

**REPORT OF THE
UNDERGROUND
STORAGE TANK
PROGRAM
ENFORCEMENT
PANEL**

AUGUST, 2001

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EXECUTIVE SUMMARY

Prevention of leaks from USTs is an important goal for environmental protection. The continued use of methyl tertiary butyl ether (MTBE) in gasoline has led to an even greater emphasis on leak prevention because of the threat MTBE poses to the environment. To effectively carry out their role in leak prevention, local agencies must have the means and the ability to enforce UST program requirements. In 1999, the Legislature adopted SB 989 (Ch. 812, Stats. of 1999) to address MTBE concerns. In accordance with SB 989, State Water Resources Control Board (SWRCB) staff convened a Panel to study and address concerns regarding local agency enforcement of UST leak prevention requirements. The Panel developed its report to the SWRCB, including the recommendations required by SB 989.

Of the Panel's twelve recommendations, the primary recommendation is for the SWRCB, in conjunction with the California Environmental Protection Agency (Cal/EPA), to consider seeking statutory change to obtain administrative enforcement authority for local agencies to use in enforcing program requirements. Cal/EPA has a similar proposal to obtain administrative enforcement authority in all of the regulatory programs in its Unified Program, including the UST leak prevention program. All the Panel's recommendations would require SWRCB to perform additional work, necessitating either additional resources or the diversion of existing resources.

INTRODUCTION

The California Legislature has declared that it is in the public interest to have a continuing program of enforcement of requirements for USTs that store hazardous substances (H&SC 25280). Effective and consistent enforcement in the UST program is an essential part of ensuring compliance and providing a level playing field in the regulated community, while protecting California's water resources. Timely and consistent enforcement of UST laws and regulations is crucial to the success of the program.

In accordance with SB 989 (Ch. 812, stats. of 1999), the SWRCB convened a Panel [Health and Safety Code (H&SC) Section 25284.1(a)(6)]. The Panel was comprised of representatives from local agencies, Regional Water Quality Control Boards (RWQCBs), local District Attorney's (DAs) offices, United States Environmental Protection Agency (U.S. EPA), Cal/EPA, and the SWRCB. The Panel reviewed existing underground storage tank enforcement authority and procedures. The panel met on three occasions (March 7, 2001, June 14, 2001 and July 18, 2001) and participated in the report review process which concluded July 31, 2001.

MISSION OF THE PANEL

The mission of the Panel was to recommend actions that will assist local agencies with pursuing effective enforcement action against UST owners and operators who do not comply with UST leak prevention requirements. In addition, based on the Panel's recommendations, the SWRCB is to establish effective enforcement procedures in cases involving fraud.

BACKGROUND INFORMATION - UST PROGRAM

The SWRCB's underground storage tank (UST) program is comprised of three components: leak prevention, cleanup oversight, and cleanup reimbursement.

- The leak prevention program is implemented by approximately 100 local agencies, of which 72 are Certified Unified Program Agencies (CUPAs). The SWRCB is responsible for program administration and policy, including development of regulations. The funding of local agencies and SWRCB for this program is discussed below under "Background Information – Unified Program." The SWRCB's leak prevention program is also funded by a grant from U.S. EPA.
- The cleanup oversight program is primarily implemented by the nine RWQCBs and 20 Local Oversight Program (LOP) agencies. In addition, some local implementing agencies oversee cleanup, generally at sites where groundwater has not been impacted by UST releases. The SWRCB is responsible for program administration and policy, including development of regulations. This program has several fund sources, including fees assessed on UST owners and a grant from U.S. EPA.
- The Underground Storage Tank Cleanup Fund (Cleanup Fund) reimbursement program is implemented by the SWRCB. This program provides funding to owners for cleanup of leaking UST sites. This program is funded through fees collected from UST owners for storage of petroleum.

The following is a brief summary of the evolution of UST requirements in California.

In the early 1980s, pollutants from leaking USTs were found to be affecting some drinking water wells in the Santa Clara Valley area. Drinking water in this area is obtained largely from wells tapping extensive underlying aquifers; these releases were seen as an immediate health and environmental threat.

In 1983, the California Legislature passed the nation's first State UST law addressing the threat of discharges from underground storage tanks to groundwater. [Chapter 6.7 of the Health and Safety Code, effective January 1, 1984.] This legislation was largely accomplished through the cooperative efforts of the Santa Clara Valley Water District and then Assemblyman Byron Sher. This law authorized local agencies to regulate UST design, construction, monitoring, repair, leak reporting, and response measures. Federal legislation patterned on California's approach followed in 1984.

To implement UST law, California's program required that all new USTs meet standards for corrosion protection, leak detection and spill overfill prevention. In addition, new systems were required to include secondary containment, capable of holding any leak from the primary containment until it could be detected and remedied. In 1990, to be consistent with federal regulations, the Legislature modified statutes to require upgrades of all older systems by December 22, 1998, to meet minimum standards to protect against corrosion, prevent spills and overfills and to address other deficiencies in the older systems.

In the early 1990's, the oxygenate, MTBE was added to gasoline at approximately 11 to 15 percent by volume to improve air quality. MTBE is highly water soluble and resistant to natural degradation, unlike other petroleum-based fuel hydrocarbon constituents. Once released from USTs, MTBE's low taste and odor threshold in water coupled with its high percentage in gasoline can quickly impact and impair a groundwater source at very low concentrations. MTBE concerns focused attention on the need to minimize petroleum-related releases into the environment.

In late 1997, Governor Wilson requested that the SWRCB convene a panel to address the leak history of new and upgraded USTs. One of the group's findings was that there appeared to be a lack of adequate enforcement, at the local level, against owners and operators who were not complying with leak detection requirements, or who failed to follow-up on suspected releases. In addition, a December 1998 Bureau of State Audits report found deficiencies in the state and local enforcement of UST leak prevention laws.

Executive Order D-5-99, signed by Governor Davis on March 25, 1999, directed the California Energy Commission to develop a timetable for the removal of MTBE from the state's gasoline no later than by December 31, 2002. In the interim, the possibility exists that MTBE could be released from substandard tanks and piping, with significant adverse impacts on current and future beneficial uses of groundwater supplies.

In 1999, SB 989 imposed several requirements on owners and operators of USTs to prevent MTBE releases and added H&SC Section 25284.1(a)(6):

“(a) the board shall take all of the following actions with regard to the prevention of unauthorized releases from petroleum underground storage tanks:

... (6) Convene a panel of local and RWQCB representatives to review existing enforcement authority and procedures and to advise the board of any changes that are needed to enable local agencies to take adequate enforcement action against owners and operators of noncompliant underground tank facilities. The Panel shall make its recommendations to the board on or before September 30, 2001. Based on the recommendations of the Panel, the board shall also establish effective enforcement procedures in cases involving fraud.”

BACKGROUND INFORMATION – UNIFIED PROGRAM

Senate Bill 1082 (Ch. 418, stats. of 1993) established the Unified Hazardous Waste and Hazardous Materials Management Regulatory Program (Unified Program), with the goal of consolidating, coordinating, and making consistent local implementation of the following six programs:

- Hazardous Waste Generator and Onsite Hazardous Waste Treatment
- Underground Storage Tanks
- Hazardous Material Release Response Plan and Inventories
- California Accidental Release Prevention
- Spill Prevention Control and Countermeasure Plan of the Aboveground Petroleum Storage Tanks
- Uniform Fire Code Hazardous Materials Management Plan and Inventory Statement

Currently, two of the six Unified Program components, Hazardous Waste Generator and Onsite Hazardous Waste Treatment (HWG/TP) and Hazardous Materials Release Response Plan and Inventories (HMRRP), provide the administrative enforcement authority process to local agencies.

CUPA agencies are funded through fees imposed on regulated businesses. The fees include a surcharge to fund state agencies, including the SWRCB. During Fiscal Year 2000-2001, the SWRCB received approval to use the Underground Storage Tank Fund to establish an Enforcement Unit for the UST leak prevention program. In conjunction with Cal/EPA and the AG's office, the unit investigates violations of UST program requirements. The unit is also responsible for the SWRCB's tank tester licensing function and related enforcement efforts.

PANEL'S PROCESS

In order to complete their mission, the Panel designed a survey, which was sent to CUPAs and other local agencies to collect information about their current enforcement activities. The survey was designed to determine whether changes in the existing enforcement program would enhance local agency enforcement efforts and what type of changes would be most effective. In addition to the survey, the Panel reviewed previously published documents to assist in preparing recommendations.

Review of Survey Responses

Approximately half of the contacted agencies participated in the survey. The Panel reviewed and discussed the results of the survey in preparing its recommendations to the SWRCB.

At this time, there is no established statewide administrative enforcement process in the UST leak prevention program. As a result, the local agencies, in general, requested statewide uniformity in the enforcement process to obtain consistent, efficient, and effective enforcement in the UST program. Towards this end, many local agencies recommended that they be provided

an administrative enforcement process such as the Administrative Enforcement Order (AEO) process. This would have similarities with the CUPAs' implementation of the Hazardous Waste Generator Onsite Hazardous Waste Treatment Program. The AEO is an administrative process that would allow local agencies or CUPAs to pursue an action independent of an outside prosecutorial agency. The respondents favored the creation of a uniform AEO, provided that the order was efficient, not cumbersome, and granted them the authority to carry out enforcement actions. The CUPAs would be able to determine an appropriate penalty based on the circumstances of the violator, violation and statutory or regulatory penalty criteria.

Respondents favored uniform, consistent and credible enforcement procedures that provide authority for action. According to some local agencies, problems with enforcement occur primarily with determination of tank ownership, insolvent tank owners, low market value of the abandoned tank property and lack of staffing resources by DAs to take on UST compliance cases. Based on information gathered outside of the survey, some DAs report that some referrals from their local UST agencies would require improved case development to allow for effective and timely enforcement. Some DAs feel that local agencies send them too few referrals.

Regarding possible increased state oversight or authority of UST enforcement, approximately half of the responders indicated that their management would support the development of SWRCB staff oversight responsibility to encourage recalcitrant tank owners to promptly close their non-upgraded USTs. Others stated that they are not experiencing significant problems in this area and that their management wants to continue to resolve compliance issues on a local level. Most of the responding agencies indicated they would prefer SWRCB oversight to RWQCB oversight, both to promote statewide consistency and because it is the SWRCB that currently has statutory authority for, and experience in, the UST leak prevention program.

Review of Documents

In addition to the survey, the Panel reviewed other information to assist in preparing recommendations for improvement in UST enforcement. The following documents were provided to the Panel members:

- "Report to the Legislature on Consistency of Unified Program Enforcement Authorities and Processes," prepared by Cal/EPA (January 2001).
- Proposed emergency regulations regarding "Assessment of Administrative Penalties" prepared by the Department of Toxic Substances Control (DTSC) (not dated).
- "Guidance for Administrative Enforcement Order and Hearing Procedures," prepared by the Certified Unified Program Agencies (CUPAs) (not dated).
- "Enforcement Guidelines for 1998 Upgrade Requirements," prepared by the SWRCB (not dated).
- "Improved Inspections & Enforcement Would Better Ensure the Safety of USTs," General Accounting Office (GAO) Report dated May 2001.

- Cal/EPA Concept Paper “Proposed Consistent Administrative Enforcement Authority Under the Unified Program” (July 3, 2001).
- “Recommendations for Prompt Closure of Non-Upgraded Underground Storage Tanks,” prepared by the Non-Upgraded Tank Workgroup dated January 2001.

In particular, the Panel relied on information provided in the Cal/EPA Concept Paper; the GAO Report; the Report to the Legislature on Consistency of Unified Program Enforcement Authorities and Processes; and the Recommendations for Prompt Closure of Non-Upgraded Underground Storage Tanks.

In response to SB 989, the SWRCB also convened a workgroup to address the issue of non-upgraded tanks and a report was prepared in January 2001 (Recommendations for Prompt Closure of Non-Upgraded Underground Storage Tanks). Among the workgroup's recommendations were:

- using the SWRCB UST Quarterly Report to obtain non-upgraded tank information;
- using the Emergency, Abandoned Recalcitrant (EAR) account for removal of the UST;
- delegating to the SWRCB state oversight responsibility and authority; and
- the development of an enforcement task force with lead representatives from Cal/EPA, the SWRCB, and the Attorney General's office.

The Report to the Legislature on Consistency of Unified Program Enforcement Authorities and Processes recommended statutory changes to make enforcement more consistent under the Unified Program. The UST program was found to include civil and criminal enforcement options but not administrative enforcement that would provide consistency across the Unified Programs, including the UST program. In addition, the Cal/EPA Concept Paper provides a specific proposal to establish consistent enforcement authority.

UST ENFORCEMENT CONCERNS

Between 1994 and 1996, U.S. EPA reviewed California's UST program to determine if it met requirements for program approval pursuant to 40 CFR Part 281. U.S. EPA found that California's program had many deficiencies related to enforcement due to lack of authority or procedures. Some of U.S. EPA's key concerns included:

- The State of California has no procedures for obtaining information from owners/operators and for reviewing the information. The State has no authority for enforcement against owners/operators for failure to submit information.

- The State of California has no procedures to independently address compliance with State requirements. The State has no program to verify the accuracy of the information submitted by owners/operators.
- The State of California lacks authority and procedures to ensure that information is gathered in a manner that will produce evidence admissible in enforcement proceedings or in court.
- The State of California has no data system whereby the State can monitor compliance over time.
- The State of California must demonstrate that it has the resources to oversee local enforcement and to take enforcement itself if local enforcement is inadequate.

U.S. EPA has also placed increased emphasis on compliance with UST leak prevention requirements. U.S. EPA has recommended using a uniform field citation program. In addition, U.S. EPA has announced four major initiatives for the UST and Leaking Underground Storage Tank (LUST) Programs. One of the initiatives is “improving compliance by bringing all UST systems into operational compliance.”

Most recently, the Panel reviewed information gathered from the surveys and reviewed documents that indicate problems in carrying out enforcement actions against UST owners. The survey responses included the following comments regarding obstacles to enforcement:

- Determining tank ownership
- Finding the tank's owner
- Insolvent owner/operator
- Property of recalcitrant owner/operator has low market value
- Right-of-way issues
- Enforcement options are time consuming
- Inadequate staffing
- Lack of support from local management/prosecutors
- Reluctance of some County Boards of Supervisors and City Councils to support enforcement actions against small businesses or individuals
- Perceived immunity of government agencies that own USTs.

FINDINGS AND RECOMMENDATIONS

The Panel recommended that a consistent enforcement program be developed and implemented for the UST program. An improved enforcement program is intended to promote coordinated, efficient and effective statewide enforcement of UST leak prevention requirements. In support of an improved enforcement program, the Panel made the following findings and recommendations:

Finding - Administrative Enforcement Authority:

As noted above, the UST program does not include an administrative enforcement process for local agencies. However, some of the CUPAs have an administrative enforcement authority process for the UST program through local ordinances. In general, the survey results supported the need for administrative enforcement authority (and process) to promote statewide consistency. In addition, many of the reviewed documents support the concept of a consistent enforcement authority under the Unified Program.

Recommendation - Administrative Enforcement Authority:

1. In conjunction with Cal/EPA, the SWRCB should consider seeking statutory change to obtain administrative enforcement authority for CUPAs, Participating Agencies (PAs) and local agencies (i.e., AEO process), to enforce violations of program requirements.
2. The SWRCB should develop policies and regulations as necessary to implement the new administrative enforcement authority, if granted.
3. The SWRCB should develop, and provide to CUPAs, training materials applicable to administrative enforcement authority, if granted. These training materials should include forms and procedures applicable to UST enforcement.

Finding – Training:

Based on a recommendation of the Non-Upgraded Tank Workgroup, the CUPAs may benefit from uniform, statewide training on how to develop and refer cases to the appropriate prosecutorial entity. Standardized training would facilitate statewide consistency with enforcement approaches, settlement agreements and penalty assessments.

Recommendation – Training:

4. In conjunction with Cal/EPA, the SWRCB should develop standardized enforcement procedures and provide UST enforcement training and materials to local agencies and prosecutors including:
 - Development of enforcement cases
 - Documentary Evidence – chain-of-title, deeds, property descriptions, ownership of USTs, decommissioned USTs, right-of-way issues, photographic and physical evidence, chain-of-title, etc.
 - Use of liens for enforcement
 - Referral of enforcement cases to prosecutors at the city, county, state, and federal levels
 - Criminal enforcement – infractions, misdemeanors and felony cases, penalties and incarceration options
 - Fraud detection and enforcement (tank testers license violations, tampering with UST systems equipment, etc.)

- Civil enforcement – mandatory and prohibitory injunctions, agency cost reimbursements and penalty assessments
- Courtroom Testimony – rules, conduct and techniques
- Administrative (if authority is granted) - AEO's, settlement agreements, permit suspension and revocation

Finding – UST Program Funding:

According to reviewed documents and survey responses, there is inadequate funding for UST enforcement activities by local agencies. Program funding is discussed above under “Background Information– Unified Program.” In addition, the Circuit Prosecutor Project provides vital support to the CUPA programs, and steps should be taken to ensure the current level of support is continued, according to the Report to the Legislature on Consistency of Unified Program Enforcement Authorities and Processes.

Some funds are available for removal of USTs. One program referred to as the “Replacing Underground Storage Tank (RUST) Program” is available to small businesses whose owners cannot qualify for a commercial loan. This program is administered through the Office of Small Business of the Trade and Commerce Agency. Although these funds are available for small business UST owners, it is our understanding that strict statutory eligibility criteria have greatly limited the ability of small businesses to obtain these loans.

Other funding such as the Emergency, Abandoned or Recalcitrant (EAR) Account is available to local agencies and RWQCBs to remediate abandoned contaminated petroleum sites. These funds may also be used if responsible parties of contaminated sites are not cooperating with cleanup directives from regulatory agencies. The EAR Account is administered by the SWRCB, UST Cleanup Fund Program.

Recommendation – UST Program Funding:

5. The SWRCB should consider seeking and obtaining additional resources for the UST Program:
 - Expand the categories of USTs that qualify for cleanup and removal funds including the RUST Program, EAR Account, and other resources.
 - Evaluate possible funding sources including grants to fund local UST prosecutors.

Finding - State Oversight:

The Non-Upgraded Tank Workgroup recommended developing a state oversight function that would provide additional options to increase prompt closure of non-upgraded USTs. About half of those responding to the Panel's survey, supported the development of a state oversight option to encourage recalcitrant tank owners to increase prompt closure of non-upgraded UST sites. One of the Panel's survey questions asked those local agencies whose management supported the

state oversight function whether they preferred SWRCB or RWQCB oversight. Most survey respondents preferred SWRCB rather than RWQCB oversight for statewide consistency and because it is the SWRCB that has the statutory authority for and experience in the leak prevention program.

Recommendation - State Oversight:

6. The SWRCB should consider exploring the possibility of statutory change to provide the SWRCB with independent enforcement authority to enforce leak prevention laws and regulations.

Finding – Databases:

Currently, a number of different databases are used within the CUPAs, PAs and local agencies to enter UST enforcement data. In order to allow statewide analysis of UST enforcement information and to improve local tracking of enforcement activities, the use of a single statewide database should be evaluated. In addition, a single database system may provide better access to the public.

Recommendation – Databases:

7. The SWRCB should consider recommending continued efforts to interlink and improve compatibility of statewide databases, such as the Unified Program database (under development), GeoTracker, SWIM II (under development), etc. to track violations and other enforcement data.

Finding – Tank Tester License Fraud Procedures:

Unlicensed tank testers and related fraudulent activities are significant UST enforcement issues. Conducting adequate tank and line tests is crucial in evaluating the integrity of the UST systems to protect human health and the environment. However, program procedures have not been articulated. Therefore, procedures should be developed and implemented to ensure that the SWRCB's tank tester licensing program is enforced to protect human health and the environment.

Recommendations – Tank Tester License Fraud Procedures:

8. The SWRCB should develop procedures for taking enforcement actions against those tank testers who conduct fraudulent activities.
9. The SWRCB should consider increasing its enforcement efforts against violators of tank testing requirements pursuant to H&SC Section 25284.4 and California Code of Regulations (CCR) Title 23 Section 2773.

Finding – CUPA Evaluations:

Timely and improved CUPA evaluations would assist enforcement efforts and are necessary for the continued success of the Unified Program. Uniformity in the guidelines and approach by the evaluation teams are key to ensuring statewide consistency in CUPA and PA enforcement approaches. It is also critical that the results of these triennial evaluations be reported to the individual CUPAs expeditiously so that CUPAs can implement needed improvements as soon as possible.

Recommendation – CUPA Evaluations:

10. Cal/EPA and the SWRCB, in cooperation with local agencies, should continue working to expedite and improve the CUPA evaluation process.

Finding – Cleanup Enforcement:

Based on H&SC Section 25284.1(a), this Panel has limited its review to the UST leak prevention program. However, many findings and recommendations of this report have parallels in the UST cleanup program. The Panel believes there are enforcement issues that should be studied in the UST cleanup program.

Recommendation – Cleanup Enforcement:

11. The SWRCB should consider convening a UST Cleanup Enforcement Roundtable to discuss enforcement issues. The Roundtable should include representatives from DAs, city attorneys, Cal/EPA, RWQCBs, CUPAs, PAs, local agencies, and the AG's office. The Roundtable should identify whether any further steps are necessary to improve UST cleanup enforcement.

Finding – SWRCB Funding:

The Panel expects that some of the recommended tasks for SWRCB will require additional staffing. For example, for SWRCB oversight, the Non-Upgraded Tank Workgroup indicated additional SWRCB staffing resources needs might be “medium to high.”

Recommendation– SWRCB Funding:

12. The SWRCB should consider implementing the Panel's recommendations that will not require additional resources. The SWRCB should consider requesting increased staff for UST enforcement, as needed, to implement the Panel's recommendations requiring additional resources.