State of California
State Water Resources Control Board
Division of Clean Water Programs
Underground Storage Tank Cleanup Fund Program

1995 LEGISLATIVE ANNUAL REPORT

Prepared For:

The Honorable Members of the California Legislature

By:

State Water Resources Control Board
Division of Clean Water Programs
Underground Storage Tank Cleanup Fund
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Executive Summary

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) has prepared this Annual Report to the Legislature describing the status of the Underground Storage Tank Cleanup Fund Program (Fund) and setting forth recommendations for legislative changes to improve the efficiency of the program, with special emphasis on expediting environmental cleanup and the distribution of money from the Fund, including alternative methods for the distribution of that money.

Program Achievements & Issues

The Fund was faced with several program issues this past year. The following is a synopsis of those issues:

Blythe Environmental Remediation Demonstration Project

Approximately 22 plumes have been classified as "commingled" in the City of Blythe, designated as the demonstration area for this project pursuant to SB 108 (Chapter 296, 1994, Kelley). The City will benefit from a cost-effective cooperative cleanup of these plumes. Current discussions between the Fund, the City of Blythe, and the County of Riverside include attempting to arrange with the regulatory agencies to have one lead responsible party, one cleanup plan, and one closure per commingled plume. A detailed discussion of the findings of this demonstration project is contained on Page 24 of this report.

Commingled Plumes

SB 108 (Chapter 296, 1994, Kelley) directed the SWRCB to address the issue of groundwater plumes contaminated with petroleum from several responsible parties. Commingled groundwater contamination represents a special problem to California's groundwater protection efforts because it generally represents a more serious water quality impact, involves parties that disagree as to shared liability, and includes cleanups which continue to be stalled or handled in a haphazard manner. The Fund may seek authority to establish a separate account within the Fund to be used exclusively for commingled plumes. Under this plan, parties would file a single claim to cover the entire commingled plume. The critical element in this approach will be the responsible parties agreement to cooperate. More details on this project are found on

Page 22 of this report.

Double Payment/Settlement Issue

Approximately six percent, or one out of every 16 claims received by the Fund involve situations where the claimant has received compensation from others on account of an unauthorized release. Each case must be individually analyzed to determine whether such compensation constitutes potential double payment for costs covered by the Fund. Fund staff reviewed and issued decisions on 276 claims in Fiscal Year 1994-95. Further discussion of this issue is located on Page 25 of this report.

Cost Guidelines

Pursuant to SB 1764 (Chapter 1191, 1994, Thompson), the SWRCB was tasked to develop a summary of expected costs for common remedial actions that could be used by claimants as a guide in the selection and supervision of consultants and contractors. This summary of expected costs for common remedial actions is currently being finalized, and it is anticipated that these guidelines will be available to the public by July 1996. More about these guidelines can be found on Page 29 of this report.

Pre-approval of Costs

SB 1764 (Chapter 1191, 1994, Thompson) directed the Fund to provide increased technical assistance to claimants. Technical assistance includes helping the claimant through the process of obtaining and evaluating bids or estimates and reviewing and approving costs prior to work being performed. For a review of this issue, see Page 30 of this report.

Storage Fee

Over the next three years, the per gallon storage fee, paid by owners of a petroleum underground storage tank to the Fund will increase as directed by SB 1764 (Chapter 1191, 1994, Thomspon). The fee was increased to seven mills ($0.007) on January 1, 1995; to nine mills ($0.009) on January 1, 1996; and will again increase to twelve mills ($0.012) on January 1, 1997.

Financial Responsibility

Pursuant to SB 1764 (Chapter 1191, 1994, Thompson), and effective July 1, 1995, the level of financial responsibility (deductible) was reduced, and the maximum amount of funding increased to $1 million per occurrence, less the deductible amount. A complete discussion of financial responsibility begins on Page 10 of this report.

Program Status & Goals

The best measures of effectiveness for this program are the number of claimants served and the number of claims paid . As of March 31, 1996:

- The Fund had issued 3,252 Letters of Commitment (LOCs) in the amount of $351 million. The potential long term obligation of the 3,252 LOCs issued is estimated at $488 million.
- $123 million has been appropriated for Fiscal Year 1995-96 for the award of new or increases in existing LOCs.
- 9,300 claims have been accepted. Based on an estimated average cost per claim of $150,000, existing claims represent an estimated long term demand of approximately $1.39 billion.
- 162 "A" claimants, 2,085 "B" Claimants, 764 "C" claimants, and 241 "D" claimants had received LOCs.
- The Fund had received 6,981 reimbursement requests, 5,822 of which had been paid, for a total of $235 million.
- It is the Fund's goal to issue approximately 1,000 new LOCs during Fiscal Year 1995-96.
- Twenty sites have been approved to receive funds for direct cleanup by the regulatory agency (Emergency, Abandoned, Recalcitrant Account): six emergency sites, four prompt action sites, two abandoned sites, and eight recalcitrant sites. Approximately $780,000 has been expended.
- To date, 195 claims to the Circle K Settlement Trust Fund have been received, with 191 claims accepted. The 191 accepted have been paid with approximately $1.15 million expended.
- As of March 31, 1996, 110 applications have been submitted to the RUST Loan Program for an amount of $22.4 million.

Program Philosphy

The Program

History

Underground storage tanks (USTs) are a major threat to groundwater in the United States. As of June 1995, 28,051 underground storage tank (UST) leak cases were reported with less than 27 percent of these sites having been remediated and closed.

Federal and state laws require every owner and operator of a UST to maintain financial responsibility for any damages arising from their tank operations. The Barry Keene Underground Storage Tank cleanup Fund Act of 1989 was created by the California Legislature due to the inability of tank owners and operators to obtain insurance for their tanks and pay for cleanup when a leak was discovered. The Fund is administered by the California State Water Resources Control Board (SWRCB).

The Act was created to achieve two goals. First, to provide affordable environmental impairment insurance to eligible UST owners and operators enabling them to meet federal and state financial responsibility requirements. Second, to provide financial assistance for eligible cleanup costs and damages awarded to third parties injured by petroleum releases.

The Underground Storage Tank Cleanup Fund Program (Fund) was established to administer the Act in February 1991. Regulations for administration were approved and became effective on December 2,

1991. In December, more than 10,000 claim applications were mailed to potential claimants and by January 17, 1992, 6,300 claim applications had been received. A preliminary review of all 6,300 applications was completed by April 16, 1992 and claimants were notified. The first Priority List, adopted on July 16, 1992, contained 3,583 claims.

On June 9, 1993, the United States Environmental Protection Agency approved California's Fund as a mechanism for meeting the federal financial responsibility requirements for underground storage tanks containing petroleum.

Funding

Established by SB 299 in 1989, modified by SB 2004 in 1990, and other subsequent legislation, the Fund requires every owner of a petroleum underground storage tank which is subject to regulation under the Health and Safety Code (H&SC) to pay a per gallon storage fee to the Fund. This fee began on January 1, 1991 at six mills ($0.006) per gallon and, with the implementation of SB 1764 (Thompson) signed by the Governor September 1994, was increased to seven mills ($0.007) per gallon on January 1, 1995 and to nine mills ($0.009) on January 1, 1996. It will increase to twelve mills ($0.012) on January 1, 1997. The program is scheduled to sunset on January 1, 2005 at which time the collection of the fee will end.

Eligibility Requirements

To be eligible to file a claim with the Fund, the claimant must be a current or past owner or operator of the UST from which an unauthorized release of petroleum has occurred, and be required to undertake corrective action by the regulatory agency. Other eligibility conditions include compliance with applicable state UST permitting requirements and regulatory agency cleanup orders. In addition to USTs subject to state regulation, owners of small home heating oil tanks which have an unauthorized release of petroleum are also eligible. The maximum reimbursement per occurrence is $1 million, less the deductible. The deductible varies from $0 to $20,000 depending upon the claimant's priority classification and compliance with the requirement to have permitted the USTs. (See "Financial Responsibility").

Claim Priority System

The implementing legislation sets forth a claim priority system which is based on claimant characteristics. The highest priority, Class A, is given to residential tank owners; the second priority, Class B, is given to small California businesses, governmental agencies and nonprofit organizations with gross receipts below a specified maximum; the third priority, Class C, is given to California businesses, governmental agencies and nonprofit organizations having fewer than 500 employees; and the fourth priority, Class D, is given to all other claimants.

Under statute, the Priority List must be updated at least once a year to include new claims. Since Fall 1993, the Fund 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.

There is one major exception to the priority system. Legislation (AB 1061, Chapter 432) passed in 1993 requires the Fund to award approximately 15 percent of its funds annually to any lower priority classes that would not otherwise be funded (i.e., "C" and "D" claimants each receive at least 15 percent of the annual funding).

As of June 30, 1995, the Fund has received 296 Priority "A" applications, 3,736 Priority "B" applications, 1,853 Priority "C" applications, and 5,668 Priority "D" applications, for a total of 11,553 applications.

Letters of Commitment

When a claim is activated from the Priority List, the eligibility requirements are verified with the appropriate regulatory agency, and a Letter of Commitment (LOC) is issued. The LOC is the mechanism by which the program awards or encumbers funds for reimbursement of cleanup costs. A claim is removed from the Priority List when the claimant is issued 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. However, for the purposes of projecting long term obligations, the Fund uses the median claim amount of $150,000. As of March 31, 1996, the Fund had issued 3,252 LOCs in the amount of $351 million. The potential long term obligation of the 3,252 LOCs issued is estimated at $488 million.

$123 million has been appropriated for Fiscal Year 1995-96 for the award of LOCs. With the large number of active LOCs, a substantial part of the annual appropriation must be used to amend (increase) existing LOCs. The Fund estimates that as much as $50 million must be set aside for amendments to ensure that funding is available when needed to provide reimbursements. It is the Fund's goal to issue approximately 1,000 new LOCs during Fiscal Year 1995-96.

As of March 31, 1996, 162 "A" claimants, 2,085 "B" claimants, 764 "C" claimants, and 241 "D" claimants had received LOCs.

Reimbursements

Once an LOC is issued, claimants may submit requests for reimbursement of the eligible costs that they have incurred. Eligible costs include reasonable and necessary corrective action costs incurred after January 1, 1988, and certain third party compensation costs awarded to parties injured by the claimant's petroleum release.

As of March 31, 1996, the Fund had paid 5,822 reimbursement requests for a total of $235 million. The average in-house processing time, from receipt of the initial reimbursement requests to payment approval, varies from 30 to 45 days. The average payment has been approximately $40,000. Since April 1, 1995, monthly payment volume has averaged approximately $10.5 million.

Financial Responsibility

Federal EPA regulations (40 CFR, Section 280.90, Subpart H, Financial Responsibility) published 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 petroleum USTs. The following are the approved mechanisms:

- - Financial Test of Self-Insurance
- - Guarantee
- - Insurance and Risk Retention Group
- - Surety Bond
- - Letter of Credit
- - Trust Fund
- - State UST Cleanup Fund

Mechanisms that may be used in conjunction with the UST Cleanup Fund:

- - Letter from Chief Financial Officer
- - Certificate of Deposit

Mechanisms that may be used by local governments:

- - Bond Rating Test
- - Financial Test
- - Guarantee
- - Government Fund

On June 9, 1993, the United States Environmental Protection Agency (EPA) approved California's Fund as a mechanism for meeting the federal financial responsibility requirements for underground storage tanks containing petroleum. The Fund covered up to a maximum of $990,000 per occurrence and annual aggregate with the tank owner and/or operator demonstrating the remaining $10,000 of required coverage.

SB 1764 (Chapter 1191, 1994) amended the Funds coverage limits effective July 1, 1995. The Fund may be used as an alternative to or in conjunction with the other mechanisms authorized by the Federal Act. In order to use the Fund as a basis for demonstration of financial responsibility, an owner or operator must at all times:

1. Demonstrate financial responsibility of at least the following amount per occurrence and per annual aggregate coverage exclusive of the Fund:

PRIORITY CLASS | FINANCIAL RESPONSIBILITY AMOUNT

- Priority Class A | $ -0-
- Priority Class B | $ 5,000
- Priority Class C | $ 5,000
- Priority Class D | $10,000

If a waiver is granted pursuant to CCR Section 2811(a)(2)(B), demonstrate financial responsibility of at least twice the above amounts per occurrence and per annual aggregate coverage, exclusive of the Fund.

2. Demonstrate financial responsibility for any required amount above $1 million exclusive of the Fund for those owners and operators required to comply with the provisions of CCR Section 2807(d); and

3. Maintain eligibility to participate in the Fund.

As an alternate to the mechanisms authorized in the Federal Act, the SWRCB approved two mechanisms that may be used in conjunction with the Fund. The "Letter from Chief Financial Officer" requires that the owner or operator demonstrate a tangible net worth of ten times the required minimum applicable annual aggregate coverage as required.

The other alternate mechanism is a Certificate of Deposit which the owner or operator secures at their banking institution. The Certificate of Deposit is made payable to the State Water Resources Control Board for the required minimum applicable annual aggregate coverage.

The Fund submitted a report to the Legislature as part of a long term study, required by Chapter 6.75, Article 8, Section 25299.80 of the H&SC, which assessed the availability of private insurance coverage for unauthorized releases from petroleum USTs. The study showed that private insurance coverage is available but not widely used by tank owners and operators. This was attributed to several factors, some of which are listed below:

1. Qualifying factors associated with insurance coverage.

    a. Tank age.
    b. Soil sampling required by some insurance companies prior to acceptance.

2. Premium levels remain high.

3. Not all insurance companies offer pollution liability coverage.

4. Availability of the Underground Storage Tank Cleanup Fund as a mechanism.

    a. Mandatory storage fee already paid by UST owners.
    b. The Fund meets the minimum financial responsibility requirements.

A recently revised edition of the Fund's Financial Responsibility Guide was distributed to UST owners, operators and local regulators informing them of the changes affecting financial responsibility.

Current Fund Status

Please refer to Table 1 for a summary of the Fund's current status.

Table 1
Underground Storage Tank Cleanup Fund
STATUS REPORT

CASH BALANCE (March 31, 1996)
Does not include minor adjustments due to fines, penalties, or interest.

Funds Received:

- Mill Storage Fee Collected $441,274,358
- Net from Previous Fees 8,591,052
- Net Interest Earned 17,751,839

Total Funds Received: $467,617,249

Funds Expended & Committed:

- Program Administration $22,227,859
- Local Oversight Program $28,498,362
- Trade & Commerce Loan Program $26,500,000
- Board of Equalization $4,642,999
- Claims Reimbursement $354,865,091

Total Funds Expended & Committed: $436,734,311

Available Balance: $30,882,938

APPLICATIONS (As of March 31, 1996)

	A	B	C	D	Total
Received	296	3736	1853	5668	11553
Approved	190	2570	1989	4551	9300
Rejected	53	597	240	994	1884
Pending	6	136	42	185	369

LETTERS OF COMMITMENT (LOCs)

	A	B	C	D	Total
Issued	162	2085	764	241	3252
Amount	$6 M	$192 M	$107M	$46 M	$351 M

PAYMENTS

	A	B	C	D	Total
Issued	230	4343	982	267	5822
Amount	$4 M	$135 M	$72 M	$24 M	$235 M

Fund Subaccounts

Section 25299.50 of the H&SC provides the SWRCB the statutory authority to modify or create accounts in the Fund, which the SWRCB determines are appropriate or necessary for proper administration of the Fund. Two accounts have been created: (1) the Emergency, Abandoned, Recalcitrant (EAR) Account; and (2) the Circle K Settlement Trust Fund Account.

EAR Account

Sections 25299.36 and 25299.37(f) of the H&SC authorizes State Regional Water Quality Control Boards (RWQCB) or a local agency to undertake or contract for corrective action at petroleum underground storage tank sites. The Petroleum Underground Storage Tank Emergency, Abandoned, Recalcitrant (EAR) Account was established in 1991 to provide funding. The EAR Account may be used to take corrective action at petroleum UST sites which have had an unauthorized release and which require either: (1) immediate or prompt action to protect human health, safety and the environment (emergency or prompt action sites); or (2) where a responsible party cannot be identified or located (abandoned sites); or (3) the responsible party is 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 SWRCB manages the EAR Account which is funded by an annual Budget Act appropriation of $5 million from the Petroleum UST Cleanup Fund.

As of March 31, 1996, 20 sites have been approved to receive EAR Account funding: six emergency sites, four prompt action sites, two abandoned sites, and eight recalcitrant sites. Approximately $780,000 has been expended. Currently, nine sites are included on the Fiscal Year 1995-96 EAR Account Annual Site List for a total approved funding amount of $1.34 million. In addition, 3 sites have been approved for emergency response work with a total of $175,000 approved for the 3 sites. Site investigations or site remediation is being actively conducted at five of these sites.

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 based on the authority granted by a July 26, 1993 court-approved settlement agreement, executed between the SWRCB and Circle K Corporation, and Section 25299.50 of Article 6 of Chapter 6.75, Division 20, H&SC.

California was awarded approximately $3.9 million to be provided in annual payments over a seven year period be used to pay for tank removal and preliminary site assessment costs, up to $15,000, and a portion of corrective action costs (22%), up to $200,000 per designated site. Eligible claimants can recover the remaining portion of eligible corrective action costs from the Fund.

Ninety-nine claims were submitted prior to February 15, 1994, the final filing date for inclusion on the Initial Priority List. As of March 31, 1996, 195 claims have been received with 191 claims accepted. The 191 claims have been paid with approximately $1.15 million expended. New claims will be processed once the SWRCB receives the next annual payment in the amount of $463,000. An updated Priority List, including all unpaid claims and those claims received after the initial filing date, was approved by the SWRCB on October 26, 1995.

Rust Loan Program

Chapter 8.5 (commencing with Section 15399.10) of Part 6.7, Division 3, Title 2, of the California Government Code created a loan program, to be administered by the California Trade and Commerce Agency, to assist small businesses in upgrading, replacing, or removing tanks to meet applicable local, state or federal standards. Each fiscal year, $4 million is appropriated from the Underground Storage Tank Cleanup Fund for this loan program, known as the Repair/Replace Underground Storage Tank (RUST) Loan Program.

RUST is designed to assist small "Mom and Pop" gas station businesses in adhering to new tank regulations. The loan can be used to repair, remove or replace USTs to meet the regulatory requirements.

The terms are a low fixed interest rate, guided by the State Surplus Money Investment Fund (SMIF) currently at 5¾ percent, with a 2 percent loan fee, and a 10 to 20 year repayment term. The loans range from $10,000 as a minimum to $350,000 as a maximum with eligible project costs 100 percent financed. As of March 31, 1996, 65 loans were processed accounting for $13.1 million encumbered.

RUST loan application volume continues to increase as owners and operators of single walled USTs are approaching the December 28, 1998 deadline to bring their tanks into compliance with the new regulations. As of March 31, 1996, applications have been submitted for 110 loans for an amount of $22.4 million. An average of 125 inquiries on the RUST Program are received monthly.

Fund Financial Management

Financial management of the Fund occurs at four levels:

Level I - Storage Fee/Duration of Program

The setting of the underground storage fee by the Legislature is the first level of Fund management. The size of the fee ultimately dictates how quickly money is generated and claims are paid. The original fee was 6 mills/gallon stored which generated approximately $66 million for claims payments annually. Due to the implementation of SB 1764, the fee was increased on January 1, 1995 to $0.007 mills/gallon; to $0.009 mills/gallon on January 1, 1996; and will again increase to $0.012 mills/gallon on January 1, 1997.

It is estimated that an additional 6,000 claims may be filed over the life of the program. Existing claims plus future claims represent a potential long term demand of about $2.08 billion. The current fee structure is expected to generate approximately $1.9 billion of which approximately $1.7 billion will be available for award of LOCs.

Level II - Annual Appropriation

The second point of Fund financial management is the annual appropriation of funds authorized in the Budget. The appropriation limits the amount of money that can be encumbered during a budget year and consequently regulates the number and amount of LOCs that can be issued.

In requesting each year's appropriation, it has been the goal of the SWRCB to have the appropriation set high enough to allow for paying down any large outstanding balance in the Fund as quickly as is reasonably possible, but not to request an appropriation which exceeds actual funds collected and available during the year. When the Fund first began issuing LOCs in August 1992, approximately $100 million was already available for claims. Consequently, for the first full three years of activity, an appropriation of about $115 million was requested for LOCs, even though the annual rate of collection for claims was only about $66 million. Fiscal Year 1995-96, the annual appropriate has been increased to $123 million.

Level III - Letters of Commitment (Encumbrances)

The third level of financial control for the Fund is in the issuance of Letters of Commitment (LOCs). The SWRCB seeks to accomplish four objectives in managing LOC activity:

1. Encumber all appropriated funds each year;
2. Activate as many claims as possible from Priority List;
3. Reserve sufficient funds to carry active cases through the current fiscal year;
4. Comply with statutory requirements regarding priority of claims (i.e., pay claims in priority order with exception to the requirement that 15 percent of each year's appropriation must go to "C" claims and 15 percent to "D" claims).

To successfully accomplish these objectives, the SWRCB must develop an encumbrance plan at the start of each fiscal year and must closely monitor the size of each LOC to ensure that funds are only

encumbered for 12 to 18 months before liquidation.

Level IV - Payments (Liquidation)

The fourth and final point of financial management is actual reimbursement of claimants, or the liquidation of LOCs. Over the life of the program, payments are expected to consume the most staff time, but to a great degree, payments require the least management from a larger financial perspective. Simply put, if the first three levels of financial management are properly conducted, ample funds should be available for actual payments. The SWRCB's basic objectives for payments are:

1. Assist claimant with cost issues prior to the incurring of such costs.
2. Process payments within 30 days of receipt;
3. Pay approved costs while questioned costs are decided (i.e., pay what we can immediately);
4. Balance thoroughness of review against duration of review to ensure accountability and detection of fraud;

The greatest management issues related to payments include the determination of cost eligibility and assurance that no double payments occur.

Program Issues

Following are some of the major issues currently facing the Fund. A brief discussion accompanies each issue.

Blythe Environmental Remediation Demonstration Project

Senate Bill 108 (Chapter 296, 1994, Kelley) added Section 25299.83 to the H&SC which directs the SWRCB to establish the Blythe Environmental Remediation Demonstration Project (Demonstration Project) in conjunction with the City of Blythe and County of Riverside. That law also required the SWRCB to report to the Legislature on the status of the Demonstration Project.

A contract was let to Holguin, Fahan, and Associates for the development of a report on the field investigations and release identification efforts for this demonstration project. At the time of the legislative report, submitted May 1995, the SWRCB was still in the process of reviewing the draft report from the contractor. The report stated that the findings would be transmitted to the Legislature with the submittal of this September 1995 UST Cleanup Fund Annual Report to the Legislature. The following is a discussion of the findings of the Demonstration Project.

The SWRCB has received the final report of the Blythe Environmental Remediation Demonstration Project. The contractor performed background research and conducted a limited soil and groundwater investigation along the Hobson Way corridor located in Blythe. Based on the final report, several locations of commingled petroleum underground storage tank sites have been identified, cost estimates

have been developed, and cleanup strategies have been recommended.

Approximately one-half of the identified sites have been characterized as "leaking tank sites" in a previous study conducted by Metcalf & Eddy. A significant number of new releases have been identified by Holguin, Fahan, and Associates.

Approximately 22 plumes have been classified as "commingled" and would cost- effectively benefit from a cooperative cleanup, although none are currently under cooperative cleanup effort. Current discussions include attempting to arrange with the regulatory agencies to have one lead responsible party, one cleanup plan, and one closure per commingled plume.

Commingled Plume Issue

Senate Bill 108 (Chapter 296, 1994, Kelley) added Section 25299.83 to the H&SC which directs the SWRCB to address the issue of groundwater plumes contaminated with petroleum that are commingled from several responsible parties. This includes the development of proposed regulations for cleanup and plume management procedures and handling of claims involving multiple claimants.

Problem Statement
Commingled groundwater contamination represents a special problem to California's groundwater protection efforts because it generally represents a more serious water quality impact, involves parties that disagree as to shared liability, and includes cleanups which continue to be stalled or handled in a piecemeal, haphazard manner. A systematic approach to commingled cases offers the potential to significantly reduce costs and duplication of effort, to avoid litigation between property owners with commingled plumes and to more rapidly and efficiently address the technical aspects of cleanup and achieve the desired water quality goals in a timely manner.

Funding these cases under the Fund also poses difficulties. Currently, the Fund does not have provisions to encourage responsible parties involved in commingled cases to have joint access to the Fund even though the Fund has long held the position of encouraging coordinated cleanup efforts between eligible claimants having commingled plumes because of the anticipated savings in corrective action costs.

Definition
The Fund has developed a working definition of a commingled plume:

> "Commingled plume is defined as the condition that exists when petroleum groundwater contamination plumes, from two or more discrete UST unauthorized releases from two or more sites, have mixed or encroached upon one another to the extent that the investigation and cleanup of one plume will necessarily affect the other. The contributing USTs must be under the control of separate owners and operators. The term "commingled" does not apply to soil contamination cases. SB 108 is very specific in that it specifies that the "Board shall address the issue of groundwater plumes that are contaminated with petroleum that is commingled from several responsible parties ..."

Proposal Under Consideration
A separate subaccount, the Commingled Plume Account, is being evaluated as a means of facilitating cleanup of commingled plumes. Reimbursement would be on a "first come first serve" basis rather than on a priority class. Commingled plumes affect a variety of responsible parties. Unlike the reimbursement scheme applied to the Fund, administration of a "merit" scheme would be administratively inefficient.

This alternative would provide concurrent funding to all sites to encourage coordinated cleanups. This approach would require a cooperative effort among most, if not all, of the parties involved. In order for a commingled plume cleanup to be effective, all of the contamination must be identified and the cleanup must be implemented on the commingled plume as a whole and not on a piecemeal effort.

The commingled plume approach would require all parties to agree to cooperate and join together on a cleanup effort. Realizing that some responsible parties may be ineligible for reimbursement and/or some may be unable to pay, it is still in the best interest of the Fund, the eligible claimants, and the people and environment of the State to perform a joint cleanup. This approach would also require adequate site investigation to prove that the plumes are commingled, and the regional board (or local agency) must work with the responsible parties of the commingled plume to ensure that there is no duplication of effort. It is anticipated that there would be a savings in staff time for the regional boards: one cleanup, one file, one lead responsible party, one investigation, one cleanup plan, and one closure.

Double Payment/Settlements

Many claims filed with the Fund involve circumstances where claimants have or will receive funds from other sources (insurance, lawsuit, agreement with other tank owners and operators, etc.) in consideration of the unauthorized release. Section 25299.74(c) of the H&SC provides that claimants transfer and assign to the State of California any and all rights which the claimant may have to recover corrective action costs from any person responsible or liable.

Section 2812.2(b) of the Fund's regulations provides that no claimant is entitled to double payment on account of any corrective action or third party compensation claim cost. Thus, a claimant is not entitled to reimbursement from the Fund where the costs have been reimbursed or paid by others as this would mean a double benefit to the claimant.

Claimants are required to complete a "Non-Recovery From Other Sources Disclosure Certification" under penalty of perjury disclosing all compensation received, or to be received, from any source and to identify all parties that may be involved in litigation over the contamination of the site. Approximately six percent, or one out of every 16 claims received by the Fund, involve situations where the claimant disclosed having received compensation from others on account of the release. Fund staff reviewed and issued decisions on 276 claims in Fiscal Year 1994-95.

Most often, the documentation provided does not specify why the money was paid. In such cases, the claimant argues that, although the cause of action was the contamination discovered on the site, the money received was not for cleanup. Often, at the same time, the party paying money to the claimant

states that they paid for the costs of cleanup and wants reimbursement from the Fund.

These situations are contentious and are addressed on a case-by-case basis. The Fund provides a mechanism for claimants to appeal decisions that they disagree with.

The various double payment issues are reviewed on a case-by-case basis. In the interest of making this issue easier to manage, the Fund has recently implemented the following policy:

If any money or other form of compensation is received by a claimant from another party, where the underlying complaint or other basis for payment included a demand for the costs of cleanup, the Fund shall presume that all compensation received from other parties for costs related to an unauthorized release was received by the claimant for costs that are eligible for reimbursement by the Fund, and the Fund shall reduce the claimant's eligibility for reimbursement by the amount of compensation received.

This presumption may be rebutted by the claimant by documentation prepared in relation to, and prior to, the commitment to compensate the claimant, that demonstrates the compensation was for costs other than those eligible for reimbursement by the Fund. This presumption may also be rebutted by written documentation prepared by the party that compensated the claimant that demonstrates the compensation was for costs other than those eligible for reimbursement by the Fund.

If the Fund reduces a claimant's eligibility because of the compensation the claimant received from others, a third party has paid costs that otherwise would have been reimbursed by the Fund. Recognizing this benefit, the Fund may subsequently apply a credit against the compensation received thus reversing the reduction in eligibility, provided that the Fund finds (1) the compensation received from other parties is for payment of costs that otherwise would have been reimbursed by the Fund; (2) the claimant's eligibility has been correspondingly reduced; and (3) the party or parties that paid the compensation are not eligible to, or waive their right to, file a claim with the Fund for reimbursement of the costs.

This credit, made by the Fund in recognition of the claimant's legal fees in obtaining the compensation from other parties, will be limited to a reasonable credit and in no case will exceed actual attorney fees and costs incurred to collect the compensation received. Generally, a reasonable credit will equal no more than 30 percent of the compensation received from other parties, which the Fund shall apply toward costs eligible for reimbursement. In cases where the compensation received was paid pursuant to a judgment or verdict after trial, generally the credit will equal no more than 40 percent of the compensation received from other parties.

Effects of SB 1764

Senate Bill 1764 (Thompson) was signed into law September 30, 1994 (Chapter 1191, 1994), making several changes to the Fund. The following is a discussion on each of the major provisions.

Cost Guidelines

Pursuant to Section 25299.57(h) of the H&SC, the SWRCB was tasked to develop a summary of expected costs for common remedial actions that may be used by claimants as a guide in the selection and supervision of consultants and contractors. This document will provide guidance to Fund claimants for evaluating proposed and incurred corrective action costs at sites covered by the Fund. Specifically, these guidelines will help claimants identify reimbursable goods and services, understand how the Fund evaluates activities and costs, and estimate what costs are likely to be reimbursed. Claimants will also be able to judge whether additional justification will likely be required to support a given costs, or whether a call for assistance from the Fund is in order.

The guidelines do not set prices for the listed items and activities, and are not intended to remove the element of competition or freedom of choice from the industry. The intention of these guidelines is not to replace the three bid requirement.

The cost guidelines consist of three sections:

1. UNIT COSTS - A unit of service, activity, or product is delivered for a set cost. Examples include an analytical test from a laboratory or an hourly rate for a consultant's staff person.
2. PROJECT COSTS - A project cost may be an aggregate of unit costs such as consultant billing hours, equipment rental, and subcontractors, or it may be simply consultant labor. It describes a level of effort required to perform certain tasks such as preparation of a report or conducting a quarterly monitoring report. Tasks and conditions will differ between sites and the Fund will review each case individually.
3. POLICIES - A description of various Fund policies, standard practices, and statements on how the Fund addresses issues concerning reimbursement. General information intended to be helpful, but not necessarily directly tied to certain costs, is included in this section.

The finalized guidelines will be available to the public in July 1996.

Financial Responsibility Reduction

Effective July 1, 1995, the level of financial responsibility (deductible) was reduced. Class A claimants are no longer responsible for a deductible of any amount. Class B and Class C claimants have had their deductible reduced to $5,000. The deductible for Class D claimants remains the same at $10,000.

The Fund evaluated all in-house claims and determined that all eligible claims will receive the benefits of the reduced deductibles.

Pre-approval of Cost Estimates

The Fund has been directed to provide increased technical assistance to claimants. Technical assistance includes helping the claimant through the process of obtaining and evaluating bids or estimates and reviewing and approving costs prior to work being performed.

While the Fund had, for some time, been pre-reviewing costs and advising claimants as to their reasonableness, formal pre-approval connotes a greater commitment of the part of the Fund and the

claimant. Pre-approval requires that a set of assumptions and conditions be established which, if met, would be cause for full reimbursement.

The Fund has developed a pre-approval request form which instructs the claimant on what documentation is required to review costs. Standard documentation includes: a workplan approved by the regulatory agency, copies of bids received, and a detailed project budget from the selected contractor or consultant.

Increase in Storage Fee

Before SB 1764 passed, the mill fee was $0.006 for each gallon of petroleum placed in a UST. On January 1, 1995, the fee was increased by 1 mill for a total of $0.007. On January 1, 1996, the fee was increased by 2 mill for a total of $0.009, and on January 1, 1997, the fee will again increase by another 3 mill for a total of $0.012. The new fees, collected by the Board of Equalization, are expected to increase the annual revenue collection from approximately $85 million to $170 million.

Proposed Regulatory Action

The SWRCB is in the process of proposing to amend Chapter 18, Division 3, Title 23 of the California Code of Regulations (CCR), the Underground Storage Tank (UST) Cleanup Fund Program. The proposed amendments are being made to update the regulations for clarification of legislative changes made pursuant to Chapter 1191, Statutes of 1994 (Thompson) to Chapter 6.75 of the California Health and Safety Code (H&SC).

In addition to the proposed changes having regulatory effect, the SWRCB is proposing to make numerous editorial changes to the regulations. Many regulations have been reworded for clarity, and unnecessary, repetitive phrases have been removed wherever possible to make the language less cumbersome.

A Notice of Proposed Rulemaking announcing the pending amendments of regulations governing the Underground Storage Tank Cleanup Fund Program was mailed to all interested parties on July 7, 1995, and a public hearing will be scheduled prior to the SWRCB's adoption. It is anticipated that the regulations will be effectively filed with the Secretary of State's Office by July of 1996.

Legislation

The following is a summary of legislative changes that have affected the Fund since its inception:

AB 1699 (Kelley) - Signed by the Governor 10/14/91: Specifies the type of expenses that SWRCB can reimburse under third party claims, and redefines and clarifies the legislative intent for eligibility of residential tanks.

SB 1356 (Greene) - Signed by the Governor 9/12/92: Exempts the multiple bid requirement for tanks

owned or operated by a public agency if the prospective costs are for private professional services within the meaning of Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code and those services are procured in accordance with the requirements of that chapter.

SB 3188 (Hauser) - Signed by the Governor 9/30/92: Creates the "Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989" and establishes the Fund in the State Treasury rather than the General Fund.

AB 1061 (Costa) - Signed by the Governor 9/22/93: Amends the priority ranking for the Fund to include, in the second ranking, a city, county district, or nonprofit organization that has total annual revenues of less than $7 million, and includes in the third ranking, a city, county, district, or nonprofit organization that employs fewer than 500 full-time and part-time employees, and requires the SWRCB to allocate approximately 15 percent of the amount appropriated to Class C and Class D claimants. Also allows for claimants who meet specific criteria to request a waiver of the permit eligibility requirements.

AB 2303 (Richter) - Signed by the Governor 7/11/94: Deletes the provision that tank owners or operators who had completed corrective action with regard to a release from a tank by October 2, 1989, are prohibited from filing a claim to the Fund.

SB 108 (Kelley) - Signed by the Governor 7/20/94: Directs the SWRCB to develop cleanup procedures and proposed regulations applicable to unauthorized releases of petroleum from multiple responsible parties which are the result of commingled contamination of groundwater plumes. The Blythe Environmental Remediation Demonstration Project will be established and the City of Blythe is to be used as the demonstration project for this purpose.

SB 1764 (Thompson) Signed by the Governor 9/30/94: This bill has a major impact on the operations of the Fund. Refer to Page 28 of this report for a discussion of its provisions.

Recommended Legislation

Homeowners and small businesses are paid first under program regulations. But like most government programs, there are many complex and confusing requirements which stand between the people the program is designed to assist and the actual achievement of that assistance. Current statute places a requirement on small business owners and operators making a claim to the Fund that all of the officers of their business must be domiciled in California.

The Fund has encountered cases whereby a closely held California corporation has met all the Priority Class B requirements with the exception of domiciliary due to one shareholder/officer residing outside of California. In one case (J&B Fertilizer, Inc., Order No. WQ-93-16-UST) the corporation had two major shareholders with one residing and domiciled in California; the other resided in California up until October of 1988, when he purchased a home in Oregon. Although the shareholder spends three-fourths of his time in California for business purposes, his immediate family resided continually in Oregon. This claim was determined to be ineligible for Priority Class B.

In another case (Vollman/Clark Ranch Partnership), the owners of five-eighths of the partnership are domiciled in California while the owners of the remaining three-eighths of the partnership reside outside of California (the managing general partner resides in California). Since all partners were not domiciled in California, the Division determined that the claim was not eligible for Priority Class B and the claim was placed in Priority Class D.

Even though their financial ability to pay for the corrective action was similar to others that qualify for Class B, these particular claimants were rejected because of a portion of the owners/officers were not domiciled in California.

The Fund incorporates the definition of a small business from the Department of General Services, and this definition does not always coincide with the legislative intent for small business claimants to the Fund.

PROPOSED SOLUTION

The following language is being proposed for amending the California Health & Safety Code (H&SC) to allow for the lifting of the domiciliary requirement:

Section 25299.52 (The text of the version that becomes operative on July 1, 1995)

(b) Except as provided in subdivision (c), in awarding claims pursuant to Section 25299.57 or 25299.58, the board shall pay claims in accordance with the following order of priority:

(1) Owners of tanks who are eligible to file a claim pursuant to subdivision (e) of Section 25299.54.

(2) Owners and operators of tanks which are either of the following:

> (A) An owner or operator which is a
>
> , except for the requirement that the officers of the business be domiciled in California, meets the qualifications of a small business ~~, as defined~~ as providedin subdivision (c) of Section 14837 of the Government Code.
>
> (B) An owner or operator which is a city, county, district, or nonprofit organization that receives total annual revenues of not more than seven million dollars ($7,000,000). In determining the amount of a nonprofit organization's annual revenues, the board shall calculate only those revenues directly attributable to the particular site at which the tank or tanks for which the claim is submitted are located.

(3) Owners or operators of tanks which are either of the following:

> (A) The owner or operator owns and operates a business which employs fewer than 500

full-time and part-time employees, is independently owned and operated, is not dominant in its field of operation,

and the principal office is located in California~~, and all of the officers of the business are domiciled in California.~~

(B) The owner or operator is a city, county, district, or nonprofit organization that employed fewer than 500 full-time and part- time employees. In determining the number of employees employed by a nonprofit organization, the board shall calculate only those employees employed at the particular site at which the tank or tanks for which the claim is submitted are located.

(4) All other tank owners and operators.

ESTIMATED FISCAL IMPACT

The Fund has determined that there would be no fiscal impact with this proposal.

ARGUMENTS (Pro/Con)

Pro: The Legislative intent of the Fund is to give financial assistance for the cleanup of unauthorized releases of petroleum from underground storage tanks first to homeowners and small business owners and operators. This legislative proposal will amend those statutes governing the priority class applicability to enable the Legislative intent to be more fully realized.

Con: There could possibly be a further delay in the processing of payments for those in lower priority classes.