
THE UST PIPELINE

News from the Petroleum UST Release Compensation Board

James R. Rocco, Chairman

Starr J. Richmond, Executive Director

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Know Your Subrogation Rights & Responsibilities

When a third party, such as a contractor performing work on an underground storage tank (UST) system, causes or contributes to a release of petroleum, you, as the tank owner, are entitled to seek reimbursement from that third party for any costs you incur for lost business, bodily injury, property damage, and cleanup of the release. If you are eligible to claim reimbursement for the corrective action costs under the Fund, the Board has the statutory right to recover any costs that have been or will be reimbursed to you out of the Fund. This is known as the Board's right to subrogation.

To protect the monies available in the Fund for reimbursement to Ohio's owners, the Board's rule 3737-1-22 lays out the tank owner's responsibility in the subrogation process. This rule requires the responsible person (RP), i.e. the owner or operator, at the time of the release to:

- notify the Board in writing *within 30 days* of a third party causing or contributing to the release from an assured UST system; and
- provide reasonable advance notification to the Board of any and all settlement meetings.

Further, the rule requires the RP to notify the third party that:

- the Board has a right of subrogation pursuant to Ohio Revised Code 3737.92(I) and it may assert this right by written correspondence with the RP, the third party or its legal representatives, or institute and pursue legal proceedings against the third party independently or in conjunction with the RP;
- no settlement, compromise, judgment, award, or other recovery in any action or claim by the RP is binding on the Board;
- any settlement, compromise, judgment, award, or other recovery in favor of the RP does not preclude the Board from enforcing its subrogation rights against the third party; and
- attorney fees, court costs or other litigation costs cannot be assessed against the Board for enforcing its subrogation rights.

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Annual Per-Tank Fees and Applications Due July 1



Annual fee statements were recently mailed to all tank owners. The mailing included the application for a Certificate of Coverage, the listing of existing facilities and a new facilities page, instructions and voluntary survey. This year, the mailing also included a checklist to assist owners with verifying the fee statement is fully completed before returning it to the Board. The fee statement must be fully completed by signing the Certification of Compliance, selecting a financial responsibility mechanism and having the statement notarized, if applicable, as well as documenting any changes in the number of tanks.

The completed fee statement and annual per-tank fees, which have remained at \$600 per tank for coverage at the standard \$55,000 deductible and \$800 per tank for coverage at the \$11,000 reduced deductible, are due by July 1. The incoming fee statements and payments are reviewed on a first-come, first-served basis. The review process includes ensuring the owner or operator paid all outstanding fees, submitted a fully completed fee statement, and received a Certificate of Coverage in at least one of the prior two fiscal years. If these requirements are met, a 2012 Certificate of Coverage is issued.

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Subrogation Rights & Responsibilities

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If the RP impairs the Board's ability to subrogate against the third party that caused or contributed to the release or otherwise fails to comply with the rule, a minimum reduction of 50% of the eligible corrective action and/or third party claim costs will be withheld from the Fund's reimbursement to the RP.

By way of example, in February 2009, a contractor improperly installed a submersible pump element on an owner's UST system. Two weeks after the installation, the owner found fuel in the submerged turbine pump sump area and reported a release to BUSTR within 24 hours. Within 30 days of discovery, the owner notified the Board that a third party caused or contributed to the release and notified the contractor of the Board's right of subrogation.

Eligibility to receive reimbursement from the Fund for the costs to clean up the release was granted to



the owner and the owner began to submit claims to the Board.

After several discussions with the owner, contractor, and the contractor's insurer, the insurer agreed to settle the owner's costs for lost business and other expenses, as well as the costs paid and anticipated to be paid to the owner out of the Fund to clean up the release. At the time of the settlement, the Fund had reimbursed the owner over \$250,000 and the total cost of the release, including lost business and corrective action, is expected to exceed \$600,000.

The Board has a fiduciary duty to ensure monies paid out of the Fund are used in accordance with Ohio law and to take every action necessary to maintain the solvency of the Fund. The Board does this, in part, by exercising its right to recover monies from third parties that cause or contribute to releases from assured petroleum USTs. Since the Fund is financed only by per-tank fees, the monies in the Fund must be used wisely to ensure the annual fees remain affordable and monies are available to Ohio's owners when the need arises.

Annual Fees

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If the requirements for the issuance of a Certificate of Coverage are not met, a Notice of Pending Denial is issued to the tank owner and the owner is given 30 days to correct any deficiencies. Once all deficiencies are corrected, a Certificate of Coverage is issued. The effective date of the Certificate of Coverage will be the date payment was received by the Board.

If the owner does not respond to the Notice, a Determination to Deny a Certificate of Coverage is issued. If the owner corrects the deficiencies after the Determination is mailed, the effective date of the Certificate of Coverage will be the date the correcting information is received by the Board.

Non-Payment of Fees

Owners who do not pay the annual fees by July 1 are issued a Notification of Non-Compliance. If payment is not received within 30 days of this notice, an Order Pursuant to Law, which requires immediate payment and assesses an additional late payment fee of up to \$1,000 per tank, is issued. If the fees remain unpaid, the account is certified to the Attorney General's Office (AGO) for collection. Currently, the AGO charges a 10% collection fee on all amounts collected. If an owner fails to remit the fees to the AGO, the account is assigned to an independent attorney, known as Special Counsel, who charges a 33 1/3% collection fee in addition to the AGO's 10% collection fee. All collection costs are passed on to the tank owner. Owners may contact the Board's office at any time to resolve outstanding fees.

Cost Pre-Approval Reminder

Over two years ago, the Board eliminated the mandatory cost pre-approval requirement for Tier 2 fate and transport model calibration plans, Tier 3 evaluation plans, and monitoring plans where the cost of the pending activities is estimated to be less than \$6,000. Additionally, revised estimated cost and completion schedules for corrective actions requiring mandatory cost pre-approval must *only* be submitted when the actual costs will exceed the previously pre-approved amount by 20% or \$6,000, whichever is less. Although no longer required, a number of owners and consultants continue to submit these types of requests.

The purpose of these changes to the Board's rules was two-fold. First, they reduce the pre-approval requirements for Ohio's owners and allow the subject corrective action activities to continue without delay. Second, if fully implemented, they reduce the staff's workload, thereby allowing more time for the review and settlement of claims submitted for reimbursement. Unfortunately, due to the number of cost pre-approval requests still being submitted for the subject activities, the staff has not fully realized the anticipated amount of time savings.

For additional assistance in determining whether cost pre-approval is required, go to Ohio Administrative Code 3737-1-12.1 at <http://codes.ohio.gov/oac/3737-1-12.1> or see the insert in the September 2009 UST Pipeline at <http://petroboard.org/Pdfs/Sept2009Insert.pdf>.

BUSTR Operator Training

Pursuant to the Bureau of Underground Storage Tank Regulations' (BUSTR) new rules, effective May 16, 2011, *all* tank owners and operators must designate and train Class A, Class B and Class C operators for each of their UST sites by August 8, 2012.

Refer to BUSTR's website at <http://www.com.ohio.gov/fire/bustMain.aspx> for information on licensed private instructors and training dates.



FAQs Regarding the Eligibility & Claims Processes

Q: I suspect that I've had a release of petroleum from my underground storage tank. What should I do?

A: Contact the State Fire Marshal's Bureau of Underground Storage Tank Regulations (BUSTR) at 614-752-7938 or 800-686-2878 and report the release within 24 hours. BUSTR will instruct you on how to proceed with the clean up (also called corrective action).

Q: How do I receive reimbursement from the Financial Assurance Fund (Fund)?

A: The first (and most important) step in the reimbursement process is to submit a completed Application for Eligibility to the Board within one year from the date the suspected release or release,

whichever is first, was required to be reported to BUSTR. The application and supporting documentation will be reviewed and you will receive a determination of your eligibility to file claims for the reimbursement of corrective action costs. The Application can be found on the Board's website at <http://petroboard.org/Pdfs/EligibilityApplication.pdf>.

Q: What is required to be granted eligibility to claim against the Fund?

A: In addition to timely submitting an Application for Eligibility, tank owners must meet the following requirements at the time of the release to be granted eligibility to claim against the Fund:

- possess a valid Certificate of Coverage for the UST from which the release occurred;
- ensure the UST system is in compliance with BUSTR's rules for UST systems;
- demonstrate financial responsibility for the deductible amount of coverage with the Fund; and
- report the release to BUSTR within 24 hours.

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Eligibility/Claims Processes

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Q: I was denied eligibility to claim against the Fund. What do I do now?

A: A tank owner may appeal the determination of eligibility within 30 days of the determination. If an appeal is filed, the Board will appoint a referee and an adjudication hearing will be scheduled in accordance with Ohio Revised Code 119.09.

Q: I was granted eligibility to file claims for reimbursement. What should I do now?

A: You may begin to immediately submit claims for reimbursement. The Claim Reimbursement Application is available on the Board's website at <http://petroboard.org/Pdfs/ClaimApplication2007.pdf>. In general, costs for reimbursement must be submitted to the Board within one year from the program task completion date. The program tasks and completion dates are defined within Ohio Administrative Code 3737-1-12. Additional information regarding the claim filing deadlines is available on the Board's website at <http://petroboard.org/Pdfs/ClaimFilingDeadlines.pdf>.

Q: How long does it take to receive payment for a claim?

A: Currently, the response time between receipt of a claim application and payment averages 340 days.

Q: Is there any way to get the claim reviewed sooner if I can't afford to wait for payment?

A: Yes, you may apply for hardship status with the Board. To be granted hardship status, you must have been granted eligibility to claim against the Fund, and complete a Hardship Status application

and submit financial data demonstrating financial difficulty. In addition, you must submit two years of federal personal tax returns and/or the federal tax returns of the corporation, partnership or company. If you are granted hardship status, the review and, if appropriate, payment of your claim will be expedited for one year. You must reapply each year to continue your hardship status. The Hardship Status Application is available on the Board's website at <http://petroboard.org/Pdfs/HardshipApplication.pdf>.

Q: How much coverage does the Financial Assurance Fund provide?

A: The Fund will reimburse reasonable and necessary corrective action costs up to \$1 million minus the deductible amount (\$11,000 or \$55,000, depending on the owner's Fund coverage).

Q: I bought a property on which a release was discovered before I bought it. The responsible person was granted eligibility to claim against the Fund. Can I take over the cleanup?

A: Yes. The responsible person (RP), i.e., the owner or operator, at the time of the release can submit a Limited Power of Attorney (PoA) for Signature Delegation, which will allow the RP to authorize the new owner, as an attorney-in-fact, to file forms with the Board. This PoA allows the new owner to sign claim reimbursement and cost pre-approval applications, certification affidavits, and direct payment authorizations on behalf of the RP. The PoA does not limit the liability of the RP and does not grant standing to the new owner to appeal any order or determination of the Fund's director. This right resides solely with the RP.

The PoA is available on the Board's website at <http://petroboard.org/Pdfs/SignatureDelegation.pdf>.

If you have any questions regarding the eligibility or claims processes, call the Board's office at 614-752-8963 or 800-224-4659 (Ohio only).

Unclaimed Monies List

The Board's staff identifies and tracks owners and operators who may be entitled to a refund of fees. If attempts to contact the owner are unsuccessful, the owner's name is added to an Unclaimed Monies List, which is included with this newsletter. If you or someone you know is on this list, please contact Krista Nichols at 614-752-8963 or 800-224-4659 (Ohio only) for information on how to claim the refund. You may also check the Unclaimed Monies List on the Board's website at <http://www.petroboard.org/unclaimed.htm>.