

LEGISLATIVE AUDIT DIVISION

Angus Maciver, Legislative Auditor
Deborah F. Butler, Legal Counsel



Deputy Legislative Auditors:
Cindy Jorgenson
William Soller

TO: Legislative Audit Committee Members

FROM: David Singer, Associate Management and Program Analyst

CC: Christopher Dorrington, Director, Department of Environmental Quality
Amy Steinmetz, Administrator, Waste Management and Remediation Division
John Monahan, Chair, Petroleum Tank Release Compensation Board
Terry Wadsworth, Executive Director, Petroleum Tank Release Compensation Board

DATE: December 15, 2023

RE: Performance Audit Follow-Up (23SP-12): Administration of the Petroleum Tank Cleanup Fund (20P-01)

ATTACHMENT: Original Performance Audit Summary

Introduction

The Administration of the Petroleum Tank Release Cleanup Fund (20P-01) report was issued to the Legislative Audit Committee in October 2021. The audit included three recommendations to the Petroleum Tank Release Compensation Board (board) and the Department of Environmental Quality and one recommendation to the Montana Legislature. In August 2023, we conducted follow up work to assess implementation of the report recommendations. This memorandum summarizes the results of our follow-up work.

Overview

Through our follow-up work, we determined that one recommendation is partially implemented and three recommendations have not been implemented. We found that several additional steps remain to be taken by the board and Department of Environmental Quality to address the issues we identified in the original audit. The original audit found that the board was largely effective in its review and reimbursement of environmental remediation work. The audit also identified several areas for improvement in the administration of the program. These areas included: the board's review of corrective action plans and eligibility information was often occurring late in the process and after the Department of Environmental Quality had approved workplans; the board was unnecessarily reviewing technical details and withholding obligation of funding of approved workplans; the board spent significant resources reviewing costs of corrective action plans and claims; and the board could be more proactive in providing the legislature with information to inform decision making regarding the fund's future role in reimbursing remediation of releases in Montana.

Background

The Petroleum Tank Release Cleanup Fund (fund) provides financial assurance and a funding mechanism for owners of underground petroleum storage tanks and is used to reimburse the costs of cleaning up environmental contamination caused by these tanks. The fund is financed by a \$0.0075 (three-quarters of a cent) fee per gallon of fuel levied on the distribution of petroleum products from wholesalers, amounting to approximately seven million dollars per year. The seven-member governor-appointed

Petroleum Tank Release Compensation Board oversees a staff of six and is responsible for the management and oversight of the fund. The board is administratively attached to the Department of Environmental Quality (department). The department is responsible for the regulation of underground storage tanks and release cleanup. When an owner of an underground storage tank discovers a release, they are required to notify the department. The owner applies for eligibility for reimbursement from the fund, works with the department, and hires a consultant who develops a corrective action plan. The department reviews and approves the plan. The board also reviews the plan, determines if the owner is eligible to have cleanup costs reimbursed by the fund, obligates funding for cleanup of a release, and reviews and reimburses claims submitted by consultants. When a leak is sufficiently cleaned, the department closes the release. As of December 1, 2023, 1374 out of 4,788 petroleum releases in Montana were deemed eligible for fund reimbursement and have been cleaned up and closed. There are 577 open releases that have been determined eligible for the fund; 194 open releases have not applied to the fund or otherwise have not been determined eligible for fund reimbursement. In 2022, 22 of 46 releases resolved were fund eligible and 9 out of 31 releases discovered in 2022 applied and were deemed eligible for the fund.

Audit Follow-up Results

The following sections summarize the progress toward implementation of the report recommendations. During follow-up work, we interviewed department and board management and reviewed workplan obligation data to determine if the board and department have worked together to improve information sharing and earlier board workplan review. We reviewed Senate Bill 334 passed by the 2023 Montana Legislature to determine if the bill clarified that the Petroleum Tank Release Compensation Board does not have a role in basing reimbursement on the methods prescribed within approved corrective action plans, as recommended. We reviewed the research and outreach conducted by the board and department to inform the implementation of a competitive bid process for remediation projects. We reviewed the board's 2021-2022 biennial report to determine if the board provided a more detailed discussion of information and policy options available to inform legislative decision-making regarding the continued existence and future role of the fund. Lastly, we interviewed staff and reviewed bills from the most recent legislative session to determine if the board sought legislation that prepares the fund for eventual closure of all historic releases.

Recommendation #1

We recommend the Petroleum Tank Release Compensation Board work with Department of Environmental Quality to collaborate during corrective action plan development to verify eligibility, assure fund availability, and provide any other relevant input for consideration prior to final plan approval by the department.

Implementation Status – Partially Implemented

The original audit found cases where the board reviewed, established how much they were willing to reimburse, and provided input on workplans after the department had approved them. The audit found that there were further delays in obligation of funding to remediate releases, as the board awaited insurance, workplan, and owner and release eligibility information from the owner, department, or consultant. The intent of this recommendation, in tandem with the subsequent recommendation, was to secure all board input prior to final plan approval, so all parties could be confident that the approved corrective action plan would be obligated and paid if it were followed.

During audit work, we spoke with department and board staff, reviewed documents, and examined statutory changes to learn about how the department and board have worked together to address these issues. In interviews, the department and board expressed that statutory changes made during the 2023 legislative session may help improve earlier review of workplans and information sharing. SB 334 clarified that the board's review of workplans should begin earlier in the process when the department makes the workplan available for local government review. The bill as passed also required that the owner, a representative of the owner, the department, the board, and board staff hold a meeting to discuss releases for which costs are expected to exceed \$100,000. Board staff and the department expressed that these meetings may facilitate improved communication but also stated that the required meetings may not be an efficient use of resources if the consultant has not characterized the release and performed a

remedial alternatives analysis. Waiting for a required meeting can lead to longer obligation times. Department staff will assess the effectiveness of these meetings in improving collaboration and workplan review. The first of these required meetings occurred in September 2023, after our follow-up work was complete.

The board and department have taken steps that may assist with making information more readily available for review, such as entering eligibility information in the department's remediation database and converting paper documents to electronic. Despite these efforts, we observed evidence of continued delays in obligation of workplans due to the board reviewing technical details of releases and awaiting release eligibility and other information. The department has discussed working with the board on additional initiatives to improve information sharing, timely workplan review, and other business process. This includes reasonable cost guidance, outreach, improved communication of the process to owners, prerelease eligibility, and corrective action templates for consultants that request information typically needed by the board during their review. If completed, these improvements would move this recommendation closer to full implementation.

Recommendation #2

We recommend the Montana Legislature clarify statute by making amendments as needed to clarify the Petroleum Tank Release Compensation Board does not have a role in approving or basing reimbursement on the specific methods prescribed within approved corrective action plans that bring an eligible petroleum release to closure.

Implementation Status – Not Implemented

The original audit found that the board sometimes questioned cleanup methodologies and withheld funds from corrective action plans already approved by the department. Audit work concluded that the department is the state regulatory authority that should determine necessary work to bring a release to closure, and the board's refusal to obligate funds based on what the department had already determined to be necessary cleanup work was inappropriate.

During follow-up work, we reviewed SB 334 and interviewed department staff. As introduced, the bill sought to clarify the roles of the department and the board by providing definitions of actual, reasonable and necessary. Board members and board staff testified in opposition to the bill. The board's attorney claimed that these definitions would reduce the board's ability to control spending on cleanup of petroleum releases and could affect the actuarial soundness of the fund. The definitions were later amended out of the bill. The final version of the bill that passed did not clarify the board's role as recommended, still allowing the board to reimburse for what it determines to be reasonable costs of responding to a release, even if the remediation plan had already been approved by the department. At present, the board continues to review and question technical details of department approved corrective action plans.

Recommendation #3

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to develop a process, seeking legislation if necessary, whereby remediation projects are competitively bid to bring releases to closure, in accordance with existing state procurement laws.

Implementation Status – Not Implemented

The original audit found that board staff expended significant resources on its cost review process and that a competitive bid model could save staff resources and be a more effective cost control mechanism. As part of follow-up work, we interviewed department and board staff and reviewed research conducted by both the board and department on competitive bidding. We found that board staff and the department have not developed or implemented a process where remediation projects are competitively bid.

The board and department researched other states' use of competitive bidding and reached out to stakeholders to obtain their input. The board's attorney is researching how a competitive bid framework

relates to existing state procurement laws. A memo provided by the board's attorney noted how state procurement laws apply to contracts between the state and third parties. In contrast, the program currently allows the owners to select consultants. Board staff stated that the next steps are for them to interview representatives from Pennsylvania in the Fall of 2023 (after follow-up work was complete) regarding their use of a competitive bid model and research how Pennsylvania's framework relates to existing Montana laws. Board staff plan to present the final results of their research to the board, which will make a decision on the proposed bid process. If any legislation is needed, it would be introduced in the 2025 legislative session at the earliest. If the board believes that the process can be implemented via rule, the earliest the updates could go into effect would be the start of 2025.

Recommendation #4

We recommend the Petroleum Tank Release Compensation Board work with the Department of Environmental Quality to seek legislation that prepares the fund for the eventual closure of all historic underground storage tank releases in Montana.

Implementation Status – Not Implemented

The original audit found that the board's statutorily required discussion of the future of the fund in its biennial report was limited and not proactive. Audit work also found that other states have taken steps to transition away from a purely publicly funded insurance model for underground storage tanks. The audit report concluded that it is important for the board to provide the expertise and options available to inform the legislature regarding the continued necessity and future role of the fund.

During audit follow-up work, we asked the department and board if they pursued legislation that addressed the future of the fund. We found that the board and department did not seek legislation that prepares the fund for closure of historic underground storage tank releases in Montana.

As part of follow-up work, we also reviewed the board's Petroleum Fund 2021-2022 Biennial Report. Statute requires this report be provided to the department director and the Legislative Auditor by July 1 prior to each regular legislative session. However, the report was not received by our office until December 21, 2022. This meant the report was of limited value for informing any potential forward-looking legislation in the 2023 session. We found that the report did include a more robust discussion of a recent EPA study of private insurance coverage for underground storage tanks in the United States. It also discussed the potential need for establishing minimum insurance standards for underground storage tanks in Montana as a step to facilitate the transition of the fund to private insurance. The report provided the progress towards closure of open petroleum releases in Montana in the appendix. While these additions are improvements from the previous biennial report, we found that the board can still do more to research and report on alternative policy options and address several issues that concern the future of fund. The board and department discussed with us additional information that could be included in the board's biennial report to guide legislative decision making, though they gave no firm commitment to include this information in the future. This information could include:

A discussion of other states' use of and experience with requiring private insurance for underground storage tanks

- A discussion of other states' approaches to providing financial assurance and funding for cleanups of petroleum releases, such as providing funding for historic releases and requiring private insurance coverage for new underground storage tank releases.
- Additional leak prevention and mitigation programs, such as added inspections for certain tanks.
- Addressing issues associated with above ground storage tanks.
- A discussion from the department regarding resource constraints and other issues that inform the status of open releases and time needed to bring releases to closure.
- Additional steps that can be taken to uncover historic contamination and accurately estimate the future liability of the fund.