-Compliance and Orders Pursuant to Law, which were sent in the months of July and August.

Mr. Leasor said expenses for office supplies were 80% of the amount budgeted due to the purchase of new board room guest chairs. He said salary expenses were below budget, and explained that the budget for salaries had been built with the expectation that an additional claims analyst would be hired, but the position has not been filled. In addition, two positions in the compliance department are currently vacant. He said printing and copying costs are low, but this expense will increase with the publication of the newsletter and printing of the annual fee statements in the fourth quarter.

Mr. Leasor said the legal and professional line item is below the anticipated amount. However, this will increase when the second quarter costs associated with the Assistant Attorney General and auditing services are invoiced. He said there has been minimal travel for legal related matters, which resulted in travel expenses also being below budget. He said employee expenses were below budget due to vacancies, and the telephone expense was below budget due to the timing of invoices.

Mr. Leasor said all other expenses are at or below where they should be at this time in the fiscal year.

Vice-Chairman Hull questioned whether accelerated depreciation is used for certain assets. Mr. Leasor responded stating the Board depreciates all capital assets using straight line depreciation over a period of five years.

Compliance and Fee Assessment Report:

Chairman Rocco called on Madelin Esquivel, Assistant Director, to present the compliance and fee assessment report.

Ms. Esquivel reported as of February 29, 2016, refunds totaling $55,950 had been paid to 69 owners for the 2015 program year, which began July 1, 2015. She said a total of $36,165 was used to offset prior years' outstanding fees. She said the combined amounts total $92,115, which represents 41% of the $225,000 refund goal set for the 2015 program year. She reported the amount of refunds pending totals $1,379,134.

Ms. Esquivel said, as of February 29, 2016, a net total of $140,450 had been collected by the Attorney General's Office and Special Counsel.

Ms. Esquivel said since July 1, 2015, 321 accounts totaling $1,124,050 had been certified to the Attorney General's Office for collection. She said the most recent certification was on March 14, 2016, and included the unpaid 2015 program year's fees.

Ms. Esquivel said four Orders Pursuant to Law are under appeal. She reported that three were under review and one settlement is pending. She said one Determination to Deny a Certificate of Coverage

was under appeal, and noted that the report and recommendation concerning the appeal would be presented by the Hearing Officer later in the meeting.

Ms. Esquivel reported that two Ability to Pay Applications are pending review. The Ability to Pay program allows former UST owners experiencing financial difficulty to apply for and receive a determination of their ability to pay delinquent fees.

Ms. Esquivel reported that 3,051 Certificates of Coverage had been issued thus far for program year 2015. She said there are 136 Applications for Certificates of Coverage currently in process.

Ms. Esquivel stated that there are 54 uncashed refund checks that total $43,417. She said there is $37,050 in refunds pending for 32 owners from whom more information has been requested.

Claims Reports:

Chairman Rocco called on Cindy Duann, Claims Supervisor, to present the claims reports.

Ms. Duann said, as of March 1, 2016, a total of 2,358 Fund eligible sites had received no further action status. She pointed out that 19% of these sites were cleaned up exclusively under BUSTR's risk based corrective action (RBCA) rules and had an average cleanup cost of about $72,300 per site.

Ms. Duann reported that, as of March 1, 2016, a total of 1,538 claims with a total face value above the deductible amount were pending review. She noted that in general, claims are being reviewed within five to six months of receipt.

Ms. Duann stated that, as of March 1, 2016, 18 claim settlement determinations were under appeal.

Ms. Duann reported that during the months of January and February, a total of 109 claims were received, and the staff settled or closed 127 claims in these months. She said during the last eight months, an average of 65 claims per month were received. She noted that the monthly average of claims received is very similar to the previous year. She said so far this program year, the staff settled or closed an average of 71 claims per month.

Ms. Duann said the average of claimed costs that are disallowed is currently 20.8% of the face value. She said this is slightly higher than the average disallowed costs in the previous two program years.

Ms. Duann stated that, as of March 1, 2016, the total claim settlement offer was $4.8 million, and the total claim settlement offer for program year 2015 is anticipated to be $7.5 million.

Ms. Duann said that during the last eight months, 53 eligibility applications were received and 56 eligibility determinations were issued. She said of the 56 eligibility determinations issued, 41% were denied. She pointed out that the main reason these applications were denied was due to no release being demonstrated or no corrective action work being required by BUSTR. She explained that even in instances where closure and site check sampling results are below action levels and no further action is required by BUSTR, owners will still submit an eligibility application in order to protect their rights to seek reimbursement from the Fund in the event the no further action is reopened in the future.

She said, as of March 1, 2016, a total of 15 eligibility applications were pending review, and four determinations to deny eligibility were under appeal.

Ms. Duann said the Cost Pre-Approval Statistics Report has been revised, and pointed out that a new column titled "Notification of Cost Exceedance" had been added. She explained that the Board's mandatory cost pre-approval rule requires the tank owner to provide a revised estimated cost and completion schedule if during the implementation of a remedial action plan or other corrective action program tasks, the actual costs are estimated to exceed the pre-approved amount by more than 20% or $6,000 (whichever is less). She said in the past, these cost exceedance notifications were included in the column titled "Annual RAP Cost Pre-Approvals", and the revised report more accurately reflects the type of cost pre-approval requests being received and determined.

Ms. Duann said that during the last eight months, a total of 100 requests for cost pre-approval had been received, and 105 cost pre-approval notifications were issued. There are 34 cost pre-approval requests currently pending review. She said the numbers of cost pre-approval requests received and notifications issued are very similar in comparison to the last program year.

Vice-Chairman Hull asked whether the additional costs are typically approved or denied when notification is received that costs are expected to exceed the pre-approved amount and a revised cost estimate is submitted for pre-approval. Ms. Duann responded explaining that the rule provides an option to either review the revised estimated cost and completion schedule in detail or to simply notify the owner that the revised costs will be evaluated when the claim reimbursement application is submitted. She said that oftentimes the additional costs have already been incurred and therefore, the costs cannot be preapproved.

Vice-Chairman Hull questioned whether there were any consequences for submitting notification of cost exceedance after the fact. Director Richmond responded stating the claimed costs are subject to a 50% penalty when there is a failure to seek pre-approval of the additional costs when required. Ms. Duann clarified that the 50% penalty is only applied to the claimed amount exceeding $6,000 of the pre-approved amount. Following a brief discussion, Vice-Chairman Hull suggested that the pre-approval program and mandatory notification of revised cost estimates be a topic that is addressed in an upcoming newsletter publication.

<u>New Business:</u>
Administrative Appeal – Report & Recommendation

Chairman Rocco called upon Howard Silver, the Board's Hearing Officer, to present the Report and Recommendation concerning the Determination to Deny a Certificate of Coverage issued to S.H.A. Petroleum, Inc.

Facility Number: 22723-0001, S.H.A. Petroleum, Inc.
162 South Broadway Street, New Philadelphia

Hearing Officer Silver said the case being presented to the Board concerned S.H.A. Petroleum Inc., a corporation operating out of Medina, Ohio, which owns four underground storage tanks located in New

Philadelphia, Ohio. He said that since its purchase of the tank system in 2011, S.H.A. Petroleum, Inc. has never possessed a Certificate of Coverage for any of the tanks. He stated that on June 30, 2014, an Application for Certificate of Coverage was received by the Board. However, because no Certificate had been issued for the subject tanks for the past two consecutive fiscal years, a rule adopted by the Board required the submission of additional information in order for the Certificate to be issued.

Mr. Silver said on November 4, 2014, the Board's Executive Director, Starr Richmond, directed correspondence to S.H.A. Petroleum, Inc. that set forth the particular information needed in order for a Certificate to be granted. He said that in accordance with the Board's rules, this letter also informed S.H.A. Petroleum, Inc. that the information was to be provided within 30 days from the mailing of the notice. He said that none of the requested information was received, and on December 9, 2014, Director Richmond issued another letter stating that since no response had been received, the Certificate of Coverage was denied.

Mr. Silver said that S.H.A. Petroleum, Inc. timely filed a written objection to the Determination to Deny a Certificate of Coverage, and requested that an adjudication hearing be held. He said the ex parte record hearing was held on December 10, 2015, as no representative for S.H.A. Petroleum, Inc. attended the hearing. He noted that S.H.A. Petroleum, Inc. had received notification of the hearing in October 2015, but no communication had been received as to whether it would participate in the hearing.

Mr. Silver said that Assistant Attorney General, Jennifer Croskey, represented the Board at the hearing, and presented information demonstrating that S.H.A. Petroleum, Inc. did not provide the documents required by statute and rule necessary to secure a Certificate of Coverage. He said that he found that the criteria for the issuance of a Certificate had not been met, and the Executive Director's determination to deny the Certificate of Coverage comprises valid state action as a matter of fact and law, and therefore, recommended to the Board that it be upheld.

Chairman Rocco asked whether the tanks were in operation, and Mr. Silver stated that three tanks were in use, and one tank was out of service. Mr. Stephenson and Vice-Chairman Hull recommended that BUSTR consider attaching a red tag to the tank system to prohibit fuel delivery, and believed it may be appropriate since the tanks have been operating out of compliance with the State Fire Marshal's rules for many years. Mr. Stephenson pointed out that prohibiting fuel delivery would likely compel the tank owner to quickly take action to correct any deficiencies.

After some further discussion, it was clarified that although S.H.A. Petroleum, Inc.'s Certificate had been denied, it could at any time, reinstate coverage by submitting the required documentation. Vice-Chairman Hull then made a motion to accept the Hearing Officer's recommendation to uphold the Executive Director's Determination to Deny a Certificate of Coverage. Mr. Stephenson seconded, and Chairman Rocco called for a roll call. The following members voted in the affirmative: Messrs. Bryant, Fleming, Geyer, Hills, Hull, Pisula, Stephenson and Rocco. There were no nays. The motion passed.

Assistant Attorney General Memorandum of Understanding

Chairman Rocco called upon Ms. Richmond to discuss modifications to the Assistant Attorney General's legal services contract.

Ms. Richmond said the Memorandum of Understanding (MOU) authorized by the Board at the June 2015 meeting required amendment as a result of the retirement of Carla Dowling-Fitzpatrick. She said the existing contract was being amended to name Jennifer Croskey as the Assistant Attorney General to provide legal services to the Board, and increase the cost by about $4,900 annually. She noted that the current MOU is for services from July 1, 2015 through June 30, 2016.

Chairman Rocco said that he and Ms. Richmond had met with the Attorney General's Office to discuss the MOU and the increased costs, and felt as though the additional costs were reasonable given the considerable time being required for the Board's ongoing litigation. He then requested a motion to authorize the chairman to enter into the amended agreement. Vice-Chairman so moved and Mr. Hills seconded. A vote was taken and all of the members were in favor. The motion passed.

Certificates of Coverage – Ratifications:

Chairman Rocco called upon Ms. Richmond to present the lists of owners who have either been issued or denied a Certificate of Coverage for ratification by the Board.

Ms. Richmond said the lists behind Tabs 7 and 8 are listings of facilities that, since the January Board meeting, had been issued or denied a program year 2014 or 2015 Certificate of Coverage.

Ms. Richmond said the process used to review the fee applications and issue or deny a Certificate of Coverage includes a review for completeness to determine full payment was received; financial responsibility for the deductible has been demonstrated; and the owner has certified with his signature that he is in compliance with the State Fire Marshal's rules for the operation and maintenance of petroleum underground storage tanks. She said if these requirements are met and if the tanks existed in previous years, a Certificate for the subject tanks has been issued to the owner in at least one of the prior two years, then a Certificate of Coverage is issued.

Ms. Richmond explained that if deficiencies or compliance issues are identified, notice is provided to the owner in accordance with the Board's rules. The owner is provided 30 days to respond to the notice with information to correct the deficiency or compliance issue. If correcting information is not received within this time, a determination denying the Certificate of Coverage is issued to the owner.

She said the Board's rules and the Revised Code make provisions for an appeal of the determination. Ms. Richmond said that throughout this process, the Board's staff works with the owner to correct the fee statement record and if necessary, refers the owner to BUSTR to correct the registration record.

Ms. Richmond requested the Board ratify her actions with respect to the issuance of the 2014 program year Certificates of Coverage for the four owners of the four facilities included on the list behind Tab 7.

Vice-Chairman Hull moved to ratify the issuance of the 2014 Certificates of Coverage for the facilities listed. Mr. Geyer seconded. A vote was taken and all of the members were in favor. The motion passed.

Ms. Richmond noted that no 2014 Determinations to Deny a Certificate of Coverage had been issued since the January Board meeting.

Ms. Richmond requested the Board ratify her actions with respect to the issuance of the 2015 program year Certificates of Coverage for the 46 owners of 89 facilities included on the list behind Tab 8.

Vice-Chairman Hull moved to ratify the issuance of the 2015 Certificates of Coverage for the facilities listed. Mr. Fleming seconded. A vote was taken and all of the members were in favor. The motion passed.

Ms. Richmond requested the Board ratify her actions with respect to the denial of the 2015 program year Certificates of Coverage for the 38 facilities included on the list behind the Tab 8 green divider page.

Vice-Chairman Hull moved to ratify the denial of the 2015 Certificates of Coverage that were listed. Mr. Geyer seconded. A vote was taken and all of the members were in favor. The motion passed.

Executive Session:

Chairman Rocco requested a motion to enter into executive session with counsel pursuant to Ohio Revised Code 121.22(G)(3) to discuss matters of pending or imminent court action. Mr. Hills so moved. Vice-Chairman Hull seconded. Chairman Rocco called for a roll call. The following members voted in the affirmative: Messrs. Bryant, Fleming, Geyer, Hills, Hull, Pisula, Stephenson and Rocco. There were no nays. The motion passed.

Reconvene Meeting

The Board adjourned from executive session and reconvened the public meeting.

Chairman Rocco stated that during the executive session, he and Mr. Fleming requested to be recused from a portion of the executive session, and the meeting was turned over to Vice-Chairman Hull.

Confirm Next Meeting and Adjourn:

Chairman Rocco said that the next Board meeting will be held on Wednesday, June 8, 2016, at 10:00 a.m.

Mr. Bryant made a motion to adjourn the meeting and Vice-Chairman Hull seconded. All were in favor.