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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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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 (Program). This annual report discusses recent legislative changes to the Program for improving the efficiency of the program, with special emphasis on expediting environmental cleanup and the distribution of monies from the Program.

*Allan Patton, Manager
Underground Storage Tank Cleanup Fund*



Executive Summary

The Underground Storage Tank Cleanup Fund Program (Program) 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 Program 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 Program also provides money to the Regional Water Quality Control Boards (RWQCB) 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 Program are the number of claimants served and the number of claims paid since the beginning of the program. As of June 30, 2002:

- The Program received 17,290 claim applications and approved 13,878 of those for placement on the priority list.
- Program staff completed 10,542 detailed reviews on approved claims and subsequently issued 9,338 Letters of Commitment (LOC).

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- The Program issued LOCs with a dollar amount (face value) greater than \$1.3 billion. The Program paid 31,097 reimbursement requests totaling \$1.1 billion.

Program Improvements

The Act establishing the Underground Storage Tank Cleanup Fund (Fund) required that claim applications be given an initial review and decision of eligibility within 60 days of receipt. During (FY) 2001-02, the average time for initial review was 37 days.

The average time to process payments is now 48 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.

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The Program

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 satisfy federal and state financial responsibility requirements. To fulfill the federal financial responsibility requirements specified in 40 CFR, Part 280(H), 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 Program 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, Program statutes require every owner of a petroleum UST that is subject to regulation under the Health and Safety Code to pay a per gallon storage fee into the Fund. This fee, which began on January 1, 1991, has increased over time and currently generates in excess of \$190 million annually.

The State Water Resources Control Board (SWRCB) administers the Program. 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 resulting from new legislation and to address issues not anticipated when the initial regulations were written.

Immediately after the regulations took effect, the Program mailed out claim applications to more than 10,000 potential claimants. By January 17, 1992, the Program had received over 6,200 claims. Program 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

Program 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 every 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 Program to award approximately 15 percent of the annual appropriation 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, legislation signed by Governor Davis on July 19, 2000 provided immediate funding for Fire Safety Agencies that submitted applications to the Program by January 1, 2000.

Letter of Commitment (LOC)

The LOC is the mechanism used by the Program to award or encumber funds for reimbursement of eligible costs. When a claim is activated from the priority list, the eligibility requirements are verified with the appropriate regulatory agency, and a LOC is issued. A claim is removed from the priority list when the Program 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. To ensure that funds do not lie dormant, only a small-unliquidated balance is maintained for most claims. This results in an LOC amendment being required for almost all payments. Currently, approximately 4,750 claims have active LOCs.

Reimbursements

Once the Program 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. Reimbursement requests can be submitted no more often than monthly and for amounts greater than \$10,000.

To assist individuals and small businesses with cash flow burdens, the Program will reimburse for costs incurred but not necessarily paid. Claimants must pay vendors within 30 days of receipt of funds, and provide proof of payment (cancelled checks) with the next reimbursement request.

Claimants are not entitled to double payment related to any corrective action or third party compensation costs. Claimants are required to identify, under penalty of perjury; all funds received that relate to 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. The Program evaluates these funds and determines the proper offset to avoid double payment.

Cost Pre-Approval

Cost pre-approval is a method by which the claimant can come to an understanding with the Program with regards to eligible reimbursable costs prior to starting the cleanup. If the proposed project activities are completed for the approved amount, full reimbursement is virtually assured.

Closures

Once cleanup is completed at a site, the claim undergoes a final audit and a final payment is issued. Any unliquidated funds are disencumbered. Through the life of the program, approximately 4,500 claims have been closed.

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Fund Subaccounts

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 Program. In addition, two accounts have been established through subsequent legislation. Accounts created under these authorities include: (1) Emergency, Abandoned, Recalcitrant (EAR) Account; (2) Commingled Plume Account; and (3) Fire Safety Agency Subaccount.

EAR Account

The Emergency, Abandoned, Recalcitrant (EAR) Account was established in 1991 by the SWRCB under authority provided by sections 25299.36, 25299.37 and 25299.50 of the Health and Safety Code. This account provides funding to RWQCBs and local agencies to undertake or contract for corrective action at UST sites that have had an unauthorized release, if (1) the site requires immediate prompt action to protect human health, safety and the environment (emergency or prompt action sites), (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. The EAR Account has been used at 57 sites, and \$3.7 million in funds have been expended.

Commingled Plume Account

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 and expensive manner. Unless performed in a coordinated manner, corrective action at commingled plumes often prove to be ineffective.

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 release sites have mixed or encroached upon one another to the extent that the corrective action performed on one plume will necessarily affect the other. Commingled plume claims do not include soil contamination, unless it can be demonstrated that the contaminated soil is an immediate threat to groundwater.

The Commingled Plume Account has received 31 claim applications. Eighteen claims have received Letters of Commitment amounting to \$21.4 million with \$8.0 million being paid out in reimbursement requests.

Fire Safety Agency Subaccount

The Fire Safety Agency Subaccount was created by AB 2872 and signed by Governor Davis on July 19, 2000. The bill transferred \$5,000,000 from the Fund to the Subaccount and authorizes the SWRCB to expend the money to pay claims that were filed by Fire Safety Agencies before January 1, 2000. The Program has issued 33 LOCs from the Fire Safety Agency Account, amounting to approximately \$3.2 million, \$2.4 million of which has been paid.

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Financial Responsibility

United States Environmental Protection Agency (EPA) regulations (section 280.90, 40 CFR part 280, Subpart H- Financial Responsibility) published on October 26, 1988, require 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 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, a person must (1) be the owner or operator of a petroleum UST, (2) have a completed Financial Responsibility certificate on file, and (3) be in compliance with UST laws and regulations. The Program 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

The annual goal of the Program 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 Program. Claims reviewers, in accordance with statutes and regulations, determine claim eligibility, and issue LOCs to eligible claimants.

During FY 2001-02, 657 claims were added to the Priority List. In addition, the Program issued 515 LOCs with a face value of \$184 million. Regulations require that claim applications be given an initial review and decision of eligibility within 60 days of receipt. During FY 2001-02, the average time for initial review was 37 days.

It is not possible to accurately predict the number of new claims that will be received in the future. However, based on past history, 1,000 new LOCs are expected to be issued in FY 2002-03, and the Program will successfully perform initial reviews within the 60-day timeframe.

Payments Review

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

During FY 2001-02, the Program received 5,358 reimbursement requests and processed 4,797 payments for a total of \$171,954,173. The average time for processing payments was 48 days.

During FY 2002-03, the Program expects to receive and process approximately 5,300 reimbursement requests.

Cost Pre-Approval Review

In order to expedite payment processing time, the Program pre-approves estimated corrective action costs to ensure that costs are eligible, reasonable and necessary.

During FY 2001-02, the Program's Technical Units completed 3,338 cost pre-approvals for a total of \$88,949,217.

The Program does not expect any significant change in the number of cost pre-approval requests received during FY 2002-03.

Settlements Review

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

During FY 2001-02, staff reviewed 199 claims involving settlement issues. Since the beginning of the Program, 1,825 settlement claims have been reviewed, for a total savings to the Fund of \$31,075,928.

It is not possible to accurately project the number of future claims which will involve settlement issues. However, based on previous history, we anticipate 200 claims will be reviewed in FY 2002-03.

Closure Review

The Program reviews claims that have concluded corrective action activity or are no longer eligible to receive reimbursement. This process allows previously reserved (encumbered) funds to be released (disencumbered) for use by other eligible claimants.

In Fiscal Year 2001-02, 446 claims were closed. The total amount disencumbered was \$6,233,583, and since the beginning of the program all disencumbrances total \$56,487,431.

During FY 2002-03, the Program projects that 500 claims will be closed.

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Fiscal Status Report

CASH BALANCE Fiscal Year End 2001-2002

	<u>01/02 Fiscal Year</u>	<u>Since Inception *</u>
FUNDS RECEIVED:		
- Mill Storage Fee Collected	\$197,451,303	\$1,562,946,294
- Net From Previous Fees		\$8,591,052
- Net Interest Earned	\$6,551,071	\$89,157,796
Total Funds Received:	\$204,002,374	\$1,660,695,142
FUNDS EXPENDED & COMMITTED:		
- Program Administration	\$12,497,284	\$86,583,298
- Cleanup Oversight ¹	\$18,607,614	\$102,194,242
- Department of Trade & Commerce ²	- - -	\$75,500,000
- Board of Equalization ³	\$1,912,000	\$13,706,751
- Claims Reimbursement	\$174,347,409	\$1,336,406,053
- Department of Health Services ⁴	\$5,000,000	\$5,000,000
- CalEPA	\$7,102	\$169,157
Total Funds Expended & Committed:	\$212,371,409	\$1,619,559,501
NET FUNDS AVAILABLE:		\$41,135,641

* Amounts from previous report have been adjusted to reflect actuals.

¹ Under authority provided in Health and Safety Code Section 25299.51, the SWRCB receives an annual appropriation to hire or contract for state and local government staff to oversee cleanups.

² From the inception of the Fund, through Fiscal Year 1998-99, the Department of Trade and Commerce received an annual appropriation to provide loans to small businesses for the upgrade and replacement of underground storage tanks. The program is still in existence, but no further appropriations are anticipated.

³ The Board of Equalization receives an annual appropriation to cover the costs of collecting the Underground Storage Fee.

⁴ Under authority provided in Health and Safety Code Section 25299.99.1, the board annually transfers \$5,000,000 to the Department of Health Services for the Drinking Water Treatment and Research Fund.

Legislation

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 was to address the contamination of public water supplies caused by oxygenates. The Drinking Water Fund was used for investigation, cleanup or treatment of groundwater or surface water, as well as replacement or alternative water supplies and research into treatment technologies. The section that created the Drinking Water Fund was repealed by its own terms on January 1, 2002.

Senate Bill 665 (Sher): Approved by Governor Davis on September 3, 1999, and filed with the Secretary of State on September 3, 1999. This bill made numerous technical and clarifying corrections to UST laws. Provisions of this bill include limiting reimbursement of regulatory technical assistance costs to \$3,000, revising procedures for preapproval of corrective action costs, and clarifying that the Fund is a state entity entitled to claim the protection of sovereign immunity.

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 available for reimbursement of a corrective action claim to \$1.5 million per occurrence and extended the authorization 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.

Assembly Bill 2886 (Kuehl): Signed by Governor Davis on September 25, 2000, and filed with the Secretary of State on September 27, 2000. The passage of this bill clarified the use of the Emergency, Abandoned, Recalcitrant (EAR) Account and allows the Department of General Services, at the request of the SWRCB or the Regional Water Quality Control Board (RWQCB), to enter into contracts and act as an agent of the SWRCB or the RWQCB in cleanups of EAR Account sites.

Assembly Bill 1465 (Nation): Approved by Governor Davis on August 6, 2001, and filed with the Secretary of State on August 6, 2001. This bill revised the definition of "claim" to refer to all of the documents submitted to the Fund for reimbursement of costs incurred due to an occurrence, including, but not limited to, the application, reimbursement requests, and verification documents. The bill amended the definition of "UST" to include non-residential heating oil tanks, thus subjecting owners of these heating oil tanks to the storage fee requirement and, assuming other eligibility conditions are met, permitting the SWRCB to accept Cleanup Fund claims from owners or operators of these heating oil tanks. In addition, this bill clarified the Cleanup Fund sunset provision. Finally, AB 1465 required claimants, as a condition of eligibility to the Fund, to demonstrate that they have paid all storage fees, interest, and penalties for the UST that is the subject of the claim.

Senate Bill 526 (Sher): Approved by Governor Davis on May 9, 2002, and filed with the Secretary of State on May 10, 2002. The passage of this bill provided that the requirement to designate a site as having no residual contamination only applies to a site listed on the SWRCB's database system if, at the time a closure letter is issued for the site or at any time after a closure letter has been issued, the SWRCB determines that no residual contamination remains on the site.

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Significant Issues

Pay-For-Performance Pilot Project

Traditionally, cleanups have been paid for on a time and materials (T&M) basis. The trouble with this approach is that it creates an incentive to prolong the cleanup. For example, under a T&M approach the contractor gets paid to adjust and repair an inefficient soil vapor extraction system regardless of how much pollution is being removed.

To address this problem, the Cleanup Fund Program is conducting a pilot project to change the way we pay for cleanups. Under the new approach, called pay-for-performance (PFP), vendors are reimbursed as pollutants are removed from the environment, instead of on a T&M basis. This approach has been successful in other states, and is being encouraged by the federal EPA.

PFP is an alternative way to contract for environmental cleanup UST sites. Under a PFP agreement, contractors are paid a predetermined amount of money for reaching specific contamination reduction goals. The specific price, interim payment milestones, contamination level goals and time for reaching the goals are all agreed to at the beginning of the cleanup and not changed thereafter. Contamination reduction is measured and payments are made as contamination levels are reduced and cleanup goals are achieved and maintained. Paying for cleanups through such agreements rewards contractors for quickly and efficiently reaching cleanup goals and results in speedier cleanups that protect health, safety and the environment.

As of July 2002, the Program has approved five cases for the pilot program and is hoping for a total of twenty to provide a fair evaluation on whether PFP will work in California.

~ NOTES ~