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Petroleum Tank Release Fund Subcommittee

60th Montana Legislature

SENATE MEMBERS

ROBERT STORY JR--Chair

HOUSE MEMBERS

SUE DICKENSON
CYNTHIA HINER
RICK RIPLEY

COMMITTEE STAFF

HOPE STOCKWELL, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA PETERSON, Secretary
BARBARA SMITH, Fiscal Analyst

MINUTES

Approved June 25, 2008

Date: May 13, 2008

Room 102
State Capitol Building

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COMMITTEE MEMBERS PRESENT

SEN. ROBERT STORY JR, Chair
REP. SUE DICKENSON
REP. CYNTHIA HINER
REP. RICK RIPLEY

STAFF PRESENT

HOPE STOCKWELL, Research Analyst
TODD EVERTS, Staff Attorney
BARBARA SMITH, Fiscal Analyst
CYNTHIA PETERSON, Committee Secretary

Visitors

Visitors' list ([Attachment 1](#))
Agenda ([Attachment 2](#))

SUBCOMMITTEE ACTION

The Petroleum Tank Release Fund Subcommittee took no formal action.

CALL TO ORDER AND ROLL CALL

00:00:38 Sen. Bob Story, Chairman of the Petroleum Tank Release Fund Subcommittee (Subcommittee), called the meeting to order at 4:55 p.m. The secretary noted the roll (**Attachment 3**). Chairman Story provided a history of the Subcommittee. Chairman Story identified the purpose of the present meeting as an effort to gather information.

AGENDA

FUND SOLVENCY ANALYSIS - Barb Smith, Fiscal Analyst

00:04:32 Hope Stockwell, Legislative Research Analyst, spoke about the abbreviated time line for the Subcommittee and the need for immediate direction on any of the Subcommittee's proposals. Ms. Stockwell explained the next meeting of the Subcommittee will be timed with the Legislative Finance Committee meeting in June. Ms. Smith clarified the next Legislative Finance Committee meeting is scheduled for June 5-6, 2008. Chairman Story agreed the Subcommittee would attempt to coordinate its meeting.

00:07:51 Barb Smith, Fiscal Analyst, submitted and reviewed "Petroleum Tank Release Fund Summary Report" (**EXHIBIT 1**).

00:16:32 Ms. Stockwell submitted a copy of SB 145 (2005) (**EXHIBIT 2**) and followup to the 2003 audit (**EXHIBIT 3**). Ms. Stockwell emphasized the audit had recommended transitioning to a system that requires more private insurance, and that the eventual termination of the Petroleum Tank Release Fund (PTRF) is another option and is provided for in statute.

Questions from the Subcommittee

00:17:56 Rep. Dickenson recalled one problem with underground tanks is that the tanks are located in abandoned lots and there is no identifiable ownership. Ms. Smith agreed found tanks without ownership are a liability to the PTRF, and it would be impossible to predict the impact on the PTRF until tanks are found. Rep. Dickenson thought the PTRF needed to have a cushion. Ms. Smith agreed and recalled the number of found tanks seems to be decreasing.

00:19:48 Rep. Ripley asked why the proposed legislation was dropped last session. Ms. Smith recalled the bill asked for an increase in the fuel surcharge, and that the Executive Branch would not support the proposal.

00:20:31 Chairman Story asked Todd Everts, Staff Attorney, what the original purpose of the tank fund was and whether it was intended to be an insurance fund. Mr.

Everts explained the PTRF was to operate as a form of insurance to cover mom and pop operations that could not afford an underground petroleum tank cleanup.

00:21:46 Sandi Olsen, Department of Environmental Quality (DEQ), believed the federal program provided that if certain standards were met, the program could be delegated to the state. One of the requirements was that owners and operators of underground storage tank operations provide \$1 million in financial assurance, including establishment of a state fund that people would have access to under certain eligibility criteria.

Ms. Smith submitted the list of options which was inadvertently dropped from the Finance Committee Report ([EXHIBIT 4](#)).

LEGISLATIVE OPTIONS

Proposals from the Petroleum Tank Release Fund Compensation Board (Two Bills)

Terry Wadsworth, Executive Director

00:23:53 Mr. Wadsworth appeared on behalf of the Petroleum Tank Release Fund Compensation Board (Board) and complimented Ms. Smith on her report and commented on page 4, Exhibit 1, and the long-term fund solvency and long-term viability of the PTRF. Mr. Wadsworth asked the Subcommittee to also consider how cleanup is managed and how the non-degradation rule plays a role in the balancing of risk in contamination at the site. Mr. Wadsworth suggested adding the language "Discovery of historic tanks, management of cleanup, as well managerial decisions by the Board". Mr. Wadsworth also commented on page 6, Exhibit 1, and stated the Petroleum Marketer's Association would like to clarify the language so it addresses "insurance coverage for tanks which cover cleanup of new leaks." In the summary paragraph, Mr. Wadsworth suggested adding language "based on the number of work plans requested by DEQ resulting in claims submitted to and approved for payment by the board." Mr. Wadsworth suggested the language regarding insurance first could be strengthened in the statute. Mr. Wadsworth asked the Subcommittee to keep in mind the PTRF covers more than what is required by the federal program. Mr. Wadsworth submitted and reviewed a written PowerPoint presentation regarding the Petroleum Tank Release Fund (PTRF) proposed 2009 legislation ([EXHIBIT 5](#)). Mr. Wadsworth agreed with Rep. Dickenson that unknown liability is a consideration and explained how above ground storage tanks are also an unknown liability. Mr. Wadsworth believed the proposed 2009 legislation attempts to assess unknown liabilities.

Questions from the Subcommittee

00:37:15 Rep. Dickenson requested definitions for the acronyms "AST" and "PST." Mr. Wadsworth clarified "AST" stands for "above-ground storage tank" and "PST" stands for "petroleum storage tank."

00:37:56 Rep. Ripley asked for the difference between the 2007 and 2009 draft legislation and why Mr. Wadsworth believed the 2009 legislation would pass when the legislation could not get introduced in 2007. Mr. Wadsworth identified the fee increase of .25 percent and the removal of the administrative costs as the two aspects that would be difficult to get passed. Mr. Wadsworth explained in 2007, a cap on administrative costs was requested. Mr. Wadsworth explained efforts to reach a compromise with other interest groups. Mr. Wadsworth agreed these are problematic areas and stated the legislation has been broken into two separate bills. Mr. Wadsworth explained they are still working with interest groups to arrive at an acceptable solution.

00:40:41 Chairman Story addressed the single-wall, double-wall tank issue and noted that currently a double-wall tank has no deductible if there is a leak, and the proposal would implement a deductible. Mr. Wadsworth agreed and stated the petroleum marketers recognize all underground storage tanks will move to double-wall tanks in the future. Mr. Wadsworth explained the legislation is attempting to provide an incentive to go to double-wall tanks.

DEQ PERSPECTIVE - Sandi Olsen

00:42:55 Sandi Olsen stated the DEQ thought it was premature to advocate for the proposals. Specifically, the DEQ does not support eliminating funding for the department regulatory and board administrative expenses since the two programs would be unable to operate. Ms. Olsen explained DEQ would not support funding increases in light of the current funding needs of other agencies, and that the PTRF would not be DEQ's top priority for increased funding. The DEQ does support shifting the cleanup responsibility to the insurance industry, as long as the proposal does not impact specific parties and cautioned against leaving homeowners without resources above and beyond insurance. Ms. Olsen believed the above-ground storage tank program is good, but cautioned a number of pieces would have to come together to have a successful, cost-effective program. Ms. Olsen submitted and reviewed "Department of Environmental Quality Initial EPP Request" ([EXHIBIT 6](#)). Ms. Olsen addressed concerns that had been expressed to the Board about the cost of monitoring and explained DEQ's proposal to streamline monitoring.

Questions from the Subcommittee

00:51:23 Rep. Dickenson wanted to know how volunteers and consultants would work together. Ms. Olsen explained that if the owner operator agrees, the DEQ would do the monitoring, and it would be a voluntary opt-in process. Rep. Dickenson asked whether the proposed process would save the individual operators money since they currently pay for their own consultant. Ms. Olsen responded owners and operators would realize savings indirectly since the costs are submitted to the PTRF for reimbursement.

00:53:35 Chairman Story asked how many years DEQ has been cleaning up spills. Ms. Olsen stated the DEQ has been cleaning up spills since 1989, and that 62 percent of the spills are cleaned up. Chairman Story wondered how much of the

cleanup procedure is common to every site or whether each spill has to be treated individually. Ms. Olsen responded the owner operator is supposed to take responsibility for the cleanup, and DEQ has a pool of approximately 20 consultants. Chairman Story asked Ms. Olsen to explain the cleanup process. Ms. Olsen provided the Subcommittee with "Petroleum Release Investigation and Cleanup Process" ([EXHIBIT 7](#)). Chairman Story asked about the length of time required to complete a release cleanup, and Ms. Olsen responded cleanup time would depend on the type and nature of the cleanup, soil type, and whether ground water is impacted.

00:59:05 Rep. Ripley addressed the draft legislation and the request for \$50,000 for operating expenses and \$50,000 for the 02058 fund. Ms. Olsen identified the 02058 fund as being the PTRF. Rep. Ripley asked whether the DEQ would be requesting \$100,000 for 2010-11 and whether the money would come from general fund to the DEQ to replace lost funding. Ms. Olsen clarified the money would be PTRF money not general fund money, and the shift would be from claims to regulation under the PTRF. Chairman Story clarified the \$100,000 would go to the DEQ, and the DEQ would pay the consultant directly. Ms. Olsen agreed.

MONTANA PETROLEUM MARKETERS REPRESENTATIVE

Frank Schumacher, Mountain View Cooperative, Great Falls

01:01:51 Frank Schumacher has worked with the PTRF for 14 years and emphasized the importance of the PTRF. Mr. Schumacher has a desire to see the PTRF remain solvent Chairman Story requested Mr. Schumacher to review his association's responses to the proposed legislation after the Board had presented its proposal. Mr. Schumacher agreed.

Terry Wadsworth

01:04:47 Mr. Wadsworth addressed the proposed 2009 draft legislation. Mr. Wadsworth submitted statistics regarding past releases ([EXHIBIT 8](#)). Mr. Wadsworth also submitted and reviewed "Board Proposed Amendments to Montana Code Annotated" ([EXHIBIT 9](#)).

Questions from the Subcommittee

01:23:29 Rep. Dickenson wondered what assurance there would be that storage tanks would be monitored and how oversight of the tanks could occur. Mr. Wadsworth agreed and identified the key piece as education for the consumer. Rep. Dickenson acknowledged farmers may opt in, but if they do not, the tank could seep and leak for a substantial amount of time. Mr. Wadsworth agreed but stated that same situation could exist right now.

01:25:50 Rep. Ripley asked whether it would be cost effective for home owners to secure \$50,000 of coverage and asked how much \$50,000 of coverage would cost. Mr.

Wadsworth believed many homeowners already have coverage under their existing policies.

INSURANCE INDUSTRY PERSPECTIVE

Jacqueline Lenmark, American Insurance Association

01:27:36 Jacqueline Lenmark clarified Gregory Van Horssen would not be able to attend the hearing, but would not have been present as a representative of State Farm. Ms. Lenmark addressed the availability of insurance and expressed concern about miscommunication and conflicting information. Ms. Lenmark stated insurance coverage is available to cover the entire release and that coverage is available in all 50 states. Ms. Lenmark addressed a statement in Exhibit 1 that "coverage may not be available for pre-existing releases" and clarified there is coverage for unknown pre-existing releases. Ms. Lenmark submitted a "List of Known Insurance Providers For Underground Storage Tank Owners and Operators" (**EXHIBIT 10**). Ms. Lenmark next addressed discussion concerning deductibles and co-pays and the incentive for the owner operator to obtain insurance. Ms. Lenmark stated there is currently not a product available to insure the deductible co-pay aspect, but a product could be developed. Ms. Lenmark thought the coverage would be relatively expensive because the co-pay amount is within the range of most releases, so it is a known expense that will need to be covered and, if there is a release, it is relatively certain the expense would be incurred. Ms. Lenmark stated insurers would prefer to work with the state and provide coverage for the entire release. Ms. Lenmark stated Texas, Michigan, and Florida have worked toward eliminating their tank release funds and have transitioned to a program of private insurance or self insurance. Additionally, North Carolina developed a program to insure the deductible co-pay. Ms. Lenmark addressed the availability of insurance in Montana and cited Montana's good track record, strong regulatory framework, good record keeping, and stable judicial scheme as positive factors for insurance companies. Ms. Lenmark stated she has not investigated the issue of above-ground storage tanks. Ms. Lenmark stated some states utilized a portfolio buyout to phase out their PTRF and explained the complex transaction that would occur when an insurance company purchases the state's liability and risk. Ms. Lenmark stated she has a strong willingness to work with the other interested parties on proposed legislation.

Questions from the Subcommittee

01:44:00 Chairman Story noted Ms. Lenmark had indicated an insurance company would rather be a full insurer rather than a partial insurer and wondered why. Ms. Lenmark responded not all insurers would be unwilling. Ms. Lenmark noted the product does not currently exist and, even if the insurers were willing, the cost of the product would probably be prohibitive. Chairman Story asked for clarification between cleanup insurance and extended liability. Ms. Lenmark stated extended liability insurance would probably have to come from another liability policy, or a product would have to be developed that would provide cleanup and extended liability coverage. Chairman Story wondered about heating oil and asked if there is typically coverage in most homeowner policies or whether specific riders are

needed. Ms. Lenmark could not readily reply but offered to obtain an answer for Chairman Story.

Frank Schumacher, Mountain View Cooperative, Great Falls

01:49:42 Mr. Schumacher outlined the position of the Montana Petroleum Marketers and Convenience Store Association on the legislative proposals (**EXHIBIT 11**). Mr. Schumacher identified the solvency of the PTRF as important and that the solvency depends upon a balance between the Board and a change in the way the DEQ does business. Mr. Schumacher addressed the monitoring of sites and testified his association believes the Legislature should direct the DEQ to use a risk-based monitoring system. Mr. Schumacher stated the DEQ Remediation Division has adopted a standard for clean water that is stricter than the federal requirement. Mr. Schumacher believed an insurance company that is considering providing coverage would be deterred by the past actions of the DEQ. Mr. Schumacher did not believe the proposal was a serious attempt to address the PTRF solvency issue.

Questions from the Subcommittee

02:00:46 Rep. Dickenson asked if a risk-based monitoring system was recommended by the Defendants in the Sunburst case. Mr. Schumacher explained risk-based monitoring consists of identifying the risk, the level of contamination, and the potential down-gradient receptors. Rep. Dickenson wanted to know what the time frame would be for natural forces to negate the risk. Mr. Schumacher was uncertain. Rep. Dickenson posed a hypothetical scenario and asked what would happen if development occurs years after the release was left in the ground. Mr. Schumacher responded a no further action letter for a closed site contains a clause saying the site can be reopened.

02:04:23 Rep. Ripley asked for the DEQ's response to the statement that the DEQ adopted water-quality standards stricter than the federal government. Ms. Olsen addressed the question and explained the reference was to a guidance document that lists screening levels for contaminants that pose a risk to human health and that the document does not address all contaminants. The DEQ developed screening levels to determine potential risk. Ms. Olsen explained the DEQ took the document through the public rulemaking process, allowed for public comment, and adopted the document in an open forum. Ms. Olsen stated the document assists in forming the decisions for cleanup.

02:06:43 Chairman Story addressed Mr. Schumacher and asked whether commercial businesses that have insurance on their tanks have a separate policy or whether the coverage is included as part of their business insurance. Mr. Schumacher responded that they currently do not carry insurance on under-ground storage tanks and only cover above-ground storage tanks, and it is an accidental release policy. Chairman Story asked if a person does have a leak and does not notify his insurance company, where the \$17,500 would come from. Mr. Schumacher responded the \$17,500 is paid from company funds. Mr. Schumacher stated there is no incentive to turn a claim in to his insurance company.

PUBLIC COMMENT

No public comment was offered.

02:09:45 Ms. Olsen introduced Daniel Kenney, Section Manager for the Petroleum Fund Release sites.

SUBCOMMITTEE DISCUSSION OF PROPOSALS

02:11:01 Chairman Story suggested the Subcommittee could look at the Board's legislation and provide input. Chairman Story identified the second issue as looking at whether there is something in the current law that needs to be adjusted. Chairman Story suggested the insurance industry should become more involved in the process. Chairman Story also thought there may be a need to review how the program is managed at the DEQ. Chairman Story wondered about the way the program was set up since the Board does not have any authority and the DEQ has the responsibility. Chairman Story thought the division of power and division of responsibilities was not working well.

02:14:06 Ms. Olsen addressed Chairman Story's comment and stated it was her understanding that the two parts of the program were intended to supply a system of checks and balances. Ms. Olsen stated one other structure was tried in the past and the financial and cleanup programs were merged, but the merger caused a number of controversies, so the programs were separated.

02:16:04 Mr. Wadsworth agreed with Ms. Olsen and stated fund solvency has always been an issue. Chairman Story asked about the purpose of having a Board and asked what input the Board has in containing costs. Mr. Wadsworth directed Chairman Story to the initiatives contained in the audit report in 2003 and stated there was a recommendation for cost caps and that the Board accomplished that directive in 2005. The Board determines what is a reasonable cost and the DEQ determines whether the work meets state cleanup standards. Mr. Wadsworth identified long-term strategic planning as a key function of the Board.

02:22:15 Rep. Dickenson stated up-front that she does not want to increase the fee on gasoline but acknowledged a need to make the PTRF solvent. Rep. Dickenson asked whether any additional funding could be obtained through the general fund. Rep. Dickenson asked whether the proposed dollars were accurate or whether the amounts were padded. Mr. Wadsworth responded and stated the Board is not interested in getting both amounts, and that the Board is concerned about embarking on an inspection program for above-ground storage tanks which could result in an influx of identified releases.

02:26:44 Chairman Story addressed the proposal to bring insurance companies in as third parties and asked whether that would speed up or slow down the clean up process. Mr. Wadsworth responded that there are other states that have transitioned to private insurance. Mr. Wadsworth would like to see insurance give first-dollar coverage. Mr. Wadsworth stated an insurance company has to deny first before the PTRF would kick in. Mr. Wadsworth suggested sometimes

insurance companies are looking at the Board to provide oversight and cost control.

- 02:30:40 Rep. Ripley viewed part of the problem as the increase in the amount of workload for 2007 and wondered what caused the increase and whether the increase was temporary. Mr. Wadsworth explained the Board borrowed \$1 million to pay \$2.8 million in claims, but did not borrow all of the money because it wanted to put pressure on the system. Ms. Olsen addressed the increased workloads and explained that in 2007 the DEQ succeeded in implementing the audit recommendations to streamline the process which drove a spike in work plans. Ms. Olsen explained the DEQ was able to recruit a person who was extremely productive, but who left to work in the private sector. Ms. Olsen explained DEQ would leave one position unfilled in an effort to address funding difficulties.
- 02:34:11 Chairman Story asked Ms. Olsen to estimate the upcoming expected liability for under-ground tanks. Ms. Olsen believed there is a light at the end of the tunnel, and that the program minimizes the potential for releases. Ms. Olsen stated there are approximately 60 tanks identified per year. The overall liability for all open releases in 2002 was estimated to be \$78 million, and it takes approximately seven years to clean up a release. Ms. Olsen explained how the prioritization system addresses work plans and does not address lower priority sites.
- 02:38:44 Rep. Ripley stated he was confused about the availability of insurance and how many current policies cover releases. Rep. Ripley also wanted to know how the coverage would affect premiums. Rep. Ripley wanted the information for policies utilizing home heating oil and for farmer/ranchers.
- 02:39:51 Mr. Wadsworth stated another biennial report will be available in July and will contain that information and that the research is currently being conducted.
- 02:40:28 Chairman Story asked whether the Board has spoken with the various agricultural groups. Mr. Wadsworth responded attempts had been made and that they will continue to perform outreach. The Board is also attempting to involve homeowners. Chairman Story suggested finding a way to have formal discussions with the agricultural groups.
- 02:42:39 Rep. Dickenson requested Ms. Stockwell to research the risks of leaving a tank in the ground and obtain scientific information regarding implementing a risk-based monitoring system and how it relates to public health. Chairman Story was interested in obtaining information from the insurance industry and what other states are doing.
- 02:44:51 Ms. Stockwell asked Mr. Everts to review the Subcommittee's timeline. Mr. Everts stated the Environmental Quality Council (EQC) would need a formal proposal by the EQC's July meeting. Chairman Story asked Ms. Olsen to provide a synopsis on how the DEQ deals with being overly constrained and how the DEQ prioritizes where to spend its limited resources.

02:47:20 Ms. Stockwell stated the EQC will meet on July 13 and 14. Chairman Story reiterated the Subcommittee would work around the Legislative Finance Committee.

02:49:35 There being no further business to come before the Subcommittee, the meeting adjourned.