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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 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, 2001:

- The Program received 16,616 claim applications and approved 13,668 of those for placement on the priority list.
- Program staff completed 9,916 detailed reviews on approved claims and subsequently issued 8,823 Letters of Commitment (LOC).

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- The Program issued LOCs with a dollar amount (face value) greater than \$1 billion.
 - The Program paid 26,321 reimbursement requests totaling \$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 Fiscal Year 2000-01, the average time for initial review was 37 days.

The average time to process payments is now 41 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 (UST) 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 \$180 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 to the Program resulting from new legislation, and 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 interested constituents. 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 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 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, recent legislation signed by Governor Davis on July 19, 2000, provides immediate funding for Fire Safety Agencies who submitted applications to the Program by January 1, 2000.

Letter of Commitment (LOC)

The Letter of Commitment (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 the 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 funds do not lie dormant, only a small-unliquidated balance is provided for most claims. That 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.

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 4,200 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. 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. This account provides 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, if (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. The EAR Account has been used at 24 sites, and \$3.3 million in funds have been expended.

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, which was provided in annual payments over a seven-year period. These funds 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. All deadlines for submitting Circle K claims as provided for in the settlement have passed, and any remaining funds will revert to the Fund as part of a future Budget Act.

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.

The Commingled Plume Account has received 29 claim applications. Twelve claims have received Letters of Commitment amounting to \$12 million with \$5.4 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 in the Subaccount to pay claims that were filed by Fire Safety Agencies before January 1, 2000. The Program has issued 22 Letters of Commitment from the Fire Safety Agency Account, amounting to approximately \$1.9 million, \$903,844 of which has been paid out.

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Financial Responsibility

Federal 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, 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 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 2000-01, there have been 1,073 additional claim applications added to the Priority List. In addition, the Program has issued 774 LOCs with a face value of \$190 million. Regulations require that claim applications be given an initial review and decision of eligibility within 60 days of receipt. During Fiscal Year 2000-01, 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 this fiscal year. However, based on past history, 1,000 LOCs are expected to be issued in FY 2001-02, and the Program 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 2000-01, the Program received 5,115 reimbursement requests and processed 4,309 payments for a total of \$143,349,577. The average time for processing payments was 44 days.

During FY 2001-02, the Program expects to receive approximately 5,000 reimbursement requests while maintaining an average processing time of less than 45 days.

Technical Review

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

During FY 2000-01, the Technical Unit completed 3,227 pre-approvals for a total amount of \$79,887,412.

Based on the recent experience, the Program anticipates processing approximately 3,500 pre-approvals for FY 2001-02, 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 related to corrective action costs, all moneys received by the claimant from other sources (settlements, judgements, insurance, etc.) must be evaluated.

During FY 2000-01, the Program identified 218 claimants who had received funds from another source. Adjustments to related claims resulted in a \$5,663,956 savings to the Fund. Since the beginning of the Program, there have been 1,675 settlement claims reviewed with the total savings to the Fund being \$30,199,905.

It is not possible to accurately project the number of claims involving settlement issues that will be reviewed in FY 2001-02. However, based on previous history, the Program anticipates 200 claims will be reviewed for potential double recovery.

Closure Audit

The Program 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 2000-01, 630 claims were closed. The total dollar amount that was disencumbered for Fiscal Year 2000-01 is \$7,844,491, and as of the beginning of the program now totals \$50,253,848.

During FY 2001-02, the Program projects that 700 claims will be closed.

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Fiscal Status Report

CASH BALANCE Fiscal Year End 2000-2001

	<u>00/01 Fiscal Year</u>	<u>Total</u>
FUNDS RECEIVED:		
- Mill Storage Fee Collected	\$185,137,246	\$1,365,494,991
- Net From Previous Fees	---	\$8,591,052
- Net Interest Earned	\$12,153,330	\$82,606,725
Total Funds Received:	\$197,290,576	\$1,456,692,768
FUNDS EXPENDED & COMMITTED:		
- Program Administration	\$11,246,274	\$73,863,963
- Cleanup Oversight ¹	\$17,615,315	\$82,017,352
- Department of Trade & Commerce ²	---	\$75,500,000
- Board of Equalization ³	\$1,656,000	\$11,791,251
- Claims Reimbursement	\$151,385,879	\$1,166,089,249
- CalEPA	\$3,437	\$106,320
Total Funds Expended & Committed:	\$181,906,905	\$1,409,368,135
NET FUNDS AVAILABLE:	\$15,383,671	\$47,324,633

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.

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 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 makes numerous technical and clarifying corrections to UST laws. Provisions of this bill include limiting regulatory technical assistance costs to \$3,000 and the removal of a provision that allowed 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 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 sites.

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Significant Issues

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 to the Fund is expected to be significant. To date, the most noticeable impact of MTBE to the Fund has been an increase in the number of cleanup cases involving the treatment or replacement of water supply wells. Currently, the Program is tracking more than 50 such cases. Prior to the addition of MTBE to gasoline, it was rare that a UST release would impact a water supply well.

The Program is also conducting a pilot project to change the way we pay for cleanups. Under the new approach, called Pay for Performance, vendors are reimbursed as pollutants are removed from the environment, instead of on a time and materials basis. This approach has successfully speeded up cleanups in other states.

~ NOTES ~