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# State Water Resources Control Board

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## Division of Clean Water Programs

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## *PREFACE*

*Pursuant to Chapter 6.75, Article 9, Section 25299.81(d) of the Health and Safety Code (H&SC), the State Water Resources Control Board (SWRCB) is mandated to prepare an annual report to the Legislature describing the status of the Underground Storage Tank Cleanup Fund (Fund). This annual report discusses recent legislative changes to the Fund for improving the efficiency of the program, with special emphasis on expediting environmental cleanup and the distribution of monies from the Fund.*

*Allan Patton, Manager  
Underground Storage Tank Cleanup Fund*

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September  
2000

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State Water Resources Control Board  
Division of Clean Water Programs

**UNDERGROUND STORAGE TANK  
CLEANUP FUND**

**LEGISLATIVE  
ANNUAL  
REPORT**

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# Executive Summary

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The Underground Storage Tank Cleanup Fund (Fund) has been charged with the mission to contribute to the protection of California's public health, safety and water quality through (1) establishing an alternative mechanism to meet federal financial responsibility requirements for owners and operators of petroleum underground storage tanks (USTs), and (2) reimbursing eligible corrective action costs incurred in the cleanup of contamination resulting from the unauthorized release of petroleum from USTs.

The Fund benefits a large number of small businesses and individuals by providing reimbursement for unexpected and catastrophic expenses associated with the cleanup of leaking petroleum USTs. The Fund also provides money to the Regional Water Quality Control Boards and local regulatory agencies to abate emergency situations or to cleanup abandoned sites that pose a threat to human health, safety, and the environment, as a result of a petroleum release from a UST.

## ***PROGRAM EFFECTIVENESS***

The best measures of effectiveness for the Fund are the number of claimants served and the number of claims paid since the beginning of the program. As of June 30, 2000:

- The Fund had received 15,658 claim applications and approved 12,561 of those for placement on the priority list.
- Fund staff completed 8,910 detailed reviews on approved claims and subsequently issued 8,049 Letters of Commitment (LOC).
- The Fund had issued LOCs with a dollar amount (face value) of \$964 million.
- The Fund had paid 22,012 reimbursement requests totaling \$867 million.

## ***PROGRAM IMPROVEMENTS***

The Act establishing the Fund required that claim applications be given an initial review and decision of eligibility within 60 days of receipt. During Fiscal Year 1999-00, the average time for initial review was 45 days.

The average time to process payments is now 43 days compared to a high of 70 days in 1993. The pre-approval of costs and a streamlined review process have contributed to the rapid processing time.

In the September 1997 Annual Report to the Legislature, the Fund had set a goal of funding 500 Priority Class D claims by June 30, 1998. At the end of Fiscal Year 1997-98, the Fund had issued 566 Priority Class D LOCs; Fiscal Year 1998-99 an additional 253 Priority Class D LOCs were issued; and during Fiscal Year 1999-00, 249 more Priority Class D LOCs were issued.

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## The Program

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The Barry Keene Underground Storage Tank Cleanup Fund Act of 1989 (Act) created the Underground Storage Tank Cleanup Fund Program to help owners and operators of underground storage tanks (UST) satisfy federal and state financial responsibility requirements. To fulfill the federal financial requirements, the Fund is available to assist UST owners and operators with the costs to cleanup contaminated soil and groundwater caused by leaking petroleum tanks. The federal financial responsibility requirements also require the Fund to provide certain coverage for third-party liability due to unauthorized releases of petroleum from USTs.

Established by SB 299 in 1989, modified by SB 2004 in 1990, and other subsequent legislation, the Fund requires every owner of a petroleum UST that is subject to regulation under the Health and Safety Code to pay a per gallon storage fee to the Fund. This fee, which began on January 1, 1991, has increased over time and currently generates in excess of \$180 million annually.

The State Water Resources Control Board (SWRCB) administers the Fund. On September 26, 1991, the SWRCB adopted emergency regulations to implement the program, and the regulations became effective on December 2, 1991. The regulations have since been revised to incorporate changes to the Fund resulting from new legislation.

Immediately after the regulations took effect, the Fund mailed out claim applications to more than 10,000 interested constituents. By January 17, 1992, the Fund received over 6,200 claims. Fund staff conducted a preliminary review on the initial claim applications and the SWRCB adopted the initial priority list containing 3,583 claims on July 16, 1992. The Fund awarded the first Letter of Commitment (LOC) in August 1992, and the first check was issued approximately one month later.

## ***Priority System***

The Act sets forth a claim priority system based on claimant characteristics. The highest priority, Class A, is reserved for residential tank owners; the second priority, Class B, is reserved for small California businesses, governmental agencies and nonprofit organizations with gross receipts below a specified maximum; the third priority, Class C, is for certain California businesses, governmental agencies and nonprofit organizations not meeting the criteria for Class B; and the fourth priority, Class D, is given to all other eligible claimants.

Under statute, the SWRCB must update the Priority List at least once a year to include new claims. Since fall 1993, the SWRCB has been updating the list monthly. Claims from previous updates retain their relative ranking within their priority class with new claims ranked in their appropriate class below those carried over from the previous list. New claims in a higher priority class must be processed before older claims in a lower priority class.

The Legislature has crafted two exceptions to the priority system. In 1993, the Legislature amended the Act to require the Fund to award approximately 15 percent of its funds annually to any lower priority classes that would not otherwise be funded (i.e., Class C and D claimants each receive at least 15 percent of the annual funding). In addition, recent legislation signed by the Governor on July 19, 2000, provides immediate funding for Fire Safety Agencies who submitted applications to the Fund by January 1, 2000.

## ***LETTER OF COMMITMENT (LOC)***

The Letter of Commitment (LOC) is the mechanism used by the Fund to award or encumber funds for reimbursement of reimbursable costs. When a claim is activated from the priority list, the eligibility requirements are verified with the appropriate regulatory agency, and the LOC is issued. A claim is removed from the priority list when the Fund issues the claimant a LOC.

Initial LOCs are issued in an amount adequate to cover the actual eligible costs incurred to date plus additional "seed" money to allow the cleanup to proceed on schedule. As the cleanup proceeds, the LOC is amended as necessary.

## ***REIMBURSEMENTS***

Once the Fund issues an LOC, a claimant may submit a reimbursement request. Eligible costs include reasonable and necessary corrective action costs incurred after January 1, 1988, and amounts awarded in third-party compensation against the claimant. Only costs paid by or on behalf of the claimant may be reimbursed.

Claimants are not entitled to double payment on account of any corrective action or third party compensation costs. Claimants are required to identify, under penalty of perjury, all funds received that relate to or are paid in consideration of the UST release that is the subject of the claim. The claimant must identify funds from any source including insurance claims, legal

judgments, contributions from other potentially responsible parties, or any other source, regardless of how the funds are characterized.

### ***PRE-APPROVAL***

Pre-approval is a method by which the claimant can come to an understanding with the Fund with regards to eligible reimbursable costs prior to starting the cleanup. If the proposed project activities are completed as presented to and approved by the Fund for those costs that were pre-approved, reimbursement is virtually assured.

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## **Fund Subaccounts**

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Section 25299.50 of the Health and Safety Code provides the SWRCB with the statutory authority to modify or create accounts in the Fund that are determined to be appropriate or necessary for proper administration of the Fund. Four accounts have been created under this authority, and they are the (1) Emergency, Abandoned, Recalcitrant (EAR) Account; (2) Circle K Settlement Trust Fund Account; (3) Commingled Plume Account; and (4) Fire Safety Agency Subaccount.

### ***EAR ACCOUNT***

The Emergency, Abandoned, Recalcitrant (EAR) Account, authorized by section 25299.36 and 25299.37 of the Health and Safety Code, was established in 1991 to provide funding to Regional Water Quality Control Boards (RWQCB) and local agencies to undertake or contract for corrective action at UST sites that have had an unauthorized release, and (1) the site requires immediate prompt action to protect human health, safety and the environment (emergency or prompt action sites), or (2) a responsible party cannot be identified or located (abandoned sites), or (3) the responsible parties are either unable or unwilling to take the required corrective action (recalcitrant sites). All costs incurred are subject to cost recovery from the responsible party.

### ***CIRCLE K SETTLEMENT TRUST FUND***

Through bankruptcy proceedings, Circle K Corporation has abandoned numerous petroleum UST sites in California. The California Circle K Settlement Trust Fund was created in accordance with section 25299.50, article 6, division 20, chapter 6.75, of the Health and Safety

Code and based on a July 26, 1993, court-approved settlement agreement that was executed between the SWRCB and Circle K Corporation..

California was awarded approximately \$3.5 million to be provided in annual payments over a seven-year period. The payments are to be used to pay for tank removal and preliminary site assessment costs up to \$15,000, and a portion (22%) of corrective action costs up to \$200,000, per designated site. If there is another eligible claimant at a Circle K site, the claimant can recover the remaining portion of eligible corrective action costs from the Fund.

### ***COMMINGLED PLUME ACCOUNT***

The Commingled Plume Account was created by SB 562 (Chapter 611, Statutes of 1996) to encourage responsible parties with commingled plumes to coordinate their cleanup efforts, avoid litigation, more rapidly address required cleanups, and significantly reduce the costs of cleanup.

A commingled plume is defined as the condition that exists when groundwater contaminated with petroleum from two or more discrete unauthorized releases have mixed or encroached upon one another to the extent that the corrective action performed on one plume will necessarily affect the other. A commingled plume does not include contaminated groundwater plumes resulting from unauthorized releases or discharges from a single site. Also, commingled plume claims cannot include soil contamination, unless it can be demonstrated that the contaminated soil is an immediate threat to groundwater.

Commingled plume sites represent a special problem to California's groundwater protection efforts because they often represent more serious water quality impacts, involve parties that disagree as to liability, and include cleanups that continue to be stalled or handled in a piecemeal, haphazard expensive manner. Unless corrective action is performed in a coordinated manner, corrective action of commingled plumes could prove to be ineffective.

### ***FIRE SAFETY AGENCY SUBACCOUNT***

The Fire Safety Agency Subaccount was created in the Fund by AB 2872 and signed by the Governor on July 19, 2000. The bill transfers \$5,000,000 from the Fund to the Subaccount and authorizes the SWRCB to expend the money in the Subaccount to pay claims that were filed by Fire Safety Agencies before January 1, 2000.

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# Financial Responsibility

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Federal Environmental Protection Agency (EPA) regulations (section 280.90, subpart H-Financial Responsibility, part 280, 40 CFR) published on October 26, 1988, requires owners and operators of USTs to demonstrate through insurance coverage or other acceptable mechanisms that they can pay for cleanup and third-party damages resulting from leaks that may occur from their USTs.

On June 9, 1993, the United States EPA approved California's Fund as a mechanism for meeting the federal financial responsibility requirements for USTs containing petroleum.

In order for the Fund to be used as a financial responsibility mechanism, the law requires that the claimant must (1) be the owner or operator of a petroleum UST, (2) be in compliance with applicable financial responsibility requirements, and (3) be in compliance with UST laws and regulations. The Fund works closely with local regulatory agencies to determine whether a claimant has made a good faith effort to achieve compliance with the regulations and relies heavily on the recommendation of the regulatory agency when evaluating eligibility.

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# Program Commitments

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The annual goal of the Fund is to distribute all allocated funding by the end of each fiscal year. In order to accomplish this goal, the following tasks are necessary:

## ***CLAIMS REVIEW***

The Claims Review Unit is most often the first point of contact for claimants in the Fund. Claims reviewers, in accordance with statutes and regulations, determine claim eligibility, and issue LOCs to eligible claimants.

During FY 1999-00, there have been 816 additional claim applications added to the Priority List. In addition, the Fund has issued 1,095 LOCs with a face value of \$192 million. Regulations require that claim applications be given an initial review and decision of eligibility within 60 days of receipt. During Fiscal Year 1999-00, the average time for initial review was 45 days.

It is not possible to accurately predict the number of new claims that will be received this fiscal year. However, based on past history, 1,100 LOCs are expected to be issued in FY 2000-01, and the Fund will endeavor to perform initial reviews within the 60-day timeframe.

### ***PAYMENTS REVIEW***

Subsequent to receipt of the LOC, the claimant may submit requests for reimbursement to cover the costs of their corrective action.

During FY 1999-00, the Fund received 4,674 reimbursement requests and processed 4,283 payments for a total of \$163,806,718. The average time for processing payments was 43 days.

During FY 2000-01, the Fund expects to receive approximately 4,800 reimbursement requests while maintaining an average processing time of less than 45 days.

### ***TECHNICAL REVIEW***

In order to expedite the payment processing time, the Fund pre-approves estimated corrective action costs to ensure that the costs are reasonable, necessary, cost-effective and reimbursable.

During FY 1999-00, the Technical Unit completed 2,510 pre-approvals for a total amount of \$45,889,191.

Based on the projections of the number of claims that will request pre-approval, we anticipate processing approximately 3,000 pre-approvals for FY 2000-01, with pre-approvals being completed within a three-week timeframe.

### ***SETTLEMENTS REVIEW***

To ensure that payment from the Fund will not result in the claimant receiving a double payment on account of corrective action costs, all moneys received by the claimant from other sources (settlements, judgements, insurance, etc.) must be evaluated.

During FY 1999-00, 284 claims were identified containing corrective action costs which, if reimbursed by the Fund, would have resulted in the claimant receiving a double payment. This resulted in a \$5,459,648 savings to the Fund. Since the beginning of the Fund program, there have been 1,588 settlement claims reviewed with the total savings to the Fund being \$39,128,436.

It is not possible to accurately project the number of claims involving settlement issues that will be reviewed in FY 2000-01. However, based on previous history, we anticipate 250 claims will be reviewed.

### ***CLOSURE AUDIT***

The Fund performs audits of claims that have concluded corrective action activity or are no longer eligible to receive further reimbursement. This process allows previously reserved (encumbered) funds to be released (disencumbered) so that other eligible claimants can use them.

In Fiscal Year 1999-00, 691 claims were closed. The total dollar amount that was disencumbered for Fiscal Year 1999-00 is \$6,398,709, and as of the beginning of the program now totals \$42,409,357.

During FY 1999-00, the Fund projects that 900 claims will be closed.

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# Fiscal Status Report

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**CASH BALANCE**  
**Fiscal Year End**  
**1999–2000**

<b>FUNDS RECEIVED:</b>	<b><u>99/00 Fiscal Year</u></b>	<b><u>Accumulative</u></b>
- Mill Storage Fee Collected	\$189,718,442	\$1,180,357,746
- Net From Previous Fees	- - -	\$8,591,052
- Net Interest Earned	\$9,519,657	\$70,453,394
<b>Total Funds Received:</b>	<b>\$199,238,099</b>	<b>\$1,259,402,192</b>
<b>FUNDS EXPENDED &amp; COMMITTED:</b>		
- Program Administration	\$10,427,570	\$62,617,689
- Local Oversight Program	\$13,876,861	\$64,402,036
- Department of Trade & Commerce	- - -	\$75,500,000
- Board of Equalization	\$1,599,000	\$10,135,251
- Claims Reimbursement	\$167,019,624	\$979,325,418
- CalEPA	\$6,680	\$96,000
<b>Total Funds Expended &amp; Committed:</b>	<b>\$192,929,735</b>	<b>\$1,192,076,394</b>
<b>NET FUNDS AVAILABLE:</b>	<b>\$6,308,364</b>	<b>\$67,325,798</b>

# Legislation

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## ***RECENTLY ENACTED***

**Senate Bill 2198 (Sher)**: Approved by Governor Wilson on September 19, 1998, and filed with the Secretary of State September 30, 1998. This bill created the Drinking Water Treatment and Research Fund (Drinking Water Fund) and directed the SWRCB to transfer \$5,000,000 annually from the Underground Storage Tank Cleanup Fund to the Drinking Water Fund maintained by the Department of Health Services. The purpose of the Drinking Water Fund is to address the contamination of public water supplies caused by oxygenates. The Drinking Water Fund may be used for investigation, cleanup or treatment of groundwater or surface water, as well as replacement or alternative water supplies and research into treatment technologies.

**Senate Bill 665 (Sher)**: Approved by Governor Davis on September 3, 1999. This bill, sponsored by the SWRCB, makes numerous technical and clarifying corrections to UST laws. Provisions of this bill that impact the Fund include the limiting of regulatory technical assistance costs to \$3,000 and the removal of a provision that allowed for the Fund to sue and be sued in its own name.

**Senate Bill 989 (Sher)**: Approved by Governor Davis on October 8, 1999, and filed with the Secretary of State on October 10, 1999. This bill increased the amount of a corrective action claim to \$1.5 million per occurrence, revised the requirements for regulatory assistance, and extended the operation of the Fund until January 1, 2011.

**Assembly Bill 2872 (Shelley)**: Approved by Governor Davis on July 19, 2000, and filed with the Secretary of State on July 19, 2000. The passage of this bill created the Fire Safety Agency Subaccount in the Fund, transferring \$5 million from the Fund into the Subaccount, and authorized the SWRCB to expend the money in the Subaccount to pay claims filed by fire safety agencies.

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# Significant Issues

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## ***CURRENT AND FUTURE IMPACTS OF MTBE ON THE FUND***

The Lawrence Livermore National Laboratory estimates that over 10,000 UST sites with petroleum releases have degraded groundwater with MTBE. It is difficult to predict the cost associated with MTBE cleanup. However, the long-term impact of the Fund is expected to be significant. We are working to add an identifier for claims involving MTBE so that we can track expenditures and make sure MTBE claims are not delayed.

To provide additional funding for MTBE cleanup, SB 989 extended the Fund's sunset date to January 1, 2011, and increased the amount the Fund can pay per claim from \$1 million to \$1.5 million.