Part II:
Administration of the Ground Water Oil Clean-up Fund

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A. Introduction

This report is submitted pursuant to 38 M.R.S.A.§ 570-H, which requires that a report be submitted to the Legislature regarding the Department's and the Fund Insurance Review Board's experience administering the Ground Water Oil Clean-up Fund ("Fund"), including clean-up activities and third party damage claims.

B. Summary of Revenues and Expenditures

Table 1 illustrates financial activity in the Ground Water Oil Clean-up Fund for fiscal year (FY) 2010 (July 1, 2009 – June 30, 2010). A balance of $5,670,781 was carried forward from FY 2009. The net balance for FY 2010 was $19,353,761, including the carry forward balance. Expenditures totaled $12,095,461.

In FY 2010, there was a decrease of $2,357,280 in income and a decrease of $745,267 in expenditures compared to FY 2009. The reduction in expenditures is the result of the Department's efforts to stabilize the fluctuating balance in the Fund. These efforts are discussed in greater detail in Section I of this report (Fund Adequacy) and include prioritized spending and heightened focus on the cost effectiveness of remedial measures. The main sources of income are fees on each barrel of oil transferred into Maine by ship, road or rail.[1] The base fees are 38¢ per barrel of gasoline, 19¢ per barrel of most other refined petroleum products and 4¢ per barrel of #6 oil. Additionally, the Fund Insurance Review Board (FIRB) has adopted a rule[2] imposing a surcharge when the balance in the Fund remains below $5 million dollars for three consecutive months. The surcharge of 20¢ per barrel of gasoline and 10¢ per barrel of other petroleum products has been in effect since January 1, 2006.

[1] See 38 MRSA §569-A, sub-§5.
[2] See chapter 4 of the rules of the Fund Insurance Review Board, 90-564 CMR 4, as amended effective November 24, 2001.

TABLE 1

STATEMENT OF CASH POSITION
GROUNDWATER OIL CLEAN-UP FUND
AT JUNE 30, 2010

BALANCE FORWARD (July 1, 2009)		$ 5,670,781
INCOME		$ 16,131,840
Minus Fee Refunds		- $ 2,445,860
NET INCOME		$ 13,685,980
NET BALANCE		$ 19,356,761
EXPENDITURES		
	Personal Services	$ 4,498,613
	All Other	$ 5,846,790
	Capital	$ 0
	Indirect Cost Transfers	$ 1,201,075
	Other Transfers (Excluding FAME)	$ 548,983
	Transfer - FAME	$ 0
NET EXPENDITURES		$ 12,095,461
CASH BALANCE (June 30, 2010)		$ 7,261,299
ENCUMBRANCES		$ 877,914
NET FUND AVAILABILITY (June 30, 2010)		$ 6,263,406*

*Does not consider outstanding liabilities required to characterize sites that have not been investigated, complete ongoing remedial work, or pay user fee obligations.

NOTES:

- "INCOME" INCLUDES FEES, INTEREST, REIMBURSEMENTS, FINES AND MISCELLANEOUS INCOME.
- "OTHER TRANSFERS" INCLUDES TRANSFERS TO OTHER STATE AGENCIES, AND INTERNAL TRANSFERS TO OTHER ACCOUNTS.
- "EXPENDITURES" INCLUDE ADJUSTMENTS TO BALANCE FORWARD INCOME (CREDIT TO EXPENSES).
- THE COLLECTION OF FEES IS SUSPENDED WHEN THE FUND BALANCE REACHES $12,500,000.
- NET OBLIGATIONS INCLUDES ENBUMBRANCES AND INDIRECT COST OBLIGATIONS (UNTAKEN).

The net fund income includes all revenue received during FY 2010 minus fee refunds in the amount of $2,445,860. A person who paid fees on oil offloaded at a marine oil terminal is entitled to a refund if the oil subsequently was exported directly from the terminal to an out-of-state location.[3] Refunds during FY 2010 decreased by $277,724 compared to FY 2009. The amount refunded for each of the past 8 years is listed below.

TABLE 2

Fee Refunds For Petroleum Exported Directly Out of State From Maine's Licensed Oil Terminals

FY 2010	$2,445,860
FY 2009	$2,723,584
FY 2008	$2,353,925
FY 2007	$2,565,214
FY 2006	$1,526,008
FY 2005	$1,180,831
FY 2004	$2,736,319
FY 2003	$2,362,709

C. Status of Applications for Coverage of Clean-Up Costs

Tables 3, 4 and 5 provide statistics for eligibility determinations of applications for coverage of eligible clean-up costs and third party damages under the Fund Insurance Program. Under this program, owners and operators of oil storage tanks that have suffered a discharge may apply to the fund for coverage of clean-up costs up to $1 million per occurrence.[4] Applications related to underground oil storage facilities are filed with the Department of Environmental Protection. Applications for eligibility determinations for aboveground oil storage facilities are filed with the Office of State Fire Marshal.

Eligible applicants are subject to the payment of a standard deductible based on the number of locations with underground tanks and total tank capacity in the case of aboveground tanks. Conditional deductibles may also be assessed for non-compliance with the applicable facility installation, operation, removal and spill reporting requirements. The assessment of deductibles may be appealed to the Fund Insurance Review Board (see Part I of this report). The deductible amounts are established in statute. See 38 M.R.S.A. § 568-A(2).

[3] See 38 MRSA §569-A(7) and chapter 685 of department rules, 06-096 CMR 685.
[4] See 38 MRSA §568-A.

From July 1, 2009 through June 30, 2010, the Department received eight applications for the coverage of clean-up costs. This is the same number of applications received in FY 2009. No applicants were determined to be ineligible in FY 2010. There are no pending applications from that period. Table 3 summarizes application activity from underground oil storage facilities.

TABLE 3

Applications to the DEP for coverage of clean-up costs for underground oil storage facilities:

Total Received (July 1, 1990 - June 30, 2010)	680
Total Eligible	613
Total Eligible before September 28, 1995	285
Total Eligible September 28, 1995 - June 30, 2010	328
Total Ineligible	67

Note: Prior to September 28, 1995, owners and operators of oil storage tanks were eligible for Fund coverage only if the Department determined they were in "substantial compliance" with the applicable facility installation, operation and removal requirements. As a result of statutory changes effective September 28, 1995, all owners and operators are eligible for coverage irrespective of their compliance status but are subject to "conditional deductibles" for each instance of non-compliance. The deductible amounts are set in statute. See 38 M.R.S.A. § 568-A (2).

During FY 2010, 186 eligible applications were forwarded to the Department from the Office of State Fire Marshal; the Office found that two other applicants were ineligible for fund coverage. This represents a decrease of six eligible applicants compared to FY 2009. Table 4 summarizes application activity from aboveground oil storage facilities.

TABLE 4

Applications to the Office of State Fire Marshal for coverage of clean-up costs for aboveground oil storage facilities:

Total Received (June 16, 1993 - June 30, 2010)	2,947
Total Eligible	2,848
Total Ineligible	99

Table 5 totals the application activity from both underground oil and aboveground oil storage facilities.

TABLE 5

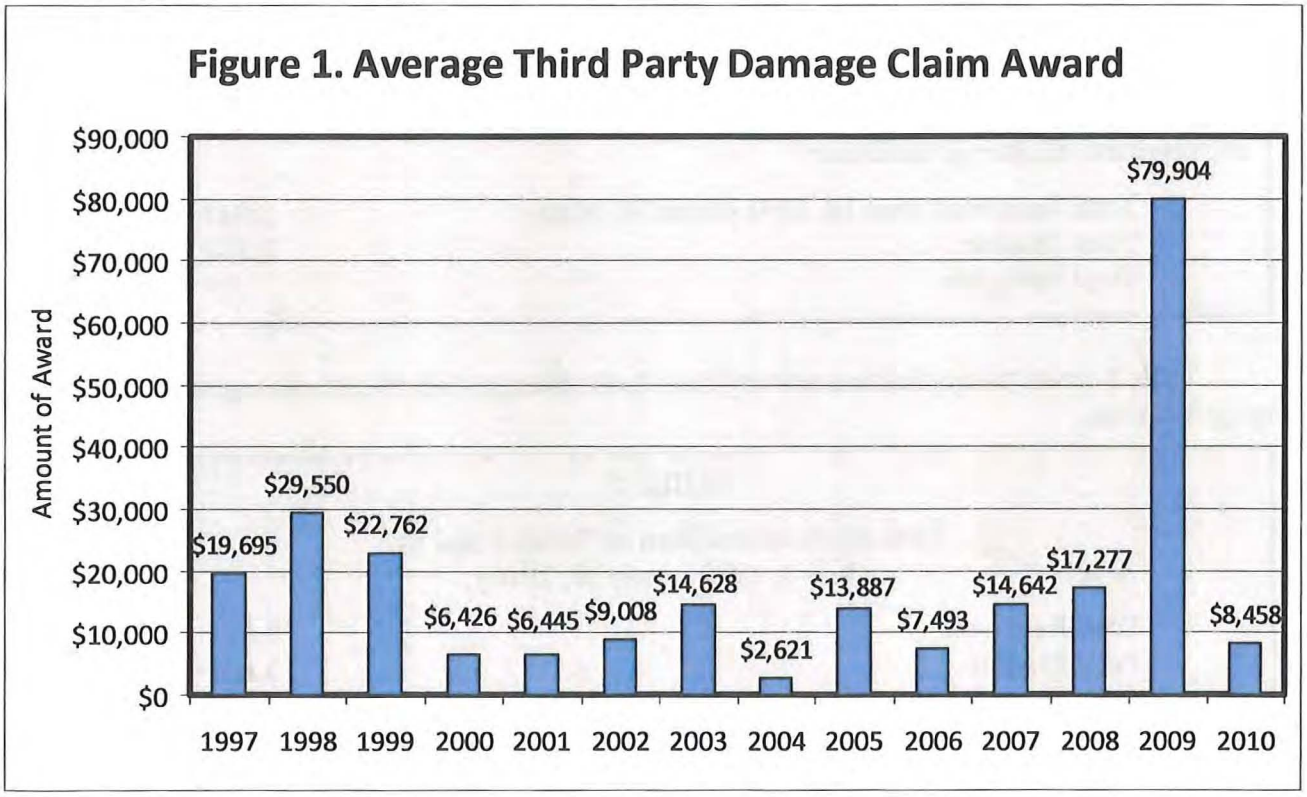
Total Applications (sum of Tables 3 and 4)
(July 1, 1990 – June 30, 2010)

Total Received	3,627
Total Eligible	3,461
Total Ineligible	**166**

D. Administration of Third Party Claims

The Department is currently processing nine claims against the Ground Water Oil Clean-up Fund for coverage of damages to third parties. During FY 2010, the Department completed processing six third party claims and awarded $33,832 in cash damages to third party claimants. Two claims were dismissed, withdrawn or settled without a cash award during FY 2010. The average award for the four claims that were settled was $8,458. The average cash award to third party claimants in FY 2009 was $79,905. In FY 2009, one claimant received the maximum award allowed in statute ($200,000), which raised the average award for FY 2009. The FY 2010 average cash award returned to more closely approximate historical averages. Figure 1 illustrates the average cash award to third party claimants from 1997 through 2010. The average award is easily influenced by the number of claims processed that include a cash award. Settlement of a small number of claims that includes property devaluation for a property or properties located where property values are high can result in a high average award. Processing multiple claims in an area that includes individual point of entry treatment units for drinking water supplies may involve awards for property devaluation and operational subsidies for maintaining and monitoring the effectiveness of the drinking water treatment system. This scenario would also likely result in a high average award for that year.

These numbers reflect only those cases where a formal claim has been filed. Many third parties do not file a claim because the damages are mitigated during site cleanup through the connection of locations with impacted water supplies to public water supplies, installation of treatment systems and individual well replacements. Claims must be filed prior to the award of any cash settlement to injured third parties. Consistent with state and federal financial responsibility requirements cash settlements can include compensation for damages to personal and real property, operation and maintenance subsidies for water treatment systems, and loss of income and medical expenses related to discharges of oil. Remedial costs to mitigate damages to third parties are reported as site cleanup costs and not as third party damages.



E. Compliance with Tank Abandonment Schedule

Maine law (38 M.R.S.A. §563-A) requires all non-conforming underground oil storage facilities (i.e. facilities not constructed of fiberglass, cathodically protected steel or other non-corrosive materials approved by the Department) to be properly abandoned in accordance with a pre-determined compliance schedule. Although the deadlines for abandonment (usually removal) of non-conforming tanks have long since lapsed (they ranged from October 1, 1989 to October 1, 1997 depending on tank age and proximity to drinking water supplies and sand and gravel aquifers), approximately 150 of these tanks are known to remain. These tanks are predominantly used for the consumptive use of heating oil. The final deadline for proper abandonment of non-conforming tanks owned by municipalities and school administrative districts was October 1, 1998.

As of December 2010, 35,627 bare steel underground tanks have been properly removed or abandoned in place since removal deadlines were enacted over twenty years ago. This includes 48 non-conforming tanks that were removed in 2010. The Department continues to use a combination of technical and financial assistance and enforcement actions to get these tanks properly removed, with priority given to locations storing motor fuels in sensitive geologic areas. In the meantime, these tanks are prohibited from receiving deliveries of product pursuant to 38 M.R.S.A. § 563-A (1-D).

In addition to the non-conforming tanks, approximately 3,607 conforming (corrosion resistant) underground oil storage tanks also have been removed or permitted to be abandoned in place. Conforming underground tanks must be removed upon confirmation of a leak or upon the expiration date of the tank manufacturer's warranty.

Owners of 65 removed tanks have failed to submit the required site assessment. The site assessment is needed to determine if clean-up actions are necessary. The Department has issued a Notice of Violation to each non-compliant owner requesting that a site assessment be performed and submitted. Currently, there are 4,342 conforming underground oil storage tanks registered and in operation in Maine.

Note: Maine law required all bare-steel underground tanks and associated underground piping to be removed by October 1, 1998. Costs associated with discharges discovered after October 1, 1998 from such facilities are no longer eligible for Fund coverage.

F. Voluntary Response Action Program (VRAP)

The Fund is used to clean up contaminated commercial property that is being sold or has been sold for re-development. This usage was not anticipated when the Fund Insurance Program was created in 1990 to help small businesses with retail gasoline sales meet federal financial responsibility requirements, thereby enabling them to gain compliance with state and federal law.

As businesses close and properties are sold for other uses, site assessments are typically required as a condition of the property transfer by the lending institution involved in the transaction. When oil discharges from storage systems are identified, the buyer is often eligible for Fund coverage and the cost of cleaning up oil contamination. Thus, the Fund increasingly has been used to help new owners clean up the site for re-development.

Some assessments, particularly at inland bulk oil distribution facilities with aboveground tanks, are revealing heavy contamination, even where there has been no prior report of an oil discharge. In other cases, post-1990 discharges are discovered to be co–mingled with historic releases. Because eligibility is predicated on the "date of discovery," the Ground Water Oil Clean-up Fund is liable even though the discharges may have occurred long ago. This trend has significantly increased Fund expenditures without serving the underlying policy purpose for which the Fund Insurance Program was established. Furthermore, there is often a change in use associated with the re-development, requiring a higher degree of clean-up than was originally anticipated.

When the Fund is used in this manner, it functions as a brownfields re-development fund in addition to an insurance program. Brownfields redevelopment is a legitimate public policy goal but it is not a goal that the Legislature articulated when it originally established the Fund Insurance Program. If the number of sites eligible for Fund coverage increases and financial resources become strained, it is possible that funding will not be readily available for eligible clean-up activities at sites undergoing re-development that pose a low risk to the environment and public health.

In FY 2010, there was a decrease in the number of applications to the Voluntary Response Action Program and less demand on the Ground Water Oil Clean-up Fund from re-development activities. However, as Maine's economic climate improves we are both optimistic that more properties will undergo redevelopment and concerned that the Fund may not be adequate to effectively support these endeavors.

G. Remediation Sites

The Fund was established to "provide for the investigation, mitigation and removal of discharges or threats of discharge of oil from aboveground and underground storage facilities."[5] Sites where such discharges pose a significant and imminent risk to public health and safety continue to be the highest funding priority. Work on lower priority sites is carried out as resources allow while maintaining a Fund balance that is sufficient to clean up future releases that threaten public health and sensitive geologic areas. The Fund balance has not been sufficient to cleanup all sites and those lower priority sites that are not funded are placed on a backlog list.

[5] See 38 MRSA §561.

As illustrated in Table 6, the backlog of sites waiting for sufficient funding has fluctuated in the past eight years. The number of backlog sites is currently at 495 (January, 2011). The backlog includes sites where ground water and drinking water supplies have been contaminated and periodic monitoring is needed to assess the success of clean-up work already carried out. Sites requiring investigation and mitigation due to potential health threats from indoor air pollution are also included.

TABLE 6

Number of Sites Needing Remedial Work

January 2011	495
January 2010	441
January 2009	494
January 2008	442
January 2006	359
January 2005	307
January 2004	343
January 2002	454

Figure 2 represents the number of long term petroleum remediation sites that have been cleaned to the Department's satisfaction using the Ground Water Oil Clean-up Fund since January 2000. The figure includes only sites that were referred to the Department's Division of Technical Services; it does not include sites that were successfully remediated with oversight from spill response staff in the Division of Response Services. Typically, only sites with substantial amounts of contaminated soil are referred to Technical Services for ground water investigation and longer term remedial efforts. Petroleum spills that can be cleaned up immediately or only require short term oversight are not included in this Figure.

Figure 2. Long-Term Petroleum Remediation Sites Closed Since January 2000

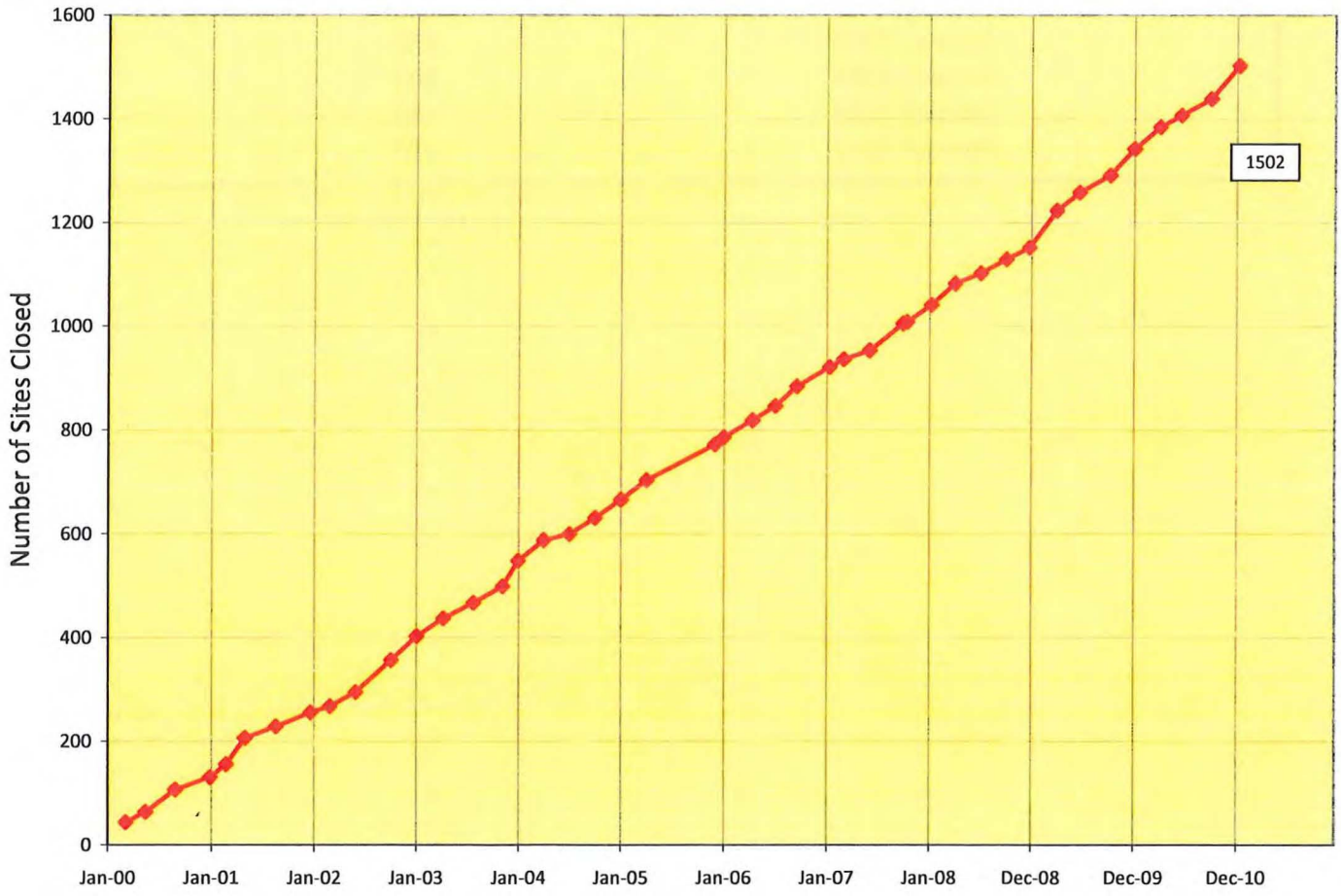


Figure 3 illustrates the number of active, long-term remediation sites. As this number fluctuates, managing expenditures through the prioritization of sites and cleaning sites to levels commensurate with the degree of risk posed will remain an important function for the Department. Revenue and expenditures will have to be carefully monitored to ensure they remain in alignment.

Figure 3. Active Sites In Long-Term Remediation

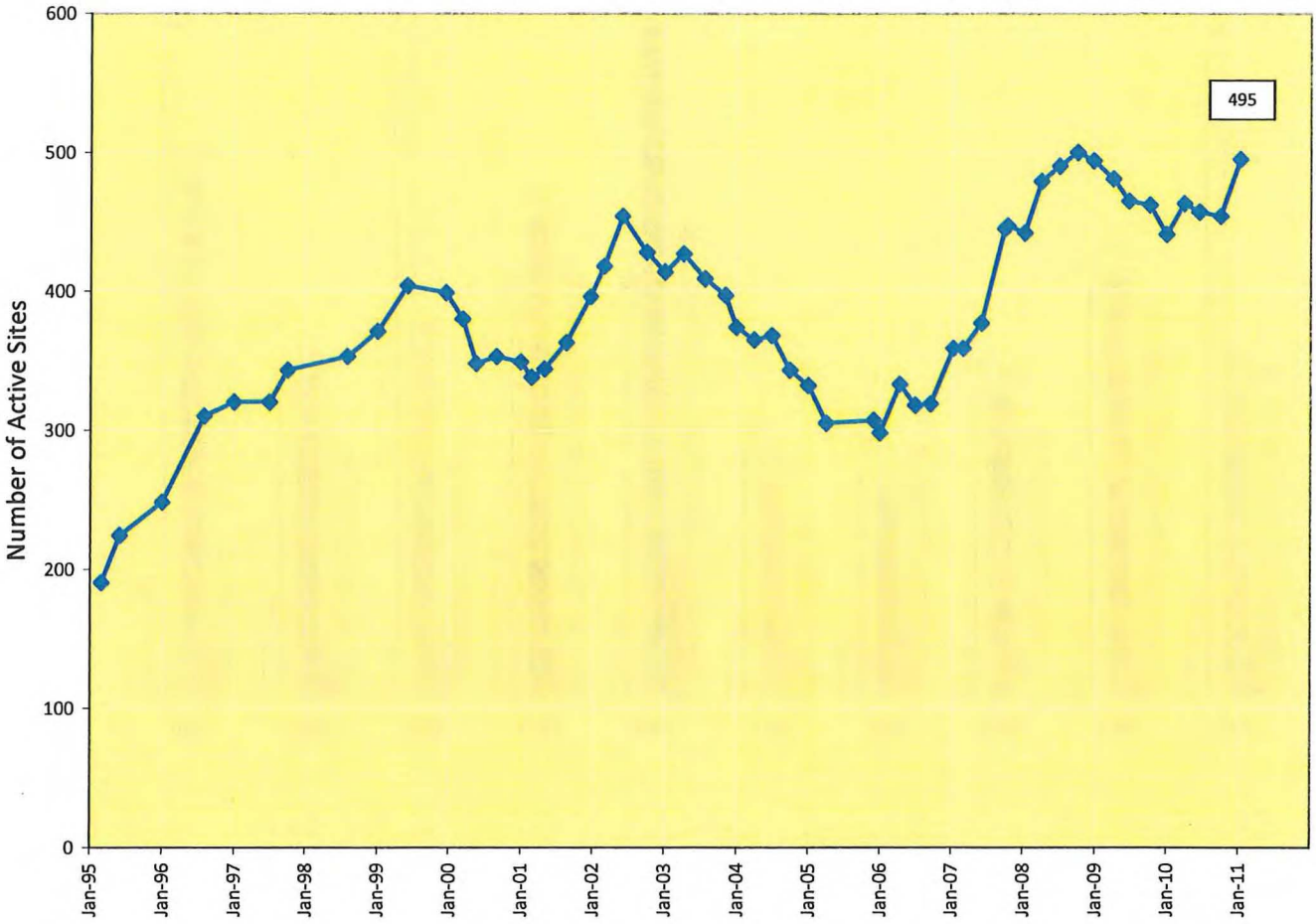


Figure 4 illustrates the makeup of sites subject to long term clean-up activities based on the predominant petroleum product released. Data from 2001 through calendar year 2010 is provided. Sites contaminated by fuel oil and kerosene account for 1,030 of the 1,490 sites (69%).

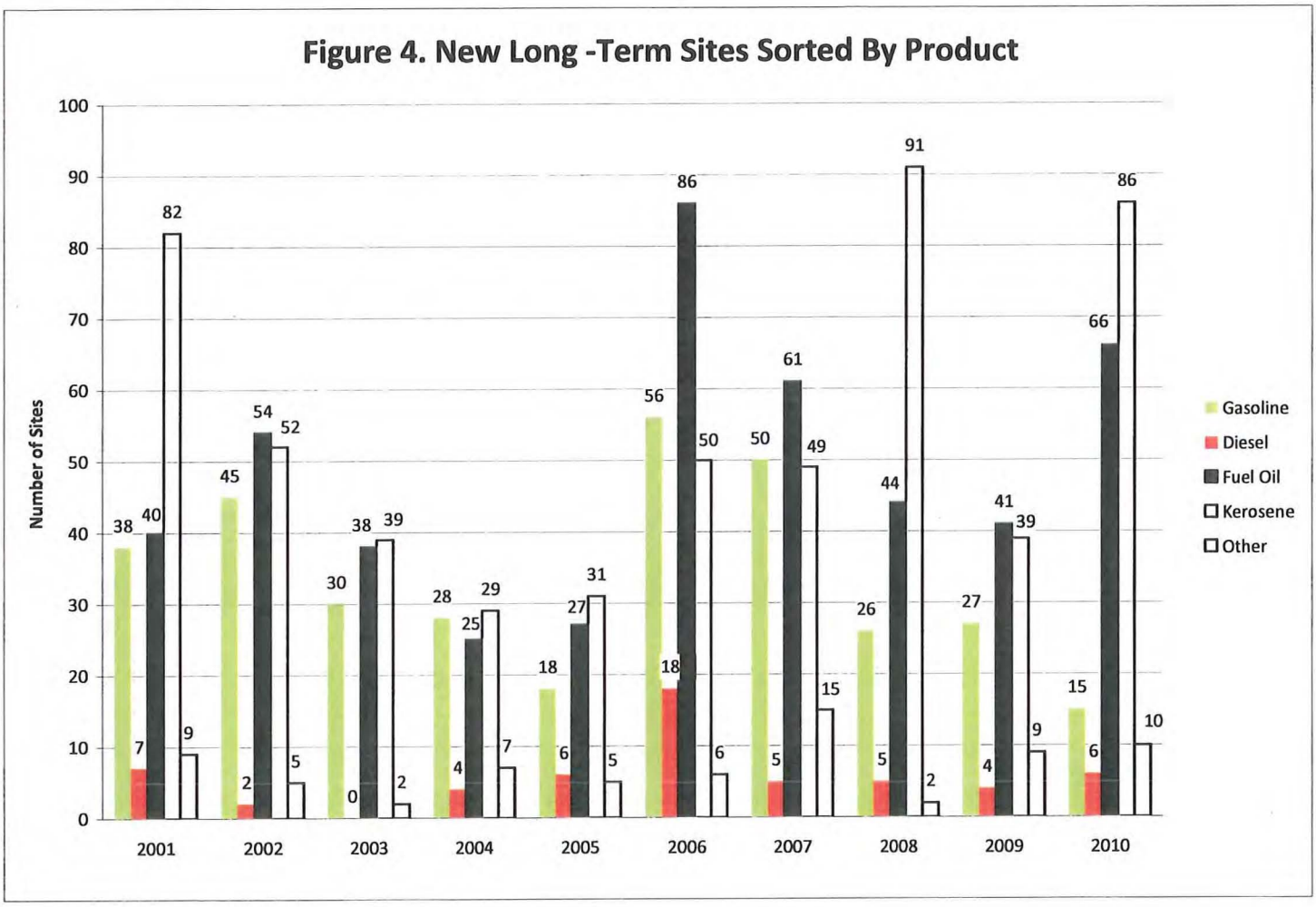
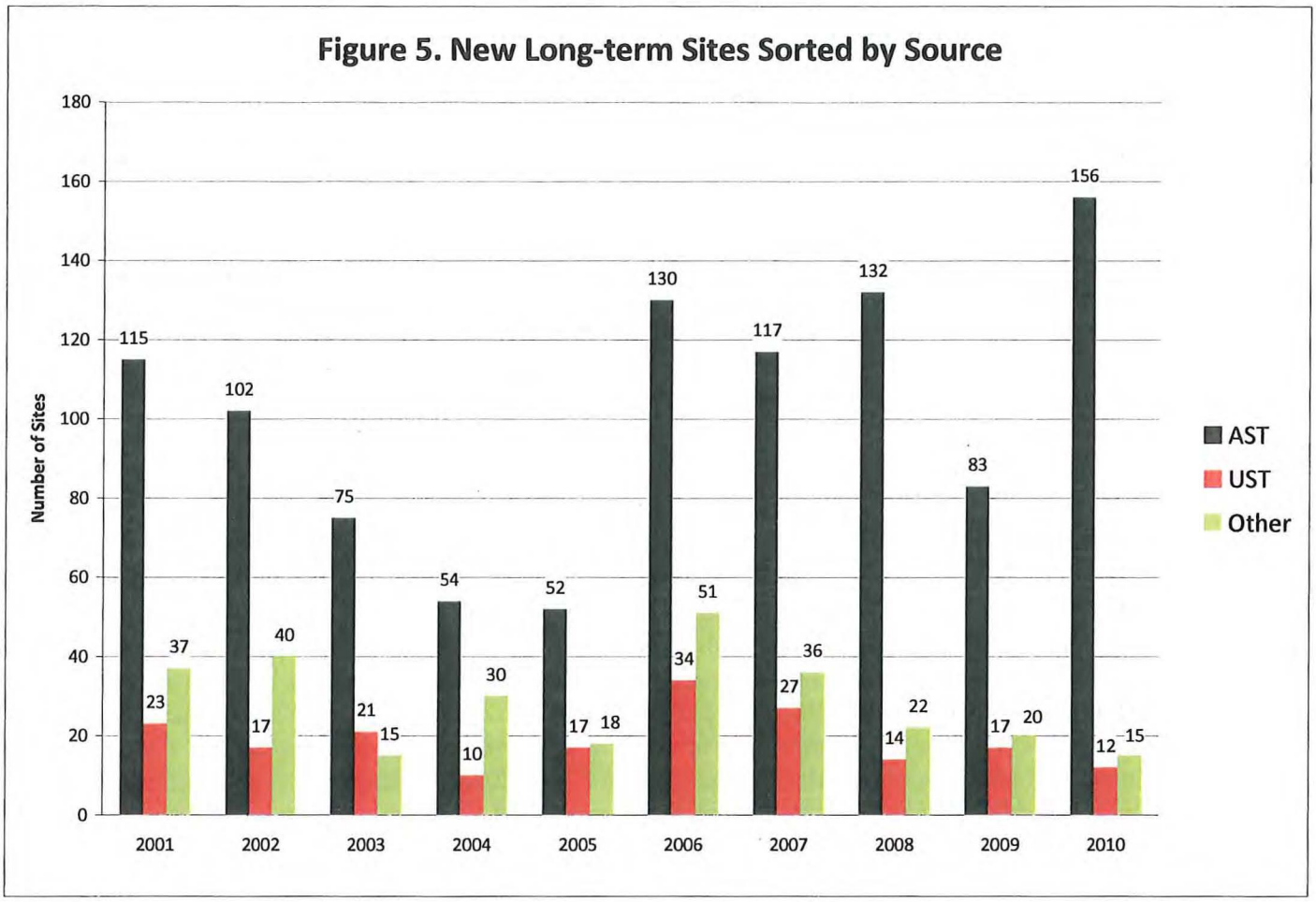


Figure 5 illustrates the make-up of sites subject to long term clean-up activities based on the source or type of storage tank facility. This analysis demonstrates that aboveground oil storage facilities account for 901 sites out of a total of 1,317 sites (68%).



H. Ongoing Activities

The Department is implementing the following initiatives to help prevent releases and reduce expenditures:

1. Third party inspections

Beginning July 1, 2003, passing annual inspection forms must be filed with the Department for all underground oil storage tanks. In September 2010, Notices of Violation (NOVs) were issued to 334 non-compliant owners. In September 2009, NOVs were issued to 352 non-compliant tank owners. Compliance with the annual inspection law has gradually improved from 70% by mid year 2004 to 87% in December, 2008 to about 90% in December 2010. Compliance improves annually after tank owners receive a Notice of Violation. Department staff continue to use a combination of inspections, outreach and enforcement actions to encourage facility owners to remain in compliance with the annual inspection requirement.

2. Certified Installers and Inspectors

Installation and testing of underground tanks, piping, and associated equipment and completion of an annual inspection report must be performed by an installer or inspector certified by the Board of Underground Storage Tank Installers. As of December 2010, 82 installers and 58 inspectors were certified. Each year the Department sponsors a day-long training program for certified tank installers and certified tank inspectors. In April 2010, 170 participants, including interested parties as well as certified installers and inspectors, attended the training program. Staff from the Department also participates in an educational program each fall sponsored by the Maine Energy Marketers Association. Each year, certified installers and inspectors must attend 8 hours of continuing education training programs. The Board of Underground Oil Storage Tank Installers approves about 25 credit hours of training each year.

3. Maintain field presence

Department staff continues to maintain a field presence through the performance of compliance inspections across the state. In Federal Fiscal Year 2010 (October 1, 2009 - September 30, 2010) Department staff completed 326 inspections. Inspection efforts targeted facilities for which no passing annual compliance inspection was submitted in the previous 12 months or that had not been inspected by Department staff in 3 years, or where tank ownership had changed. Compliance inspections include education and technical assistance components. If violations are observed Notices of Violation are issued on-site and include deadlines for gaining compliance. Department staff and certified inspectors and installers also record compliance with Stage I vapor control equipment requirements established in the federal Clean Air Act during inspections. Stage II vapor control equipment inspections and testing is no longer required.

4. Aboveground Storage Tanks (AST)

In an effort to further reduce significant discharges to groundwater and surface water bodies, legislation was adopted to close the gap between the standards governing underground piping associated with aboveground storage tanks (ASTs) and similar piping at underground storage facilities (USTs). The law has two major elements. One is to

require the phased retrofitting of leak detection on piping at the 300-500 AST facilities installed before June 24, 1991. Piping installed prior to that date at AST facilities was not required to have any leak detection until replaced, and there was no replacement schedule mandated by statute. As a result, some older underground piping at AST facilities could operate legally without leak detection until a leak was discovered, at which point it was then replaced and brought into compliance with the current requirements of Chapter 691 of the Department's Rules (06-096 CMR c691). When the new law became effective in August 2006, all motor fuel AST facilities with underground piping without leak detection installed prior to June 24, 1991 were required to be brought into full compliance with the leak detection requirements of Chapter 691 by January 1, 2011.

Another major element of the law requires motor fuel AST facilities with underground piping to be registered with the Department and requires the facility owner to submit passing annual underground piping inspection reports. The registration and inspection deadlines for all motor fuel facilities except diesel included a registration due by January 1, 2007, and an annual passing inspection to be performed by July 1, 2007.

Through December 2010, approximately 150 facilities containing motor fuel with underground piping were registered and entered into the Department's database. Of the 150 motor fuel facilities with underground piping, 40 were required to upgrade their underground piping to current leak detection standards by January 1, 2011. Of these 40 facilities, 24 facilities have complied with the deadline by either upgrading the piping, removing their facilities or taking their facilities out of service. This leaves 16 non-compliant facilities that continue to operate past the deadline. Ninety-five diesel facilities have been registered.

5. Operator Training

The Energy Policy Act of 2005 (Act) requires each state to provide training opportunities for operators of underground oil storage facilities storing motor fuels. The Department has developed an internet based training program, called TankSmart, that meets the requirements of the Act. The program has been available since February 2010 and is free of charge. The Department hosted 12 sessions to provide the regulated community with an opportunity to review and offer comments on the program. The program is designed to be cost effective and user friendly. Operators enter the facility registration number and are directed to a series of facility specific training modules. The operators view the training modules and take a computer generated test consisting of multiple choice and true/false questions. Upon successful completion of the test (i.e. answering 80% of the answers correctly), operators may print a certificate indicating the training has been completed. A written training program is also available for those facilities that do not have a computer or for those that prefer a written training and testing program rather than the internet based program. In addition, an outreach program is being established to provide support to facility owners in understanding the new operator training regulation and in getting started with the TankSmart program. This support can range from a phone or email conversation to an on-site meeting with a staff member to go over the training materials, assist the owner operator with accessing the online program, and answer any questions. A proposed rule, *Chapter 693, Operator Training for Oil and Hazardous Substance Storage Facilities,* is subject to an extended public comment period scheduled to conclude on May 11, 2011. After the comment period closes, the Department will prepare written responses to each comment, revise the rule as appropriate based on those

comments, and present the rule to the Board of Environmental Protection for final adoption. A final rule could be in place by September.

6. Home Heating Oil Tank Replacement Program

In 1998, the Legislature authorized disbursements from the Fund to pay for replacement and upgrades of substandard home heating oil tanks (See 38 M.R.S.A.§569-A(5) (M&N). About 7,000 home heating oil tanks have been replaced under this program since 1998. For several years, this program provided about $750,000 to Maine's nonprofit Community Action Programs (CAPs) to replace high risk tanks at the homes of single family residences meeting low income eligibility guidelines. However, the balance of the Fund forced the suspension of this program for 2008, 2009, and 2010.

With the Ground Water Oil Clean-up Fund now reasonably stable, $500,000 is budgeted for distribution to Maine's CAPs in calendar year 2011. The money will be distributed to the CAPs and used to replace home heating oil tanks (typically 275 gallon tanks or 55 gallon drums) determined to be at a high risk of tipping over or leaking and creating the need for a costly clean-up. There are eight CAP agencies in Maine and the amount of the contracts will run from $19,450 to $102,900. The amount of money is based on the proportional number of Low Income Heating Energy Assistance Program (LIHEAP) clients in each CAP. The CAPs receive an administrative fee ranging from $201 to $288 per tank depending on the geographical area served.

I. Fund Adequacy

The balance in the Fund was $7,261,299 at the end of FY 2010 (June 30, 2010). This represents an increase of $1,590,518 since the beginning of the fiscal year. During FY 2008, the balance in the Fund had plummeted to approximately $1.7 million. The improved stability of the fund can be attributed to the additional oversight and cost effectiveness measures implemented by the Department, the deferment of several clean up projects, and the decline in re-development activity. Funding for clean up is prioritized to insure that sites posing the greatest risk are cleaned up. It is noteworthy that a small percentage of sites in locations particularly sensitive to public health account for a disproportionate percentage of annual remediation expenditures. For example, from 1996 to 2008, 46% of clean-up expenditures were needed at 2% of the commercial AST sites that were approved for coverage. Similarly, 2% of discharges from eligible UST sites were responsible for 27% of the expenditures.

A number of oversight and control measures have been implemented to help maintain solvency of the Fund, including:

- Closer technical oversight including "peer review" of clean-up remedies and budgets for all state lead clean-up projects;
- A revised budgeting system for Fund expenditures;
- Revision of health based clean-up standards;
- Clarification of eligible clean-up costs; and
- Evaluation of clean-up criteria to reduce repeat clean-ups at sites where property uses change.

These measures in combination with prioritizing expenditures based on health risks and a reduced demand from re-development projects have resulted in a more stable fund balance.

Additionally, the Department was awarded a grant under the American Recovery and Reinvestment Act (ARRA) for the purpose of investigating and remediating leaking underground motor fuel tank facilities in Maine. A grant in the amount of $1.4 million was awarded on August 26, 2009. The Department used these funds for site assessments of five former UST facilities and for the successful remediation at seven sites heavily contaminated by gasoline in Addison, Jonesport, Houlton, Topsfield, Trenton, Patten, and Smithfield. The Department was forced to defer clean-up at these seven remediation sites due to a lack of funds in the Maine Ground Water Oil Clean-up Fund in 2008 and 2009. Absent the use of federal monies on the clean up of these seven sites, these expenditures would otherwise have remained a financial liability to the Ground Water Oil Clean-up Fund.

It must be noted that over the previous 4 years, there has been a moderate but steady decline in revenue to the Ground Water Oil Clean-up Fund. Table 7 provides the net income for each of the past 4 years.

TABLE 7

Net Income – Ground Water Oil Clean-up Fund

FY 2010	$13,685,980
FY 2009	$16,043,260
FY 2008	$16,829,032
FY 2007	$17,013,819

In conclusion, it is unclear whether the current oil import fees that are the main source of revenue in the Ground Water Oil Clean-up Fund, together with our ongoing efforts to closely monitor Fund expenditures will be adequate to maintain Fund solvency and support the Department's ongoing efforts to address the backlog of sites awaiting clean-up. We can say however that:

- The Fund is accepted by the U.S. Environmental Protection Agency as an acceptable mechanism for Maine's tank owners to meet the federal financial responsibility requirements;
- State statute prohibits oil discharges and requires discharges to be cleaned up to the commissioners satisfaction, using remedies that are cost effective, technologically feasible and reliable, and that effectively mitigate or minimize damages and provide adequate protection of the public health, welfare and the environment;
- The Fund provides for the prompt and effective cleanup of petroleum releases and compensation of third party damages. Prompt response is the key to minimization of damages and the associated costs;
- Established priorities for site clean-ups allows those sites posing the greatest risks to be cleaned up in a timely manner;
- The program management measures implemented in 2009 have succeeded in stabilizing the Fund balance; and
- All approved claims for reimbursement, payments to contractors and third party claims have been paid.