



# Petroleum Underground Storage Tank Release Compensation Board

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## MINUTES OF THE 121<sup>st</sup> MEETING OF THE PETROLEUM UNDERGROUND STORAGE TANK RELEASE COMPENSATION BOARD March 12, 2008

### BOARD MEMBERS IN ATTENDANCE

Jim Rocco  
John Hull  
Duane Cable  
Brian Epperson  
Cheryl Hilvert  
Nancy Kister  
Tom Kmiec  
Don Kuchta  
Tom Stephenson

### EX-OFFICIO MEMBERS IN ATTENDANCE

Teri Finfrock, representing Ohio Department of Commerce  
Chris Geyer, representing the Ohio Environmental Protection Agency  
Chris Glaros, representing Ohio Treasurer of State

### OTHERS IN ATTENDANCE

Starr Richmond	Executive Director, PUSTRCB
Dave Reeder	Assistant Director, PUSTRCB
Ellen Mitton	Administrative Coordinator, PUSTRCB
Cindy Duann	Environmental Claims Supervisor, PUSTRCB
Rita Arnold	Office Assistant, PUSTRCB
Krista Nichols	Accounts Receivable Specialist, PUSTRCB
John Hickey	Fiscal Specialist, PUSTRCB
Michael Grube	Environmental Claims Analyst, PUSTRCB
Verne Ord	Assistant Chief, BUSTR
Cheryl Hawkinson	Assistant Attorney General
Howard Silver	Board Hearing Officer
Jennifer Rhoads	OPMCA
Ken Yokoyama	Parsons
Tim Wilfong	Speedway SuperAmerica
B.J. Reed	Speedway SuperAmerica
Doug Darrah	ATC Associates
Kirstin Watt	Vorys, Sater, Seymour and Pease LLP
Suzanne Fisher	McMahon, DeGulis LLP
Pete Chace	BJAAM Environmental

Minutes submitted by:

Ellen S. Mitton  
Administrative Coordinator

### **Call To Order:**

Chairman Rocco convened the one hundred twenty-first meeting of the Petroleum Underground Storage Tank Release Compensation Board on Wednesday, March 12, 2008, at 10:10 a.m. The following members were in attendance: Jim Rocco; John Hull; Nancy Kister; Tom Stephenson; Mayor Don Kuchta; Cheryl Hilvert; Tom Kmiec; Duane Cable; Teri Finfrock, representing Director Kimberly Zurz, Ohio Department of Commerce; Chris Glaros, representing State Treasurer Richard Cordray; and, Chris Geyer, representing Director Chris Korleski, Ohio Environmental Protection Agency.

Chairman Rocco asked if there were any comments, questions, or discussions regarding the minutes from the January 9, 2008, board meeting and there were none. Ms. Hilvert moved to approve the minutes. Ms. Finfrock seconded the motion. A vote was taken and eight members were in favor. Four members chose to abstain: Messrs. Hull, Kmiec, Glaros, and Geyer. The motion carried.

### **BUSTR Report:**

Chairman Rocco called upon Mr. Verne Ord, BUSTR Assistant Chief, to present the BUSTR report.

Mr. Ord stated that the Bureau of UST Regulations had filled the four new BUSTR inspector positions for Mahoning, Lucas, Hamilton, and Franklin counties. He said that the new inspectors are scheduled to begin work the first part of April. Mr. Ord said the addition of the four inspectors to the current staff of six will help tremendously to meet the Federal Energy mandate to conduct on site inspections of each UST in Ohio every three years.

Mr. Ord said that the Domenici-Barton Energy Policy Act of 2005 is Federal legislation signed into law on August 8, 2005. This Act amended federal laws governing the underground storage tank program and has placed notable additional requirements on the state of Ohio. He said that the BUSTR Rule Revision Advisory Committee (“committee”), consisting of UST owners and/or operators and other interested parties in Ohio, are in the process of preparing the final drafts of the Ohio Administrative Code section 1301:7-9-06 and section 1301:7-9-07 to comply with recent changes in the federal law. Mr. Ord stated that the Department of Commerce legislative representatives are currently studying the revisions needed to begin drafting proposed statute changes regarding delivery prohibition if a tank were found to be noncompliant.

Mr. Ord said that there are currently 3,960 active tank owners representing 8,062 registered facilities and a total of 23,388 registered tanks. He said that BUSTR had issued “No Further Action” (NFA) letters for 7,906 corrective action sites. Mr. Ord concluded saying that BUSTR had completed the investigations and cleanups of 15,864 corrective action sites over the history of the program.

### **Financial Report:**

Chairman Rocco called upon Mr. John Hickey, Fiscal Specialist, to present the Financial Report.

Mr. Hickey asked if there were any questions regarding the December and January financials, which were mailed to the Board members. Hearing no questions, Mr. Hickey began his report with the January income and expense line items. He stated that we are 58% of the way through the fiscal year and, as indicated in the percent of budget column on the Monthly Income Figures spreadsheet, most line items are on target with the budget.

Mr. Hickey stated that currently the Board had collected approximately \$14.7 million in fees, representing 97% of the budgeted revenue. Mr. Hickey stated that the miscellaneous income line item is artificially high because the Board had been reimbursed expenses that were spent in 2007. He added that the advertising line item is above budget as a result of the advertisements for the Executive Director and Chief Fiscal Officer. Mr. Hickey

noted that due to the five month vacancy of an Executive Director, and the current vacancy of the Chief Fiscal Officer, the salary line item is below budget. Mr. Hickey noted that the temporary services line item is slightly above budget and is expected to increase through the end of the fiscal year. He explained that although these line items are above budget, because salaries are below budgeted amounts, the overall actual expenses for the fiscal year will not exceed the total budget.

### **Claims Report:**

Chairman Rocco called on Cindy Duann, Environmental Claims Supervisor, to present the claims report. Ms. Duann said that currently the total maximum liability of in-house open claims is \$27.4 million. She said using the historical claim payout at approximately 65%, the actual claim liability of unpaid claims is about \$18 million. Regardless of which corrective action rules were used for the cleanup, a total of 1,629 sites have received an NFA and submitted claims. She said that the average site cleanup cost per NFA site is \$119,296 and the average claim payout per site is about \$64,330. In comparison, for those 50 sites cleaned up exclusively under BUSTR's 1999 and 2005 risk based corrective action rules that have reached the deductible, the average cleanup cost is about \$87,000 per site and the average claim payout is only \$39,000.

Ms. Duann noted that there has been an increase in open claims during the past three months, which is currently at 1,426. She said that there are currently 37 claims under appeal, noting that number is higher than normal and also appears to be on a steady increase.

Ms. Duann said that 108 claim packages were received in February. She said that during the last eight months, the Board received 643 claim packages or an average of 80 claims per month. During the same time period, the claims staff settled/closed 68 claims per month. She said that to date \$4.6 million had been offered and the total claims payment is anticipated to be \$7.5 million this program year. She said that the average amount paid per claim sequence this program year is under 60% explaining that per an agreement, a large claim had been paid at a very low percentage. Ms. Duann said there also had been another agreement, which to date has resulted in about 33 claims being settled at 75% of the reimbursable costs. Ms. Duann said that due to disallowed costs for items such as late filing and no cost pre-approval, the amount of settlement dollars is down.

Ms. Duann said that there has been an increase in the number of eligibility applications received by the Board, noting an average of 10 eligibility applications had been received per month. Ms. Duann said that the eligibility determination approval rate of 70% for this program year is slightly higher, saying that in comparison, the average eligibility approval rate over the past four years had been about 65%.

Ms. Duann said that the number of cost pre-approval applications had decreased since 2003. She said that so far in this program year, the Board had received a monthly average of 14 cost pre-approval applications and 19 had been determined monthly.

### ***Rules Adoption***

Chairman Rocco asked for a motion to adopt the proposed amendments to Rules 3737-1-03, 3737-1-04, 3737-1-04.1, 3737-1-07, 3737-1-08, 3737-1-09, 3737-1-12, 3737-1-12.1, and 3737-1-22 of the Ohio Administrative Code and to set the effective date as April 1, 2008. Mr. Hull so moved. Mr. Cable seconded and a vote followed. All were in favor.

## New Business

### *Appeal Hearing Report*

Mr. Howard D. Silver, Board Hearing Officer, presented his Report and Recommendation to the Board regarding the appeal of the determination to deny eligibility issued by the former Executive Director to Mr. Walter Gray, owner #16231, dba Madeira Shell, located at 7114 Miami Avenue, in Cincinnati, Ohio. Mr. Silver stated that both Madeira Shell and the Executive Director of the Petroleum Underground Storage Tank Release Compensation Board (“the Board”) were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The record hearing was held on December 12, 2007, and post-hearing briefs were received from the parties, with final reply briefs received on February 19 and 20, 2008.

Mr. Silver stated that the property upon which Madeira Shell is located was formerly operated as a gasoline station and became the subject of a real estate transaction that produced a phase two environmental site assessment of the property in December 2005. The assessment, which indicated petroleum-impacted soil and groundwater above BUSTR action levels, comprises “physical discovery” and, therefore meets the definition of “suspected release.” This suspected release was timely reported to BUSTR on January 12, 2006. The USTs were subsequently removed and a closure assessment was conducted on February 8, 2006. On February 15, 2006, laboratory results from the closure assessment samples reported contamination above BUSTR action levels; these results were also timely reported to BUSTR.

Mr. Silver stated that this case addresses a deadline and the deadline is triggered by one of two events: one year after the *suspected release* was reported (January 12, 2006); or, one year after the *release* was reported (February 15, 2006) to the State Fire Marshal. Madeira Shell filed an eligibility application to the Board on January 30, 2007 – a date which falls between the one year deadline of the reported *suspected release* and one year deadline of the reported *release*.

Mr. Silver stated the Board’s rules describe a one year filing period that begins with the date the *release* was required to be reported to the fire marshal. This date is a date determined by the State Fire Marshal through BUSTRs’ rules. He stated that BUSTRs’ rules define both a “suspected release” and a “release” and that both a “suspected release” and a “release” are required to be reported to BUSTR. Under BUSTRs’ rules, the date the release was required to be reported to the Fire Marshal is different from the date the suspected release was required to be reported to the Fire Marshal.

Mr. Silver stated a release was reported to BUSTR on February 15, 2006, following a timely report of a suspected release on January 12, 2006. The language in the Board’s rules indicates the eligibility application from Madeira Shell would be required to be submitted within one year of the date the *release* was required to be reported to the State Fire Marshal or no later than February 15, 2007. Because the January 30, 2007, filing of Madeira Shell’s eligibility application occurred within one year of the date the release was required to be reported to the State Fire Marshal, it was timely filed under Ohio Administrative Code section 3737-1-07(A)(1).

Mr. Silver said that because Madeira Shell is found to have met the conditions for eligibility contained within Ohio Administrative Code section 3737-1-07(A), the February 9, 2007, denial of Madeira Shell’s January 30, 2007, eligibility application is not in accordance with law and therefore the denial is recommended reversed.

Mr. Geyer moved to uphold the Hearing Officer’s findings of fact, conclusion of law, and the recommendation to reverse the former Executive Director’s denial of Madeira Shell’s eligibility application. Mr. Stephenson seconded. A vote was taken and eleven of the Board member’s voted in the affirmative; Ms. Finfrock abstained. The motion passed and eligibility will be granted to Madeira Shell.

### ***Hardship***

Chairman Rocco called upon Ms. Richmond to present the hardship application for Robert Tishue. Ms. Richmond stated that Mr. Tishue is applying for his fifth hardship renewal. The first hardship renewal expired in June 1998; the second in November 1999; and, the third in January 2001. Mr. Tishue applied for his fourth hardship status in November 2006 and was denied because there were no claims in-house. Ms. Richmond said that on August 8, 2007, the F-claim totaling \$11,724 was received by the Board and it has been determined there are no claim issues.

Ms. Richmond said that in addition to the review of the hardship application, a US Environmental Protection Agency (EPA) financial capacity test was used to determine Mr. Tishue's ability to carry debt. The financial capacity test indicated that Mr. Tishue would not be able to carry the debt. In addition all of his income is from social security or pension and interest earnings on those pension funds.

Ms. Richmond recommended that the Board approve this application and grant hardship status to Mr. Tishue. Mr. Hull moved to approve. Mayor Kuchta seconded and a vote was taken. Eleven members voted in the affirmative; Ms. Finrock abstained. The motion carried.

### ***Certificate of Coverage Ratification***

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

Ms. Richmond explained that behind Tab 8 there are two lists of owners. The first is a listing of owners who had been issued a program year 2006 Certificate of Coverage; and, behind the blue divider page, a listing of owners who had been denied a program year 2006 Certificate of Coverage. She said that behind Tab 9 there are also two lists of owners. The first is a listing of owners who had been issued a program year 2007 Certificate of Coverage; and, behind the blue divider page, a listing of owners who had been denied a program year 2007 Certificate of Coverage.

Ms. Richmond said that the process used to review the fee applications and issue or deny a Certificate of Coverage included a review for completeness to determine that full payment had been made, that financial responsibility was demonstrated, and that the BUSTR registration was complete. In a second level of review, BUSTR registration data is considered to determine whether tanks for which coverage is sought are in compliance with BUSTR rules. Ms. Richmond said if there are no issues, the facility receives a Certificate of Coverage.

Ms. Richmond explained that if compliance issues are discovered, notice is provided to owners in accordance with Board rules and the Revised Code. Throughout this process the Board's staff works with owners to correct the fee statement record and/or the BUSTR registration record. She stated that the staff often continues to work with owners even after a determination to deny a Certificate of Coverage has been issued. The Board's rules and the Revised Code make provisions for an appeal of the determinations issued within this process.

Ms. Richmond asked that the Board ratify her actions with respect to the 180 facilities receiving 2006 Certificates of Coverage.

Mr. Hull moved to ratify the list of 2006 Certificates of Coverage that were granted. Mr. Epperson seconded. A vote was taken and all were in favor. The motion passed.

Ms. Richmond stated that all of the processes as stated in the Board's rules and the Revised Code were followed in making the determinations for denying Certificates of Coverage. Ms. Richmond asked that the Board ratify her actions with respect to the four facilities that were denied a Certificate of Coverage for program year 2006.

Mr. Hull moved to ratify the list of 2006 Certificates of Coverage that were denied. Ms. Hilvert seconded. A vote was taken and all were in favor. The motion passed.

Ms. Richmond asked that the Board ratify her actions with respect to the 1,249 facilities receiving 2007 Certificates of Coverage.

Mr. Cable moved to ratify the list of 2007 Certificates of Coverage that were granted. Mr. Geyer seconded. A vote was taken and all were in favor. The motion passed.

Ms. Richmond asked that the Board ratify her actions with respect to the 103 facilities that were denied a Certificate of Coverage for program year 2007.

Mr. Hull moved to ratify the list of 2007 Certificates of Coverage that were denied. Mr. Epperson seconded. A vote was taken and all were in favor. The motion passed.

### **Executive Session**

Chairman Rocco requested a motion to go into executive session pursuant to R.C. 121.22(G)(3) to discuss matters of pending or imminent court action.

Mr. Hull so moved. Mr. Epperson seconded and a roll call vote followed. The following members voted in the affirmative: Messrs. Rocco, Hull, Cable, Epperson, Kmiec, Kuchta, Stephenson, Geyer, Glaros, and Mss. Hilvert, Finfrock, and Kister. There were no nays and the motion passed.

### **Reconvene Meeting**

The Board adjourned from executive session and Chairman Rocco reconvened the public meeting at approximately 10:55 p.m.

Mayor Kuchta moved to authorize the Chairman and the Executive Director, in counsel with the Assistant Attorney General, to determine and to approve the need for the Assistant Attorney General to file an appeal of an adverse court decision of an administrative appeal. Mr. Hull amended the motion to add that the Chairman report back to the Board members at its next meeting following an appeal being filed. Ms. Finfrock seconded the amendment. A vote was taken and all were in favor. The motion passed.

### **Confirm Next Meeting**

Mr. Epperson made a motion to adjourn the meeting. Ms. Finfrock seconded. All were in favor. The next board meeting will be Wednesday, June 11, 2008 beginning at 10:00 a.m.