

State Water Resources Control Board,
May 19, 2009 Hearing
Agenda Item 6: Proposed Resolution re
UST Cleanup Fund &
UST Cleanup Program

CORE Environmental Foundation
presentation by

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- Proposed Resolution: *Finding #21*

“...with rare exceptions, changing the monitoring frequency to semiannual would save \$40 million annually without harm to the environment or risk to health and safety.”

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The Law

- **Until** investigation and cleanup are **complete**,
- the owner or operator **shall submit reports** to the local agency or Regional Water Quality Board,
- ... **every three months or more frequently** as specified by the agency.
- Reports shall **include** ... the **results of all investigation monitoring** or other corrective actions which have occurred during the reporting period. 23 CCR §2652

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The Law

- Assurance groundwater monitoring is not required of owners/operators before leaks
- Groundwater monitoring is required by regulation
 - When leak is discovered and reported
 - While corrective action is ongoing
- 23 CCR §2721(b)(4))
- *CBE v. Unocal*, pp.5-6.

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The Law

- “A regulation interprets or makes specific an agency's administration of a statutory duty. (See [Gov.Code, § 11342](#), subd. (g).) A regulation cannot be used to impair the implementing statute, nor does it confer on the agency the power to limit its statutory duty....“
- *Caldo Oil Company v. SWRCB* (1996) 44 Cal.App.4th 1821, 1827 (Reversing SWRCB)

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The Law

- *Resolution No. 92-49, "Policies and Procedures for Investigation and Cleanup and Abatement of Discharges Under Water Code 13304"*
- Groundwater affected by any unauthorized release must:
 - attain background water quality or
 - best water quality that is reasonable

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The Law

- *Purves Family Trust, Order No. WQ 2005-0011-UST (Sept. 25, 2005)*
- *Ruling: “...level of site cleanup is consistent with the maximum benefit to the people of the state”*
- “...based on the site-specific information relative to this case”

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The Law

- *Shell Oil Products US*, Order No. WQ 2008-0003-UST (June 3, 2008)(3 to 1 vote)
- Ruling: “improbable that the low residual concentrations of MTBE present in the site soil will be mobilized to impact underlying groundwater” *due to*
 - “site's physical characteristics
 - “current and future anticipated climatic conditions”
- **Again, “*site-specific*” facts support SWRCB decision**

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The Law

- California UST Cleanup Fund is insurance program of reimbursement “*for claimants too impecunious to obtain insurance coverage for cleanup costs of leaks or spills..*” *Kelsoe v. Calif. State Water Resources Control Board* (2007) 153 Cal.App.4th 569, 579
- Owners/operators can be prosecuted for failure to file quarterly reports and workplans. *People v. Roscoe* (2008) 169 Cal.App.4th 829, 835

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Also, *Roscoe* decision explains:

- “...the [trial] court noted had timely cleanup occurred, the cost would have been approximately \$400,000 instead of the \$1.5 million already expended to date...” *People v. Roscoe* (2008) 169 Cal.App.4th 829, 841.
- ***The proposed Resolution violates legislative intent to the extent it reduces or eliminates the financial resources available to owners and operators.***
- Necessary for “timely cleanups.”

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- The purpose of the UST control laws:
 - protect "public health and safety and the environment" because "a significant number of the underground storage tanks containing petroleum in the state may be leaking." *Health & Safety Code §25299.10(b)(1),(3)*.
 - "It is in the best interests of the health and safety of the people of the state to establish a fund to pay for corrective action where coverage is not available." *Id.*, *§2599.10(b)(5),(6)*.

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- Strong public policy can support estoppel of SWRCB where:
 - Law violated by non-site specific cutting of groundwater monitoring from quarterly to bi-annually.
 - Cleanups required to avoid spread of contamination,
 - Monitoring necessary for cleanups, and
 - UST Fund has been delaying payments already (Finding No. 15).

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Conclusion

- Owners, Operators, Consultants, Laboratories, Contractors, and Vendors have relied on:
 - Clear and comprehensive corrective action requirements.
 - Timely, consistent and predictable reimbursement payments from the UST Cleanup Fund
- SWRCB should fix the flaws, not expand them.

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Thank you

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(Consultants, Owners/Operators,
Regulators, EnviroVendors)