

## **NOTICE OF PROPOSED RULEMAKING**

### **TITLE 23. WATERS DIVISION 3. STATE WATER RESOURCES CONTROL BOARD CHAPTER 18. PETROLEUM UNDERGROUND STORAGE TANK CLEANUP FUND REGULATIONS**

*NOTICE IS HEREBY GIVEN* that the State Water Resources Control Board (SWRCB) proposes to adopt, amend or repeal the regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

---

### **PROPOSED REGULATORY ACTION**

The SWRCB proposes to amend California Code of Regulations, title 23, division 3, chapter 18 (commencing with section 2803) relating to the Underground Storage Tank Cleanup Fund program (the Fund regulations). The Fund regulations implement the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989, which is codified in chapter 6.75 of the California Health and Safety Code (commencing with section 25299.10).

### **PUBLIC HEARING**

A public hearing has not been scheduled for this proposed action. However, as provided in Government Code section 11346.8, any interested person, or his or her duly authorized representative, may request a public hearing if the request is submitted in writing in the manner described below to the SWRCB no later than fifteen (15) days prior to the close of the written comment period. If a request for a public hearing is made, the SWRCB shall, to the extent practicable, provide notice of the time, date, and place of the hearing in accordance with Government Code section 11346.4 by mailing the notice to every person who has filed a request for notice with the SWRCB. In addition, as prescribed by Government Code section 11340.85, notice may be provided by means of electronic communication to those persons who have expressly indicated a willingness to receive notice by this means.

### **WRITTEN COMMENT PERIOD**

The SWRCB requests comments from interested persons to present any statements, arguments or contentions relating to the proposed regulatory amendments. The comments must be submitted in writing and received by the SWRCB before the close of

the written comment period in order to be considered by the SWRCB before it adopts, amends, or repeals the proposed regulations. The written comment period closes at 5:00 p.m., Pacific Standard Time, on August 4, 2003.

Comments may be hand-delivered, or submitted by U.S. mail, facsimile transmission, or electronic mail. Comments delivered by hand should be taken to 1001 I Street, Sacramento, CA., and addressed to the attention of Mr. Wes Wilkinson as shown below. Comments submitted by U.S. mail should be addressed as follows:

Wes Wilkinson, Regulations Coordinator  
State Water Resources Control Board  
Division of Financial Assistance  
Underground Storage Tank Cleanup Fund  
P.O. Box 944212  
Sacramento, CA 94244-2120

Comments submitted by facsimile should be sent to the following facsimile phone number: (916) 341-5806. Comments submitted by electronic mail should be sent to the following e-mail address: [wwilkinson@cwpswrcb.ca.gov](mailto:wwilkinson@cwpswrcb.ca.gov)

To be added to the mailing list for this rulemaking and to receive notification of updates to this rulemaking, please leave a voicemail message with Mr. Wes Wilkinson at (916) 341-5750 giving your name, address, and telephone number. If you would like to be notified electronically, please so indicate in the voicemail message and give your e-mail address in addition to the other information requested. Individuals who receive this notice by mail are already on the mailing list.

## **AUTHORITY AND REFERENCE**

Health and Safety Code section 25299.77 authorizes the SWRCB to adopt, amend, or repeal the Fund regulations. The code sections that are being implemented, interpreted, or made specific through this proposed action are set forth in chapter 6.75 of the Health and Safety Code, commencing with section 25299.10. References to specific code sections are identified in the proposed amendments to the Fund regulations.

## **INFORMATIVE DIGEST**

### **POLICY STATEMENT OVERVIEW**

Pursuant to chapter 6.75 of the Health and Safety Code, the SWRCB administers the Underground Storage Tank Cleanup Fund (Fund). The SWRCB has delegated administration of the Fund to the Division of Financial Assistance (Division). The primary purposes of the Fund, as established in chapter 6.75, are to serve as a mechanism for owners and operators of petroleum underground storage tanks (USTs) to meet federal

financial responsibility requirements and to provide financial relief to owners and operators of USTs and residential tanks by reimbursing certain costs incurred as a result of an unauthorized release of petroleum from these tanks. The Fund also provides an incentive for owners and operators to comply with applicable UST laws by reimbursing only those persons who have complied with these laws.

Pursuant to Health and Safety Code section 25299.77, the SWRCB initially developed emergency regulations to implement chapter 6.75. The initial regulations took effect on December 2, 1991, and were subsequently amended on December 27, 1994, August 6, 1996, and November 27, 2000.

The specific objectives of the proposed amendments to the Fund regulations are to implement, interpret, and make specific certain provisions in chapter 6.75 of the Health and Safety Code, including certain legislative changes to that law that were made pursuant to chapter 154, statutes of 2001 (Nation) (Assembly Bill 1465). The regulatory amendments that are proposed to accomplish these objectives include the following:

Revised Definition of “Claim”: Assembly Bill 1465 revised the definition of “claim” in Health and Safety Code section 25299.13. The proposed amendments reflect the revised statutory definition of “claim.”

Revised Definition of “Underground Storage Tank”: Assembly Bill 1465 revised the definition of “underground storage tank” in Health and Safety Code section 25299.24. The proposed amendments reflect the revised statutory definition of “underground storage tank.”

Payment of Tank Storage Fees as a Prerequisite of Fund Eligibility: Assembly Bill 1465 amended the requirements a claimant must meet as a condition of eligibility to the Fund by requiring the claimant to demonstrate that required tank storage fees have been paid prior to submitting an application to the Fund. The proposed amendments reflect these changes to the Fund eligibility requirements.

In addition, the SWRCB has determined that it is necessary to amend the Fund regulations to clarify (1) the permit requirement (section 2811), (2) the documentation that must be submitted to substantiate that there has not been a violation of the double payment prohibition (section 2812.3), and (3) the manner of calculating the Fund’s fair share of a claimant’s costs of obtaining settlement proceeds or a judgment (subdivision (f) of section 2812.3). The amendments are also necessary to more clearly reflect the statutory residential tank provisions set forth in subdivision (e) of section 25299.54, chapter 6.75, and to address a documentation issue concerning the date of any agreement entered into by a claimant where costs are to be incurred on behalf of the claimant or where the claimant assigns Fund reimbursement rights (sections 2811.2 and 2811.3).

Finally, the SWRCB has proposed certain changes to the Fund regulations that do not materially alter any requirement, right, responsibility, condition, prescription, or other regulatory element of any California Code of Regulations provision; i.e., “changes

without regulatory effect.” These changes without regulatory effect include changes made for purposes of revising syntax, cross-references, grammar, or punctuation, or renumbering regulatory provisions. In many cases the SWRCB has explained these changes in the Initial Statement of Reasons to avoid any confusion with the substantive amendments being proposed. To the extent that any of the changes without regulatory effect are non-substantive, and their purpose is self-evident and merely editorial, they are not identified in this Notice.

## **CHANGES WITH REGULATORY EFFECT**

The SWRCB proposes to adopt, amend, or repeal the Fund regulations as follows:

### **Chapter 18 (generally)**

Assembly Bill 1465 amended the definition of “claim” to make clear that it refers to more than just a written reimbursement request. The revised statutory definition states that a claim is a submittal of documents to the Fund for reimbursement of eligible costs. These documents include the Fund application, reimbursement requests, and verification documents. The word “claim” was replaced with more accurate terminology in several parts of chapter 18 to ensure consistency with the revised statutory definition.

### **Article 2. Definition of Terms**

**Section 2804** defines terms used in chapter 6.75 and the Fund regulations that implement the chapter. As noted above, the proposed regulatory amendments replace the word “claim” with more accurate terminology in several parts of chapter 18 to ensure consistency with the revised statutory definition. The proposed amendments also amend “residence,” “residential tank,” and “underground storage tank” for clarity purposes and to ensure consistency with governing law.

### **Article 4. The Fund**

**Section 2811** prescribes permitting and other eligibility requirements. The proposed amendments make clarifying changes to the text to ensure consistency with governing law. The amendments also reflect the new statutory requirement that petroleum storage fees be paid prior to submitting an application to the Fund.

**Section 2811.2** prescribes Fund application requirements for claimants seeking reimbursement of corrective action costs. The proposed amendments add a documentation requirement for verifying the date of an agreement entered into by a claimant that provides that costs are to be incurred on behalf of the claimant or an agreement where the claimant assigns Fund reimbursement rights. The amendments specify the documentation required for that verification and require the claimant to provide a copy of the agreement.

**Section 2811.3** prescribes Fund application requirements for claimants seeking reimbursement of third party compensation costs. The proposed amendments impose an additional Fund application requirement by incorporating by reference the new provisions of section 2811.2 that require a claimant to provide a copy of the agreement described therein and documentation to verify the date of the agreement.

**Section 2812.3** contains the double payment prohibition that prohibits a claimant from receiving reimbursement from the Fund for specified costs that have been or will be reimbursed from another source. The double payment prohibition requires a claimant, who receives reimbursement from another source, to demonstrate through documentation submitted to the Fund that the monies reimbursed are not for Fund eligible costs. The proposed regulatory amendment gives an example of the type of documentation required and provides the Division with the discretion to request any other type of information or supporting documentation that it reasonably deems necessary.

The proposed amendments also revise subdivision (d), which addresses the potential double payment issue pertaining to corrective action, regulatory technical assistance, or third party compensation costs that are advanced to a claimant or are incurred on behalf of a claimant and for which the claimant later receives reimbursement from the Fund. The existing regulation specifies that such costs advanced shall not be considered a double payment if a written contract, other than an insurance contract, exists that specifies that the costs advanced must be paid over to the person who advanced the costs. The proposed amendments reorganize this sentence into an itemized list for clarification purposes, and also address an error in the existing regulation that inadvertently omitted how the Division would treat costs incurred on behalf of a claimant pursuant to a written contract.

Finally, subdivision (f) of this section, as currently written, specifies how the Fund may reimburse a claimant its fair share of costs incurred in obtaining a settlement or judgment for costs the Fund would otherwise have reimbursed. A computation for determining this fair share of costs due the claimant is described. The proposed regulatory amendment clarifies how the fair share is to be calculated by amending the description of the calculation and expressing that calculation mathematically.

#### **Article 5. Request for Review, Appeal, and Petition Process**

**Section 2814.2** prescribes the substantive and procedural requirements for a claimant to petition the SWRCB to review a Final Division Decision. The existing regulation requires a claimant to state in the petition the date on which the Final Division Decision was received by the claimant. The November 27, 2000, regulatory amendments to the Fund regulations changed the date reference upon which a petition to the SWRCB would be considered timely filed—from thirty days from the date of receipt of the Final Division Decision to thirty days from the date of the Final Division Decision itself. As a result of these amendments, the existing regulation's requirement to identify the date of receipt is no longer applicable. Hence, the proposed amendment to section 2814.2 deletes this requirement.

## FISCAL IMPACT ESTIMATES

**Mandate on Local Agencies or School Districts:** The SWRCB has determined that the proposed amendments would not impose a mandate on local agencies or school districts. Additionally, the SWRCB has determined that the proposed amendments will not result in any additional costs or savings to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of the Government Code.

**Cost or Savings to any State Agency:** The proposed regulatory amendment to revise the definition of “residence” may require the Fund to change the priority class assigned to certain owners of residential tanks from Priority Class B to Priority Class A. The level of financial responsibility required for these owners (i.e., the deductible amount owners are required to pay that is not covered by the Fund) would then change from \$5,000 to zero. Reimbursements provided to these owners would need to be adjusted to account for this change in deductible amounts. The SWRCB has determined that there may be as many as one hundred owners of residential tanks who were assigned Priority Class B with a \$5,000 deductible who are now eligible to be assigned a Priority Class A with no deductible.

Consequently, the SWRCB estimates that additional expenditures up to a maximum of approximately \$500,000 will be required to cover the increase in reimbursements the Fund must pay as a result of the change in deductible amounts for these residential tank owners. These additional expenditures would be paid out of the Fund in the current and two subsequent fiscal years. The SWRCB has determined that it will be able to absorb these additional costs within its existing and projected budgets and resources.

**Other Non-discretionary Cost or Savings Imposed on Local Agencies:** The SWRCB has determined that there is no cost or savings imposed on local agencies as a result of the proposed amendments.

**Cost or Savings in Federal Funding to the State:** The SWRCB has determined that there is no cost or savings in Federal funding to the State as a result of the proposed amendments.

## ECONOMIC IMPACT ESTIMATES

**Statement of Significant Statewide Adverse Economic Impact Directly Affecting Business:** The SWRCB has determined that the proposed action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

**Potential Cost Impacts on Private Persons or Businesses:** The SWRCB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**Effect on the Creation or Elimination of Jobs within California:** The SWRCB has determined that the proposed action will have no effect on the creation or elimination of jobs within California.

**Effect on the Creation of New Businesses or Elimination of Existing Businesses within California:** The SWRCB has determined that the proposed action will have no effect on the creation of new businesses or the elimination of existing businesses within California.

**Effect on the Expansion of Businesses Currently Doing Business within California:** The SWRCB has determined that the proposed action will have no effect on the expansion of businesses currently doing business within California.

**Effect on Small Business:** The SWRCB has determined that the proposed regulatory action will have no effect on small businesses because the proposed amendments do not impose any new burdens or benefits. The amendments merely clarify existing Fund regulatory requirements and reflect statutory changes to chapter 6.75 that took effect on January 1, 2002.

**Consideration of Alternatives:** In accordance with Government Code section 11346.5, subdivision (a)(13), the SWRCB must determine that no reasonable alternative considered by it or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The SWRCB invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at any hearing that may be requested or during the written comment period.

## **AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS**

The SWRCB has prepared an Initial Statement of Reasons for the proposed action. The statement includes the specific purpose for each amendment, interpretation, or requirement, and the factual basis for determining the necessity of each regulatory interpretation or requirement. The statement, the express terms of the proposed regulations, and all information on which the proposals are based are available from the agency contact person named in this notice.

The rulemaking file is available for inspection and copying throughout the rulemaking process at the Division of Financial Assistance, 1001 I Street, 17<sup>th</sup> Floor, Sacramento,

California. As of the date that this notice is published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the text of the existing regulations, the express terms of the proposed regulations, and the Initial Statement of Reasons.

The rulemaking file will also be published and made available on the Division's internet website. This website address is: <http://www.swrcb.ca.gov/cwphome/ustcf/index.html>

### **AVAILABILITY OF CHANGED OR MODIFIED TEXT**

After holding any hearing that is requested and considering all timely and relevant comments received, the SWRCB may adopt the proposed regulations substantially as described in this notice. If the SWRCB makes modifications that are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least fifteen (15) days before the SWRCB adopts the regulations as modified. A copy of any modified regulations may be obtained by contacting Mr. Wes Wilkinson, the primary contact person identified below. The SWRCB will accept written comments on the modified regulations for fifteen (15) days after the date on which they are made available.

### **AVAILABILITY OF FINAL STATEMENT OF REASONS**

Upon its completion, a copy of the Final Statement of Reasons may be obtained by contacting the persons listed below. A copy may also be accessed on the Division website previously listed.

### **CONTACT PERSONS**

Inquiries concerning the proposed action may be directed to:

Wes Wilkinson, Regulations Coordinator  
State Water Resources Control Board  
Division of Financial Assistance  
Underground Storage Tank Cleanup Fund  
P.O. Box 944212  
Sacramento, CA 94244-2120  
Phone: (916) 341-5750  
E-mail address: [wwilkinson@cwpswrcb.ca.gov/](mailto:wwilkinson@cwpswrcb.ca.gov)

The backup contact person for these inquiries is:

Doug Wilson, Chief, Administration and Support Unit  
State Water Resources Control Board  
Division of Financial Assistance  
Underground Storage Tank Cleanup Fund  
P.O. Box 944212  
Sacramento, CA 94244-2120  
Telephone: (916) 341-5806  
E-mail address: [dwilson@cwpswrcb.ca.gov/](mailto:dwilson@cwpswrcb.ca.gov)

Questions on the substance of the proposed regulations may be directed to either Mr. Wilkinson or Mr. Wilson.

Please direct to Mr. Wilkinson requests for copies of the proposed text (the “express terms”) of the regulations, the Initial Statement of Reasons, the modified text of the regulations, if any, or any other information upon which this proposed rulemaking is based.