

## Meeting with the UST Fund Program Sunset Working Group

Thursday, April 24, 2014

9:00AM to 12:00PM

Petroleum Marketer's and Convenience Stores of Iowa (PMCI) offices

10430 New York Avenue, Urbandale IA

### Attendees:

Dale Cira	Aon	Interim Fund Administrator
James Gastineau	Aon	Deputy Fund Administrator
Karen Andeweg	Community Savings Bank	Fund Board Member
David Steward	IA Attorney General's Office	
Jill Reams- Widder	Casey's	
Anita Maher-Lewis	PMCI	
Steve Reinders	Cunningham Lindsey	
Tom Norris	PMMIC	
Darren Binning	Seneca	
Joe Barry	Dept of Management	Fund Board Member
Elaine Douskey	IDNR	
Jeff Hove	PMCI	
Jason Bassett	Kum & Go	

The objective of the meeting was to engage stakeholders in discussing “**what should the UST Fund program look like in 2016?**” – Essentially discussing the pending sunset provisions and their impact to the UST Fund. This discussion was prompted following discussion of the sunset provision at the March 2014 Fund Board meeting. An invitation went to individuals that are on the routine mailing list for the Fund Board updates, the Fund Board members and a general public invitation was posted in Des Moines newspaper.

This initial meeting was designed to explain the situation facing the Board and solicit input, comments, suggestions, concerns and possible solutions in a town hall style. The meeting was introduced by James Gastineau and discussion was subsequently facilitated by Dale Cira. Attachments to this summary include:

- A: UST Fund Balances as of April 22, 2014
- B: Fund Claims Status as of April 1, 2014
- C: Reopening of Sites Classified as NFA and Provisions for Funding
- D: Fourth Option for Sunsetting the UST Fund

James provided an update on the Fund balances through 3Q 2014 (see Attachment A) with a rolling annual summary of fund balance, total claims paid, and breakout by Fund accounts. At this time, the Total Fund Balance is \$28,774,833 with 615 open claims (Attachment B) and reserves set at \$28,436,402.

James also discussed the regulatory issues around Reopening of Sites classified as No Further Action. This process could complicate the impact of the sunset provisions in 2016 and needs to be taken into consideration (see Attachments C).

At the last Fund Board meeting, Scott Scheidel (former Fund Administrator) presented a discussion paper that was included in the Board packet outlining three options for how the program might end. These included:

- Maintaining the Fund Board until all claims are complete;
- Individual settlements with claimants; and a
- Loss portfolio transfer (LPT) option involving all remaining claimants.

A fourth option was brought up by David Steward at this meeting that described an approach that transferred the Fund and its responsibilities to the IDNR for administration. See Attachment D for further discussion on this option. Mr. Steward outlined the benefits as possible cost savings due to lower administrative costs, incentive to close out sites, and long history with the program. He added that he was not necessarily advocating the option, just bringing it to the group.

As an incentive for closing out claims, an option was suggested for reducing benefits to participants that are not timely in responding to requests for investigation and remediation even though funds are being made available.

Mr. Hove advocated that while changes are necessary to close out the remaining claims, we should not lose sight of some of the Fund's original goals, including continuing to provide for a thriving rural distribution system, providing funding and aid for improving tank infrastructure and upgrades to handle renewable fuels and new EPA requirements. IDNR was supportive of any measure that would support upgrades and allow for preventative measures. A possible option could allow for a separate funding stream/allocation set aside for these infrastructure upgrades. Mr. Hove highlighted that nearly \$3.5M annually of the collected funds is not spent on remediation and could be shifted to a different program. He acknowledged that the program has been responsive and adaptive to changing needs and demands made by the Board over time.

Other topics brought up for consideration as the working group moves forward include:

- IDNR Enforcement must be improved. Use of red tagging or FR benefits reduction was brought up as options for promoting compliance.
- NFA Fund must remain, but IDNR should have some oversight over how monies are spent.
- Maintain ILO Fund
- IDNR must maintain some funding to implement LUST issues, even after or if Program sunsets in its current form
- Incentives needed on the IDNR side to close sites, including threaten GWP designation for delays and more scrutiny over qualifications and designations
- Rule making changes will need to be implemented to close sites – can changes be made that can help to close sites?

Loss Portfolio Transfer Option was discussed, but there did not seem to be much enthusiasm for the approach due to concerns, such as:

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Loss Portfolio Transfer Option was discussed, but there did not seem to be much enthusiasm for the approach due to concerns, such as:

- How will the sites that are unlikely to reach closure or near spending limit to be addressed (“problem” sites)?
- Control over site will be reduced or lost to acquiring company
- The market for this alternative is unknown – PMMIC is a candidate, but they stated they are not interested in the “problem” sites. Could take on a portion of the final claims and then set up a fund or mechanism for the remainder.
- Finality is a plus, but it does not meet all the needs of the overall program.
- Rule changes are needed to allow some of these sites to close. Elaine said that rules can be changed without legislation. The rules can be proposed by any 25 people, but must be tied to statute and must be approved by the EPC (Environmental Protection Commission).

**Next Steps:**

A second meeting will be held on May 15<sup>th</sup> at 12:00PM to 5:00PM at the PMCI Offices. This next meeting will be focused on further identifying the specific benefits, impacts and challenges associated with the various options presented and discussed so far.

## A: UST Fund Balances as of April 22, 2014

UST Fund Balances - - RBCA Years

22-Apr-14

Fiscal Year - Ending		Total Fund Balances	Paid on Retro Claims	Paid on Remedial Claims	Paid on ILO Claims	Paid on Global Claims	UST Claims Paid	Reserve (all claims)	# Open Claims (RT, RM, ILO)
6/30/1997		\$153,280,882.03	\$76,402.38	\$4,887,759.76	\$2,120,912.02	\$328,413.45	\$7,413,487.61		
6/30/1998		\$181,104,495.32	\$180,021.71	\$4,355,186.76	\$1,649,089.99	\$774,708.10	\$6,959,006.56		
6/30/1999		\$185,838,540.00		\$6,910,641.00	\$1,178,014.00	\$447,756.00	\$8,536,411.00		
6/30/2000		\$183,378,757.57	\$603,968.21	\$9,518,485.26	\$1,925,603.76	\$260,042.99	\$12,308,100.22		
6/30/2001		\$149,038,129.83	\$1,127,092.49	\$6,335,752.64	\$3,014,070.06	\$65,128.35	\$10,542,043.54		
6/30/2002		\$144,309,914.38	\$621,703.89	\$7,087,271.48	\$1,316,119.50	\$695,410.89	\$9,720,505.76		
6/30/2003		\$112,751,844.69	\$1,450,131.14	\$7,495,741.62	\$2,480,499.75	\$574,870.97	\$12,001,243.48		
6/30/2004		\$102,583,972.24	\$1,063,695.21	\$12,722,725.07	\$2,358,721.25	\$909,220.30	\$17,054,361.83		
6/30/2005		\$85,488,483.35	\$1,136,059.69	\$11,649,292.36	\$1,196,279.64	\$772,721.50	\$14,754,353.19	\$82,019,162.00	1,682
6/30/2006		\$62,115,432.17	\$894,324.39	\$11,677,851.29	\$1,789,461.06	\$845,716.42	\$15,207,353.16	\$81,810,844.64	1,417
6/30/2007		\$61,664,781.05	\$529,311.26	\$8,963,906.95	\$2,110,041.68	\$485,504.29	\$12,088,764.18	\$70,933,671.90	1,285
6/30/2008	Dfs	\$26,587,382.10	\$562,166.40	\$5,460,702.40	\$2,093,767.33	\$286,152.60	\$8,402,788.73	\$55,014,083.19	1,148
6/30/2009		\$24,977,187.91	\$702,871.43	\$4,876,630.43	\$803,866.61	\$222,100.75	\$6,605,469.22	\$50,204,396.72	1,045
6/30/2010		\$33,655,401.33	\$351,636.70	\$5,307,270.07	\$1,241,332.10	\$150,907.22	\$7,060,177.09	\$46,543,461.85	972
6/30/2011		\$21,252,698.36	\$566,484.79	\$4,245,610.00	\$865,759.94	\$61,588.77	\$5,739,443.50	\$40,209,732.13	840
6/30/2012		\$24,553,694.43	\$388,896.53	\$5,541,277.22	\$787,601.67	\$70,473.29	\$6,788,248.71	\$34,367,463.21	733
6/30/2013		\$29,868,825.04	\$187,268.13	\$5,824,404.84	\$1,001,932.87	\$100,589.40	\$7,114,195.24	\$31,790,243.78	670
6/30/2014	Est.	\$33,019,875.04	\$700,000.00	\$6,000,000.00	\$1,500,000.00	\$75,000.00	\$8,275,000.00		550
<b>TOTAL</b>			<b>\$10,442,034.35</b>	<b>\$122,860,509.15</b>	<b>\$27,933,073.23</b>	<b>\$7,051,305.29</b>	<b>\$168,295,953.02</b>		

UST Fund Balances - - Current Fiscal Year by Quarter (July 1, 2013 to June 30, 2014)

FY2014 Payments	Total Fund Balances	Paid on Retro Claims	Paid on Remedial Claims	Paid on ILO Claims	Paid on Global Claims	UST Claims Paid	Reserve (RT, RM, ILO, GS, NFA)	# Open Claims (RT, RM, ILO)
3Q - 3/31/14	\$28,744,833.30	\$442,319.82	\$6,402,616.20	\$1,943,675.91	\$85,076.86	\$8,873,688.79	\$28,885,810.23	615
<b>Projected EFY14</b>	<b>\$33,019,875.04</b>	<b>\$700,000.00</b>	<b>\$6,000,000.00</b>	<b>\$1,500,000.00</b>	<b>\$100,000.00</b>	<b>\$8,300,000.00</b>		<b>550</b>

- Note 1: Dfs Defeasance of outstanding bonds; no further bond payments anticipated  
 Note 2: "UST Claims Paid" does not include AST claims, 28E agreements (CRPs, closure contracts, etc.), expenses, leg. changes, etc.  
 Note 3: "Tank Pull Claims" included in 'remedial claims paid in FY 2011 and beyond

Leg. Changes: FY 2007 & 2008 \$3.5M for Ethanol / Biodiesel  
 FY 2008 \$3M for general fund  
 FY 2009 \$5.6M for general fund; \$1.725M to ATVs & Snowmobile fund  
 FY 2011 Various transfers authorized by legislation: \$26.2M total  
 FY 2012 & beyond Decrease appropriation to \$14 M annually (\$3.5M quarterly)

## B: Fund Claims Status as of April 1, 2014

	DNR LUST	Retro Claims	Remedial Claims	ILO Claims	NFA	IUSTF eligible
High Risk	499	23	249	71	7	350
Low Risk	225	5	111	36	0	152
NAR-FP	80	2	34	6	0	42
Not Classified	167	0	1	22	10	33
Other *		3	39	13	0	55
<b>Total</b>		<b>33</b>	<b>434</b>	<b>148</b>	<b>17</b>	<b>632</b>

'Other' category (55 claims) includes:

- (a) retro claims – 2 NAR (2013); 1 trans. to contaminated sites (NAR 2014)
- (b) remedial claims – 10 State Lead projects; 29 NAR (2010 -2014)
- (c) ILO claims – all classified NAR (2006 – 2014)

### **Analysis:**

- ~ 70% of high risk sites are IUSTF eligible
- ~ 69% of low risk sites are IUSTF eligible
- ~ 50% of NAR with free product sites are IUSTF eligible
- ~ 14% of those sites not classified are IUSTF eligible (excludes NFA re-openers)

## C: Reopening of Sites Classified as NFA and Provisions for Funding

### IOWA DNR AND IOWA UST FUND BOARD REOPENING OF SITES CLASSIFIED AS NO FURTHER ACTION AND PROVISIONS FOR FUNDING

#### REGULATORY:

Iowa Code section 455B.474(1)(h)(3) states in part:

"...the owner or operator of a site who has been issued a certificate under this paragraph "h" or a subsequent purchaser of the site shall not be required to perform further corrective action solely because action standards are changed at a later date. A certificate shall not prevent the department from ordering corrective action of a new release.

The statute does not define "action standards". The Department has defined action standards to be applicable "site specific standards." 567 I.A.C. 135.12(10)(b)(2).

The section grants the Department broad discretion in deciding under what conditions a NFA classified site can be reopened and only limits that authority by defining conditions under which the Department may not reopen. Furthermore, this section does not release otherwise liable owner/operators from continuing liability in the event a site is reopened.

Iowa Code section 455G.9(1)(k) provides the Board authority to use remedial account funds to pay for assessment and corrective action arising out of releases at sites which have been issued a no further action certificate. The statute reads as follows.... "moneys in the remedial account shall only be paid out for the following":

- k. Pursuant to an agreement between the board and the department of natural resources, assessment and corrective action arising out of releases at sites for which a no further action certificate has been issued pursuant to section 455B.474, when the department determines that an unreasonable risk to public health and safety may still exist or that previously reported upon applicable target levels have been exceeded. At a minimum, the agreement shall address eligible costs, contracting for services, and conditions under which sites may be reevaluated.

The Department interprets this provision to give it the sole authority to determine what conditions constitute "an unreasonable risk to public health and safety." The Board in turn is to provide a funding mechanism when the Department determines that an "...unreasonable risk to public health and safety" may still exist.

Both the Department and the Board acknowledge that the legislative purpose for these changes was to provide a measure of finality to the continued regulation of UST sites classified as no further action and consequently, the potential continuing regulatory responsibilities of current responsible parties and future property owners.

The broad intention is to provide a state funding mechanism and state led contracting process to assess risk and take necessary corrective action under future conditions that the Department determines represent an unreasonable risk. The intended objective is to relieve UST owner /operators and property owners from assuming this continuing responsibility.

In the event the Department determines that a new condition is associated with a new release that has occurred after issuance of the NAR classification or a release which was not subject to the risk based corrective action assessment that formed the basis for the NFA certificate, the regulatory actions required by the Department are not subject to this agreement and would not be considered a reopening of a NFA certificated site.

### **IDENTIFYING NEW CONDITIONS**

There are several ways by which new information may require the Department to evaluate whether to re-open a NFA classified site and if re-opened, what type and extent of assessment and other corrective action should be taken. The following are some non-exclusive examples:

1. Tank closure investigation data. The operation of the USTS subsequent to the original release for which the NFA certificate was issued may raise the question of whether contaminant levels are indicative of a release subsequent to the original release, to the NAR classification or simply an unexplained variation in the pre-existing condition.
2. Phase I and Phase II environmental audits. If assessments identify levels of contamination which exceed prior maximums or create uncertain evidence of subsequent onsite releases or suspected off-site contributions, some degree of assessment may be necessary.
3. Citizen complaints. Vapors in basements or utility trenches, detections in wells, or identification of contaminated soils as part of construction activities may warrant action.

### **DETERMINING NEW RELEASES VS OLD RELEASES**

Iowa Administrative Code 567 - 135.6 places the responsibility on current owner/operators to report and investigate a suspected release in order to determine and confirm that suspect conditions are or are not the result of a current release. In cases where there is or has been an active UST operation at the same location after the discovery of the release for which the NFA certificate was issued, the DNR may determine that to be sufficient to meet the standard of "suspected release" and the burden will be on the current owner/operator to confirm that the condition is not the result of a release that has occurred subsequent to the NFA classification.

Release investigation and confirmation actions are not considered actions associated with re-opening of the NFA'd site. If the actions establish that the new condition is NOT the result of a new release, further action would be subject to the re-opening of the NFA'd release.

Generally, where USTS have been in service after an NAR classification / NFA certificate, environmental conditions which raise a concern are presumed to be associated with a new release until further assessment rules out a new release. Leak detection methods which do not show a leak are never conclusive evidence that a new release has not occurred given their imprecision and leak rate assumptions. The presence or suspicion of free product generally requires the current owner/operator to undertake assessment to determine the source of the product.

## D: Fourth Option for Sunsetting the UST Fund

### Fourth Option for Sunsetting the UST Fund

In addition to the three options proposed in the memorandum presented to the Board at its March 28, 2014 meeting, the following is a viable option not discussed in the memorandum. I am not advocating this option over any other option, but believe it is a viable option that should be included in the discussion. The following are my thoughts on this option:

#### Transferring the UST Program to the IDNR

- The DNR is the probably entity with the greatest interest in bringing these pre-1990 sites to closure.
- The DNR has an interest in approving budgets and invoices that is not necessarily shared by a third-party – the DNR does not have an incentive to deny claims in order to maintain a profit.
- Indeed, any incentive for profit is removed – funds are potentially saved by closing for less than cost projected, and no “discount” will be paid to the DNR for the assumed risk.
- DNR already has decades of knowledge and experience with each site.
- The money paid by taxpayers to the State will remain with the State and will not go to benefit a private entity.
- The funds will continue to be subject to an annual State audit and legislative oversight.
- All UST Fund files will remain open records subject to public review.
- Any party denied benefits will have the right to appeal the denial and be heard by the agency.
- DNR has the incentive and ability to use enforcement power to get a site moving that private entity does not possess – any site that does not move is profit to a private entity, and the chance of a site not having work done on it may increase.
- The DNR will have more incentive to clean sites with no responsible party and close them.
- If the DNR needs more funds for UST cleanup in the future, they have the ability to request more from the legislature.
- The DNR will have funds at its disposal in the event of an NFA reopener.
- The DNR can continue aspects of the program that go beyond cleanup (e.g., tank closure benefits, future upgrades required by the EPA), and the funds can continue to be used for preventative measures deemed important by the legislature.
- The transfer of the program to the DNR will be more seamless than other options in that there will be no need for an RFP or actuarial study.
- Projected fund balances at the end of 2016 should be sufficient for the DNR to manage all aspects of the UST Fund program (there is a possibility there will not be enough money for a full LPT)
- Administrative costs to run the program could be reduced as the DNR absorbs the program into its current infrastructure.
- The DNR can maintain an innocent landowner program for new discoveries that will not be available in an LPT.
- DNR can use funds to address sites with no RP and are currently not eligible for benefits.
- With the DNR, the funds will still be vulnerable to grabs by the legislature.
- The present checks and balances will not be in place, but could be replaced by appropriate rules.