

STORAGE TANK ADVISORY COUNCIL

January, 11, 2010

Oklahoma Corporation Commission
Room 105

Members present were **Deanna Atkinson, Keith Davis, Michael Key, Kathy Lippert, Keith Spiker, Joe Stephenson, Ray Vaughn** and **Kyle Williams**. **David Guthrie, Mike Sawyer** and **Karl Stickley** were absent.

Joe Stephenson opened the meeting by introducing new council member, **Keith Davis**, who is replacing **Burt Hall**.

The **first order of business** was the approval of the minutes from the last meeting. **Ray Vaughn** made a motion to approve the minutes and **Deanna Atkinson** seconded it. All members present approved the motion.

The **second order of business** was the Financial Report by Robyn Strickland. Ms. Strickland reported the December, 2009 assessment was \$1,571,023; total revenue was \$1,615,933; there were 104 claims totaling \$1,103,613; total expenses were \$1,142,309; total Indemnity Fund balance was \$12,975,718 less encumbered funds in the amount of \$12,688,872 leaving an available balance of \$306,846.

The **third order of business** was reduced revenues by Gary Walker. Mr. Walker reported that when comparing our current situation with 5 years ago the Fund is in better shape now. Mr. Walker said during the OU/OSU years we were not able to fund PO's on a monthly basis and felt that once the economy starts to turn around we will be in even better shape. **Joe Stephenson** asked if our house is in better order to deal with the shorter revenues than it was back then. Mr. Walker said a lot more was being taken out of the Fund, 50% for a few years, then it went down to 25%. Mr. Walker said 50% of your revenue is a large amount. **Kathy Lippert** asked how much ODOT was taking out monthly. Mr. Walker said ODOT gets \$500,000 and DEQ gets 8% of the collected assessment. **Ms. Lippert** asked how long ODOT will receive funds from us. Mr. Walker said at the rate of \$6 million per year it will take 8-9 years until \$54 million is paid out.

Joe Stephenson asked if we have a percentage of how much revenues were off. Mr. Walker said it appeared we are not collecting about \$500,000 per month that we were a year and a half ago which he felt was tied to the economy. **Kathy Lippert** commented that people are traveling less. **Kyle Williams** asked what percentage was \$500,000. Mr. Walker said we were getting \$2-2 ½ million a year and a half ago so it is about 25% less.

Vance McSpadden, OPMCA, said that he had talked to Gary Ridley with ODOT about the weigh stations because they have not done anything on it in a year. Mr. McSpadden

told him that while we want to pay them we do not want to string this out and suggested we could send them half of what we are doing now. Mr. McSpadden said he spoke with Mr. Ridley this morning and is going over to look at ODOT's plans. Mr. McSpadden said that hopefully we can get the money back for what it is intended. **Joe Stephenson** asked if Mr. Ridley understands our concern for having enough to pay for cleanups. Mr. McSpadden said that he does.

Michael Key asked if he had any idea on a percentage. Mr. McSpadden said he asked how soon were they going to need it and Mr. Ridley does not know but will try to get a timeline. Mr. McSpadden said that if we send \$250,000 versus \$500,000 per month it would be better. **Mr. Key** said we could work on another 5-6 sites with \$250,000.

Joe Stephenson said that historically there have been a lot of entities wanting the revenue we produce or at least have part of it and we are just trying to control the crash landing by with partnering with ODOT. Mr. McSpadden commented that they were the intended party if we went over the maintenance level anyway.

Michael Key said they are in about 38 states right now and he deals with their Indemnity Funds and State Insurance funds and they are all in the same boat. **Mr. Key** said they are being raided by legislatures for one reason or another and Oklahoma is actually still in pretty good condition compared to many others. **Mr. Key** said New Mexico's Fund is just about gone, Colorado's is on it's way out, and Kentucky is hurting terribly bad. **Mr. Key** said once the door is opened everyone starts flooding in for the money. **Mr. Key** said most state's economies have had such a downfall, they need money and feel it is easy money for them. **Mr. Key** said we need to do whatever we can do to try to block that from happening here so the money is used for what it was designed to be used for.

Gary Walker said he thinks ODOT has received about \$12 million towards the \$54 million. **Kathy Lippert** asked how many weigh stations that amount should have built. Jeff Southwick said ODOT is going to put in about 7 weigh stations with the \$54 million they receive. **Joe Stephenson** said there is a lot of electronic equipment that goes along with it so there is a lot more to it than just a building. **Ms. Lippert** said we should make a concentrated effort to get our PFP contracts paid off and minimize the encumbered balance so we don't look so lucrative. Robyn Strickland said there is only one PFP case that has any money against it. Joe Foster, Enercon Services, said we are not doing PFP contracts anymore but are doing a lot of performance-based remediation. Mr. Foster said the terminology is a little troublesome on the financial report. **Ms. Lippert** asked if the \$12 million encumbered funds represent just outstanding PO's. Ms. Strickland said that was correct. Ms. Strickland said there is \$5 million in futures and the remainder are current clean ups.

Deanna Atkinson asked if we anticipate anything or do we know of anything possibly happening going into the next session. Gary Walker said he really has not heard of anything but Vance McSpadden might hear of something before he does. **Kyle Williams** asked if the revenues are trending down as compared to last year. Mr. Walker said we were down about \$500,000 a month. Robyn Strickland said we were \$164,000 down

from the assessment this month as compared to last month. Joe Stephenson asked if that was actual dollars sold at the pump and Mr. Walker confirmed it was.

Joe Stephenson asked if there was anything we needed to get ready for the upcoming session. Mr. Walker said there was a bill to reimburse station owners for paying for a suitability study that was discussed last year but that really only affects a handful of people. Other than that he had not heard any discussions. **Mr. Stephenson** said he got one phone call last year wanting to know how much we had available that they could use.

Kathy Lippert said that Jeff Southwick had a proposal for a pilot study for a pre-filing settlement hearing if you don't meet compliance. **Michael Key** asked if Mr. Southwick could explain because he was not able to attend the meeting. Jeff Southwick said that one of the Commissioners had suggested we look at doing a pilot study for a settlement conference for enforcement. Mr. Southwick said we had an open meeting to gauge interest from parties and the idea behind the pilot was basically that you would be given 2 alternatives to settle deficiencies. Mr. Southwick said staff sends out a letter detailing your deficiencies and it currently gives you the option of paying the fine, talking to Gary Walker to see if a settlement can be reached or going to court. Mr. Southwick said we have had success in doing this, however, another alternative was to let staff do their job and not get involved. He said this would take the Director out from making that decision and just have one of our ALJ's be a settlement facilitator before we file. Mr. Southwick said the ALJ cannot do arbitration but they can make a recommendation, however, staff is not bound by the recommendation, and we go ahead and file. Mr. Southwick said that even if we file and they have not made that election they will have another opportunity to have a settlement conference. Mr. Southwick said we are going to see if there is an interest in it and see if it is a workable deal.

Ray Vaughn asked Gary Walker if he goes across the street when session starts or do we rely on the private sector to do that. Mr. Walker said Vance McSpadden is there and both he and Brooks Mitchell are as well. **Michael Key** asked Mr. McSpadden to contact them if something comes up. Mr. McSpadden said he would. **Joe Stephenson** commented that this will be a busy session.

The **fourth order of business** was Operator Training follow-up with Miranda Lenocker. Ms. Lenocker reported that about 2% of our tank owner population had taken the training and we have not really had any significant issues. Ms. Lenocker said that enough people had taken the training that if we were going to have any programming problems those would have shown up by now. Ms. Lenocker said there was a glitch on a certificate printing out properly but that has been fixed and other than that it is going well. Ms. Lenocker said we have had some good comments. Ms. Lenocker said there have been a few issues with tank owners knowing how to operate the system which was expected but so far so good.

Michael Key thanked Ms. Lenocker for all her hard work. He said that they have gotten in on numerous state's operator training programs that are similar to the AB operator training program. **Mr. Key** said Oklahoma's is very good and is in the top 5 in the

nation. Ms. Lenocker said that was great to hear. **Joe Stephenson** commented that he took the training and did get his certificate.

Kathy Lippert said that to take the operator training you have to be an operator and if possible she would like to make it open to consultants so they can also share it with the operators. Gary Walker said he did not have a problem with that but would like to discuss the idea with Ms. Lenocker. **Joe Stephenson** said they use a control number to get into the site. Ms. Lenocker said the way it is set up now you have to be an owner and have an owner account to log in. Mr. Walker asked if **Ms. Lippert** wanted all consultants to be able to take it. **Ms. Lippert** said she thinks it would be a good idea and could do nothing but assist the state because a lot of operators really don't even know their way around it. **Ms. Lippert** said consultants can help staff by walking their operators through it. **Mr. Key** said he didn't think it would be any kind of proprietary information and felt it was a great idea. Mr. Walker said that the face of it sounded good but he would like to discuss with staff.

Joe Stephenson asked what needs to be done to make sure Compliance gets everything done by July. **Michael Key** said the deadline is July, 2011 so we have plenty of time. **Mr. Key** said the states that he knows are on board now are Colorado, Wyoming, Idaho, California, Kansas will be by 2010, and he thought Iowa. **Keith Spiker** said he knows that Iowa will be ready this year. **Mr. Stephenson** asked at what point we will make a push for total compliance. Ms. Lenocker said 6 months out from the deadline we will have fuel inspectors passing out notices, however, we won't start enforcement until it is required in July, 2011. **Mr. Stephenson** said we should try to get as many people on board before that time. Ms. Lenocker said that as far as the system itself the bugs are worked out and there should not be any operational issues, however, people understanding how to use the system is another issue and we have some duplicate owner accounts that need to get straightened out. Ms. Lenocker said there will be another notification sent out to tank owners as the deadline gets closer. **Mr. Key** said there are some states that are scratching their heads on what to do so Oklahoma is way ahead.

Ray Vaughn suggested **Kathy Lippert's** recommendation on consultants taking operator training be placed on a future agenda to make sure it gets finalized. **Joe Stephenson** asked if reduced revenues should be on the agenda also. Mr. Walker said we can handle that issue with the Financial Report.

Joe Stephenson asked if there were any more questions or comments before moving on to the last item on the agenda.

Ms. Connie Bryant, attorney representing Goodrich Corporation and Michelin North America, said she wanted to bring to the Council's attention a serious gap in the regulatory program here. Ms. Bryant said she believes it is out of compliance with federal rules and regulations. She believes there has been testimony under oath from PSTD personnel who recognize that last year they went in and asked the definition of petroleum be changed and the legislature did that and it now does not comply with the federal definition. Ms. Bryant said there are certain tanks that contain petroleum under

the federal UST system that are not covered under your program according to the statute. Ms. Bryant said another issue is Title 17 § 305 where certain products covered in the federal rules, 40 CFR Part 280, which is the federal regulations that sets forth the requirements for your program.

Ms. Bryant said there have been certain personnel at the Commission taking the position that the DEQ shares jurisdiction for the federal program. Ms. Bryant said she took the deposition of the head of Land Protection Division today and he said it was their view that they did not share jurisdiction and that they did not regulate underground storage tanks of any kind that had the products in them that are listed under the definition of petroleum in the federal program. Ms. Bryant said that the definition placed on statute 305, amended in 2000, is not the way they interpret it. She said they have not implemented any rules or regulations governing underground storage tanks and they do not have a program whereby there is registration. Ms. Bryant said they do not have an Indemnity Fund and she thinks there should be legislation presented this year by the PSTD that puts the program back into compliance with federal rules. Ms. Bryant said the purpose of the program is so that tank owners only have to deal with one agency so they don't have to deal with both EPA and the state agency and that is why the Commission was granted the authority to implement the program. Ms. Bryant said the federal statute, 40 CFR Part 280, lists this commission, the Corporation Commission, as the agency who has been approved for jurisdiction. Ms. Bryant said it also requires that if there are any changes in the rules and regulations of this state with regard to the program, any changes in jurisdiction has to be approved by EPA, has to go out for public comment, and that never happened when these changes were made in 2000 and last year in 2008.

Ms. Bryant said that Goodrich Corporation had a release that occurred from an underground storage tank at their facility in Miami, OK. Ms. Bryant said it falls under the federal rules and it fell under the definition of petroleum because it was petroleum solvents until the definition was changed after they filed for their application for reimbursement. Ms. Bryant stated that she made contact with EPA and has not been able to visit with them yet but intends to with regard to this program and it's deficiencies and she said she just wanted to call this to the Council's attention. Ms. Bryant said she believes they have oversight and responsibility. Ms. Bryant said that under the rules the state's authority to implement the program can be removed and the EPA can say you are not in compliance, you have gaps in your program, and we will no longer approve your program so there are risks to that.

Ms. Bryant said she understood that she had this placed on the agenda for the last meeting and it didn't make it on the agenda for this meeting. Ms. Bryant said the last meeting was cancelled and she just wanted to call it to the Council's attention. She said that it was her understanding in visiting with Mr. Walker that he was going to propose those changes but didn't hear anything. Ms. Bryant said she knows the legislature is getting ready to go into session if it hasn't already and thinks we are a little behind the eight ball to get that done this legislative session. Ms. Bryant thanked the Council and said if anyone had questions she would be glad to address them.

Michael Key asked if Ms. Bryant could elaborate on petroleum solvent. Ms. Bryant said mineral spirits. She said petroleum solvents are defined under the federal program under the definition of petroleum UST systems and it was under this program from when these statutes were passed in 1989 or 1990. Ms. Bryant said the state definition complied with the federal definition until last year when members of the PSTD requested the legislature make the change. Ms. Bryant said she was told they did not realize that change would be in violation of federal rules at that time and said they told her they are concerned about it and she said she believes it is a serious violation. **Mr. Key** asked if the petroleum spirits, the solvent, was for retail sale in their tank. Ms. Bryant said no but the federal program does not require retail sale but there are tanks that are excepted from the federal program. **Mr. Key** asked if we collect any funds on non-retail sale materials other than over the road fuel. Gary Walker said we do not. Ms. Bryant said that it was not a requirement for reimbursement to collect a penny tax in the statutes for that.

Ms. Bryant said that DEQ has been overseeing the clean up and there is a clean up ongoing at the site. She said it was initially understood that it was a hazardous substance that was stored in the tanks. Ms. Bryant said only in the last couple of years did they get a forensic chemist involved and he identified the substance in the tank as petroleum solvents, mineral spirits, which contain less than 1% benzene. Ms. Bryant said they previously thought it was pure benzene and that is why it was under their jurisdiction. **Mr. Key** asked if they had full leak detection and in compliance. Ms. Bryant said the tanks were taken out in 1986 and said she did not think it was required at that time. **Mr. Key** said that was prior to the storage tank program. Ms. Bryant said they have registered the tanks now after they realized they should be under this jurisdiction of the federal program being implemented by this commission.

Ray Vaughn said he is not in the business except that he represents Oklahoma County. **Commissioner Vaughn** said they have some aboveground tanks and the law requires a County Commissioner be on the Council. **Commissioner Vaughn** said he had a couple of observations and asked if the information presented today had been formalized in the way of a letter to the either Mr. Walker or to the Corporation Commissioners themselves. Ms. Bryant asked if he meant a request the changes be made. **Commissioner Vaughn** said yes and Ms. Bryant said she had not requested the change be made. Ms. Bryant said she took Mr. Walker's deposition and he said he was going to instigate that change be made and also took Mr. Mitchell's deposition who said he was going to talk to the Commissioners about it. Ms. Bryant said she can send them a formal request on behalf of Goodrich. Ms. Bryant said the Commissioners are aware of the problem. **Commissioner Vaughn** said he understood but also being a practicing attorney for over 30-plus years, this is an advisory council and the real buck stops on the third floor. He said his belief is that Ms. Bryant needs to bring them into the picture if she has not done so already. **Commissioner Vaughn** said that if they have something for us to look at they can certainly assign it to us and he said that he would find it almost impossible to think that this advisory council would promote legislation of any kind. **Commissioner Vaughn** said he had only been on the Council for a couple of years but they had not done that since he had been here.

Ms. Bryant said she believes they act as an advisory council when things are presented and the PSTD usually instigates the legislative process, bringing it to the Council, explaining it to the Council and it's usually on the agenda if there is a legislative change. Ms. Bryant said she knows they are not a legislative body and is only an advisory capacity and said she knows they also have a concern about the program complying with the federal program which she said she does not believe is happening now.

Jeff Southwick said that this is the subject of litigation right now and that this is a terribly inappropriate forum to be brought up in. Mr. Southwick said he thinks it to be strong-arming in the strongest of terms to try to get Mr. Walker to someone else's point of view and he asked that the Council take the issue with a grain of salt because of the comments that have been made. Mr. Southwick said it was highly inappropriate.

The **fifth order of business** was future meeting and agenda items. It was agreed the next meeting would be held Monday, March 8, 2009, at 3:00 p.m. **Kathy Lippert** made a motion to adjourn and **Michael Key** seconded it. All members present approved the motion and the meeting was adjourned.