
September
2004

State Water Resources Control Board
Division of Financial Assistance

**UNDERGROUND STORAGE TANK
CLEANUP FUND**

**LEGISLATIVE
ANNUAL
REPORT**

**New Series No. 14
September 2004
State Water Resources Control Board**

Table of Contents

SUMMARY2

PROGRAM EFFECTIVENESS2

PROGRAM ACTIVITY3

PROGRAM IMPROVEMENTS.....3

SIGNIFICANT ISSUES.....3

THE PROGRAM.....5

HISTORY5

PRIORITY SYSTEM6

LETTER OF COMMITMENT (LOC).....6

REIMBURSEMENTS7

COST PRE-APPROVAL7

CLOSURES8

FUND SUBACCOUNTS.....9

EAR ACCOUNT9

COMMINGLED PLUME ACCOUNT.....9

FIRE SAFETY AGENCY SUBACCOUNT.....10

FINANCIAL RESPONSIBILITY.....11

PROGRAM COMMITMENTS.....12

CLAIMS REVIEW.....12

PAYMENTS REVIEW.....12

COST PRE-APPROVAL REVIEW13

SETTLEMENTS REVIEW13

CLOSURE REVIEW13

FISCAL STATUS REPORT.....15

LEGISLATION.....16

SIGNIFICANT ISSUES19

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 underground storage tanks (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 undertake corrective action at 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 key measure of effectiveness for the Program is the number of claims processed and paid since the beginning of the program. Program activity during the fiscal year ending June 30, 2004 and through the life of the Program is shown in the following table.

Program Activity

Activity	Fiscal Year 2003-04	Life of Program
Claims Received	395	18,136
Claims Approved for Priority List	319	14,495
Claims Reviewed for Letter of Commitment (Detailed Review)	414	11,613
New Letters of Commitment Issued	280	10,084
Value of Letters of Commitment	\$196 Million	\$1.653 Billion
Reimbursement Requests Processed	5,127	41,007
Value of Reimbursements	\$188 Million	\$1.552 Billion
Claims Closed	396	5,275

Another key measurement of effectiveness is the time it takes to process an application. The Act establishing the Program sets time limits for various stages of processing. One of these steps, initial review of new claim applications, requires an eligibility decision within 60 days of receipt. During FY 2003-04 the average time for initial review was 38 days.

Program Improvements

During the past year, the Program implemented improvements to its data management system, replacing an old decentralized set of databases with a new integrated system using up-to-date technology. This data system upgrade will improve data security, accuracy and reliability. Since the accuracy of the data has greatly improved, some reported values may have changed compared to previous reports.

Significant Issues

Due to the State's ongoing fiscal problems, the Program experienced a significant reduction in staffing during the past two years. With this reduction, the Program has suspended two statutorily mandated activities, cost pre-approval and review of 5 year-old claims, to allow diversion of staff to reimbursements. However, even with these staff diversions, the Program was

not able to process reimbursement requests within the same timeframes as in the past. Reimbursement request processing time has grown to 74 days, exceeding the statutory limit of 60 days.

Health and Safety Code (H&SC) Section 25299.57(c) and H&SC Section 25299.37(c)(6)(A) requires that the board pre-approve or deny pre-approval of costs within 30 days of receipt of the request. Currently, as stated above, all pre-approvals of corrective action costs have been suspended and associated USTCF staff has been diverted to process payments exclusively. Without cost pre-approval review, small business owners are at more risk of not receiving full reimbursement of costs, because there is a greater chance that issues may arise with regard to whether costs are eligible for reimbursement. For FY 2001-02, the last full year that the USTCF processed cost pre-approvals, just over 2,600 requests were reviewed.

Health and Safety Code Section 25299.39.2(a) requires the manager of the Program to annually review the case history of all claims having Letters of Commitment (LOC) active for more than five years, unless the owner or operator objects. The purpose of this review is to determine whether a recommendation for case closure is in order. In addition to being required by law, this review is beneficial to small businesses and individuals, because it provides for a third-party check on the progress of the case relative to the expenditure of funds and reduces the chance that the responsible party will run out of funds before the case is cleaned up. It also provides an opportunity for the USTCF to detect fraud and abuse if funds are being used at sites that warrant closure. Due to the Program staff reduction this work has been deferred.

* * * *

The Program

History

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 USTs 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 eligible UST owners and operators meet the costs to cleanup contaminated soil and groundwater caused by leaking petroleum USTs. The federal financial responsibility requirements also require the Program to provide 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 to accrue on January 1, 1991, has increased over time to \$0.012 and currently generates in excess of \$210 million annually.

The State Water Resources Control Board (SWRCB) administers the Program. On September 26, 1991, the SWRCB first adopted regulations for the Program. The regulations have been revised periodically in response to new legislation and to address issues not anticipated when the initial regulations were written.

Following the approval of the regulations in 1991, claim applications were mailed to more than 10,000 potential claimants. By January 17, 1992, over 6,200 claims had been received. Program staff conducted a preliminary review of 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 specified claimant characteristics relating to the claimant's ability to pay. The highest priority, designated as 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.

The SWRCB updates the priority 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 statutes 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 before 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 and to manage cash flow. When a claim is activated from the priority list, the eligibility requirements are verified with the appropriate regulatory agency, and an LOC is issued. A claim is removed from the priority list when the Program issues the claimant an LOC.

Initial LOCs are issued in an amount slightly more than needed to cover the actual eligible costs incurred to date. As the cleanup proceeds, the LOC is amended as necessary to cover new

costs. 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 4,809 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 court-approved amounts awarded to third parties against the claimant. Only costs paid by or on behalf of the claimant may be reimbursed. Reimbursement requests may be submitted no more often than monthly and for amounts not less 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 a claimant and Program staff can reach an understanding 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.

While the Program has found this to be a very effective way to provide certainty to the claimant and to reduce appeals, the activity has been suspended due to lack of staff and the need to divert staff to reimbursement payments. Should additional staff resources become available, this activity will resume.

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 5,275 claims have been closed.

* * * *

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 EAR Account was established in 1991 by the SWRCB under authority provided by sections 25299.36 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 action to protect human health, safety and the environment, (2) a responsible party cannot be identified or located, or (3) the responsible parties are either unable or unwilling to take the required corrective action. All costs incurred are subject to cost recovery from the responsible party. The EAR Account has been approved for use at 95 sites, and \$4.9 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 plume sites often proves 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 41 claim applications. Thirty (30) claims have received Letters of Commitment amounting to \$37.4 million and \$21.5 million has been 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 46 LOCs from the Fire Safety Agency Account, amounting to approximately \$4.9 million, \$3.3 million of which has been paid.

* * * * *

Financial Responsibility

The 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.

* * * * *

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 2003-04, 319 claims were added to the Priority List. In addition, the Program issued 280 new LOCs. Regulations require that claim applications be given an initial review and decision of eligibility within 60 days of receipt. During FY 2003-04, the average time for initial review was 38 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, 250 new LOCs are expected to be issued in FY 2004-05, 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 2003-04, the Program received 5,937 reimbursement requests and processed 5,127 payments for a total of \$188,318,625. The average time for processing payments was 74 days.

During FY 2004-05, the Program expects to receive and process approximately 6,000 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.

Cost pre-approval has been suspended until further notice due to recent Program staffing reductions, and no activity is expected in this area during FY 2004-05.

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 2003-04, staff reviewed 50 claims involving settlement issues. Since the beginning of the Program, 2,000 settlement claims have been reviewed, for a total savings to the Fund of \$71,000,000.

It is not possible to accurately project the number of future claims which will involve settlement issues. However, based on previous history, we anticipate 50 claims will be reviewed in FY 2004-05.

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 2003-04, 396 claims were closed. The total amount disencumbered was \$3,253,739 and since the beginning of the program all disencumbrances total \$56,074,606.

During FY 2004-05, the Program projects that 400 claims will be closed.

* * * * *

Fiscal Status Report

CASH BALANCE Fiscal Year End 2003-2004

	<u>03/04 Fiscal Year</u>	<u>Since Inception *</u>
FUNDS RECEIVED:		
- Mill Storage Fee Collected	\$214,639,206	\$1,990,803,356
- Net From Previous Fees		\$8,591,052
- Net Interest Earned	\$1,940,069	\$95,075,178
Total Funds Received:	\$216,579,275	\$2,094,469,586
FUNDS EXPENDED & COMMITTED:		
- Program Administration	\$12,960,845	\$112,204,190
- Cleanup Oversight ¹	\$17,208,946	\$138,406,030
- Department of Trade & Commerce ²	- - -	\$75,500,000
- Board of Equalization ³	\$2,043,312	\$17,848,347
- Claims Reimbursement	\$197,790,278	\$1,706,694,427
- Department of Health Services ⁴		\$10,000,000
- CalEPA	\$103,301	\$201,015
- Misc ⁵	\$568,349	\$600,456
Total Funds Expended & Committed:	\$230,675,031	\$2,061,454,465
NET FUNDS AVAILABLE:		\$33,015,121

* 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.

⁵ Misc. includes accounts receivable abatements and various contracts.

Legislation

Senate Bill 2198 (Sher): Approved by Governor Wilson on September 19, 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 is 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 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, 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, 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, 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, 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, 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.

Assembly Bill 2481 (Frommer): Approved by Governor Davis on September 27, 2002, this bill loosens the eligibility requirements to permit a claimant to the Fund who acquired a UST from an ineligible person to participate in the Program, as long as the claimant is not affiliated with the ineligible person and the claimant otherwise meets eligibility requirements. AB 2481 also relocates the UST corrective action provisions of the Health and Safety Code from Article 4 of Chapter 6.75 to Chapter 6.7 (sections 25296.10-25296.40) so that similar subject matters are in the same chapter making it more "user friendly" and promoting effective enforcement of corrective action requirements.

Assembly Bill AB 1218 (Dutra): Approved by Governor Davis on October 9, 2003, this bill established procedures the SWRCB must follow when paying claims for work performed

pursuant to an SWRCB-approved performance-based contract. The claims are limited to requests for reimbursement of corrective action costs incurred in response to an unauthorized release of petroleum from a UST. This law requires the SWRCB to advertise the bidding for performance-based contracts, under certain circumstances. Additionally, the law extends the authority to encumber funds in the Fire Safety Subaccount until June 30, 2004 and requires those encumbered funds to be liquidated no later than December 31, 2005.

* * * * *

Significant Issues

Due to the State's ongoing fiscal problems, the Program experienced a significant reduction in staffing during the past two years. With this reduction, the Program has had to suspend two statutorily mandated activities, to allow staff to be diverted to payments. Even with suspension of these other activities, the Program was not able to process reimbursement requests within the same timeframes as in the past. Reimbursement request processing time has grown to 74 days, exceeding the statutory limit of 60 days.

Health and Safety Code (H&SC) Section 25299.57(c) and H&SC Section 25299.37(c)(6)(A) requires that the board pre-approve or deny pre-approval of costs within 30 days of receipt of the request. Currently, all pre-approvals of corrective action costs have been suspended and associated USTCF staff has been diverted to process payments exclusively. Without cost pre-approval review, small business owners are at more risk of not receiving full reimbursement of costs, because there is a greater chance that issues may arise with regard to whether costs are eligible for reimbursement. For FY 2001-02, the last full year that the USTCF processed cost pre-approvals, just over 2,600 requests were reviewed

Health and Safety Code Section 25299.39.2(a) requires the manager of the Program to annually review the case history of all claims having Letters of Commitment (LOC) active for more than five years, unless the owner or operator objects. The purpose of this review is to determine whether a recommendation for case closure is in order. In addition to being required by law, this review is beneficial to small businesses and individuals, because it provides for a third-party check on the progress of the case relative to the expenditure of funds and reduces the chance that the responsible party will run out of funds before the case is cleaned up. It also provides an opportunity for the USTCF to detect fraud and abuse if funds are being used at sites that warrant closure. Due to the reduction this work has been deferred.

~ NOTES ~