



# Availability of the Colorado UST Fund To Property Owners and Mortgagees

by Rachel A. Yates

In the 1993 legislative session, the General Assembly significantly amended the Colorado Underground Storage Tank Acts, CRS § 8-20-501 *et seq.* and CRS § 25-8-101 *et seq.* ("UST Act"), by directing the Underground Storage Tank Advisory Committee ("UST Advisory Committee") to make the Underground Storage Tank Fund ("UST Fund") available to certain "innocent" tank owners and operators and mortgagees.<sup>1</sup> The amendments also changed the methods by which tank owners and operators make use of state money for reimbursement of petroleum contamination cleanup costs.<sup>2</sup>

More particularly, House Bill ("H.B.") 1165 required the Oil Inspection Section of the Department of Labor and Employment ("OIS") to create a system of percentage reductions for tank owners and operators who are not in compliance with the underground storage tank rules and regulations.<sup>3</sup> The OIS proposed, and the UST Advisory Committee adopted, the rules for percentage reductions on October 1, 1993.<sup>4</sup>

This article discusses the eligibility requirements for landowners and mortgagees who wish to seek reimbursement from the UST Fund. The article also covers the guidelines for percentage reductions for applicants that have not complied with all of the Act's requirements.

## Prior Practice Under UST Act

The OIS and the Colorado Department of Health ("CDH") have concurrent ju-

risdiction over registration, monitoring, release, reporting and remediation of underground storage tanks and petroleum-contaminated properties.<sup>5</sup> When a tank owner or operator discovers a petroleum release or contamination, it has immediate regulatory reporting and corrective action obligations.<sup>6</sup>

Because corrective action plans for remediation of petroleum contamination can be costly and of long duration, tank owners and operators may have financial difficulty paying for a complete site remediation. The UST Fund was established to reimburse tank owners and operators for these remediation costs so that the public health and environment are protected by prompt remediation.<sup>7</sup>

Prior to H.B. 1165, the tank owner or operator could apply for reimbursement only after payment of a substantial deductible and only if it had complied in all respects with the UST rules and regulations.<sup>8</sup> As applicants encountered, it could be difficult to show entitlement to UST Fund monies if the applicant had been unable to comply with all of the requirements for tank registration and maintenance. For example, if the present landowner was not the tank owner, UST Fund resources technically were not available.<sup>9</sup>

## Innocent Landowner Exception

Under H.B. 1165, as enacted, a current property owner who bears no responsibility for the release may request reimbursement for cleanup costs from the UST Fund without proving compliance with the regulatory requirements for tank owners or operators.<sup>10</sup> In addition, the UST Fund is now available to such an

entity without payment of a deductible.<sup>11</sup> H.B. 1165 also allows an "innocent" property owner to have property remediated directly from the Fund by the CDH, rather than pay the costs up front and then seek reimbursement.<sup>12</sup>

H.B. 1165 defines three categories of "innocent landowners": (1) the property owner who has never operated underground storage tanks at the property where the release occurred, provided the property was acquired before June 3, 1992, and the property owner had no reason to know that a release had occurred; (2) where an orphaned or abandoned tank is involved and the current owner, operator or property owner has never operated the tank and had no reason to know that a release had occurred; or (3) a current owner or operator of tanks if, at the time the owner or operator acquired the tanks, the owner or operator had no reason to know that a release had already occurred, if such owner or operator has operated the tanks in accordance with the Underground Storage Tank Act, and if the release was detected on or before December 22, 1998.<sup>13</sup>

H.B. 1165 also makes special provision for mortgagees and debt holders who acquire contaminated property after January 1, 1993, allowing them to seek reimbursement from the UST Fund without payment of a deductible.<sup>14</sup> In essence, it includes the owners of such equitable interests in the same group as other "innocent" landowners.

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*Column Ed.: Mickey N. Conrad of the City of Longmont—(303) 651-8619*

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*This month's column was written by Rachel A. Yates, Denver, an associate with Holland & Hart, (303) 290-1600.*

Applications from innocent landowners are just beginning to circulate through the reimbursement process. At the UST Advisory Committee meeting held January 7, 1994, the Committee considered several examples in preparation for the expected onslaught of applications.<sup>15</sup> The Committee will be looking closely at whether the property owner knew about the tanks and when the release was discovered.<sup>16</sup>

On January 21, 1994, the Committee considered the first application from an innocent landowner.<sup>17</sup> The applicant had purchased property subject to an existing lease with an oil company. When contamination was discovered in 1989, the landowner sought reimbursement for cleanup costs. As the landowner was not the tank owner or operator, the application was denied. The landowner subsequently took over the operation of the tanks and leased them to a new tenant.

Following the enactment of H.B. 1165, the applicant reapplied for reimbursement under the innocent landowner exception. The UST Advisory Committee determined that by releasing the equipment, the applicant had become a tank owner or operator and presumably no longer qualified as an innocent landowner. However, because the original application predated the lease of the tanks, the UST Advisory Committee approved the application without payment of the deductible and without percentage reduction.

This single case shows how factually complex application of H.B. 1165 is expected to be. It also should make innocent landowners wary of taking steps that might be the equivalent of tank ownership or operation. Given the UST Advisory Committee's decision, an innocent landowner might unknowingly destroy its eligibility for reimbursement.

### Percentage Reductions for Noncompliance

The recent amendments to the UST Act also required the OIS to develop a system for percentage reductions for reimbursement applications that reflect noncompliance with the UST Act.<sup>18</sup> On October 1, 1993, the UST Advisory Committee approved the proposed rules from the Oil Inspector's Office.<sup>19</sup> Under the rules, the UST Advisory Committee will determine whether and by how much a requested reimbursement amount should be reduced because of the applicant's violation of the UST Act. "Inno-

cent" landowners and mortgagees are not subject to these reductions.

Violations are grouped into four categories: registration, release detection, release reporting and tank closure.<sup>20</sup> Each of these categories is subject to a total combined percentage reduction. All registration violations combined may not exceed a 10 percent reduction in the reimbursement amount. For release detection, the total reduction may not exceed 25 percent. Release reporting has a 10 percent total reduction percentage; tank closure has a 20 percent total reduction percentage.<sup>21</sup> As an example of how this system works, the UST Advisory Committee might reduce a reimbursement amount by 10 percent if the applicant failed to register a tank or by 35 percent if the applicant also failed to install the necessary release detection equipment.

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H.B. 1165 further provides that the UST Advisory Committee is not required to approve any application for reimbursement involving substantial noncompliance.<sup>22</sup> The Committee established specific criteria for when it may deny reimbursement for substantial noncompliance.<sup>23</sup>

A finding of substantial noncompliance for an application would result from any one of the following combinations of circumstances:

- 1) a maximum (25 percent) reduction in release detection plus a maximum (20 percent) reduction in closure;
- 2) a maximum (25 percent) reduction in release detection plus a maximum (10 percent) reduction in registration plus a maximum (10 percent) reduction in release reporting; and
- 3) a maximum (20 percent) reduction in closure plus a maximum (10 percent) reduction in registration plus a maximum reduction (10 percent) in release reporting.<sup>24</sup>

While the UST Advisory Committee is willing to approve applications for reimbursement subject to some percentage reduction for past noncompliance, it is not willing to allow continued noncompliance with the Act.<sup>25</sup> Thus, the application of any owner or operator who has not brought the facility into compliance with the UST Act after the contamination occurred is not likely to be approved. Any application received for a site that is not currently in compliance with CDH regulations will be tabled until the applicant has satisfactorily come back into compliance with the technical portion of the regulations.<sup>26</sup>

The UST Advisory Committee recently has reduced reimbursement applications following these guidelines.<sup>27</sup> While the Committee is willing to consider equitable factors, such as an applicant's valiant efforts to comply with the UST Act, it has begun to impose such percentage reductions more routinely.<sup>28</sup>

### UST Fund as Alternative To Litigation

Because the UST Fund is now available to certain landowners and mortgagees without payment of a deductible or a showing of regulatory compliance, litigation over remediation costs may become a less desirable option. The Fund is available without a showing of fault or causation—elements which would have to be proved in a lawsuit. More importantly, because of the streamlined process within the CDH, certain claims for reimbursement will be processed and payment received in under forty-five days, much faster than waiting for trial.<sup>29</sup> These recent amendments to the UST Act should encourage property owners and mortgagees to consider using the UST Fund as a preferred alternative to litigation.

### NOTES

1. CRS §§ 8-20-509(3), 8-20-705(3).
2. H.B. 93-1165.
3. CRS § 25-18-105(4)(d)(I).
4. See Minutes of UST Advisory Committee meeting held Oct. 1, 1993. Minutes are available by contacting the Colorado Department of Health, Underground Storage Tank Technical Assistance Division, (303) 692-3330.
5. CRS §§ 8-20-503, 25-18-104 *et seq.*
6. CRS § 8-20-507.
7. For a more complete discussion of the purposes and operation of the Colorado Underground Storage Tank Fund, see Palu and Breggin, "Recovering Underground Storage

Tank Cleanup Costs," 20 *The Colorado Lawyer* 1405 (July 1991).

8. CRS § 25-18-109(4).

9. Prior to July 1993, the Fund was available only to tank owners and operators. 6 C.C.R. 1007-5, § 280-81(a) (1990); CRS § 8-20-50(3) and (5).

10. CRS §§ 8-20-509(3), 8-20-705(3).

11. *Id.*

12. CRS §§ 8-20-509(3.5), 8-20-705(4).

13. CRS §§ 8-20-509(3), 8-20-705(3).

14. CRS §§ 8-20-509(3)(d) and (e), 8-20-705(3)(d) and (e).

15. See Minutes of UST Advisory Committee meeting held Jan. 7, 1994.

16. *Id.*

17. See Minutes of UST Advisory Committee meeting held Jan. 21, 1994, and *Colorado Tank Reporter*, Vol. 1, No. 5 (Jan. 1994). The *Colorado Tank Reporter* is a monthly publication of the Colorado/Wyoming Petroleum Marketers Association.

18. CRS § 25-18-105(4)(d)(I).

19. See Minutes of UST Advisory Committee meeting, *supra*, note 4.

20. Copies of the OIS "Suggested Percentage Reductions of the Reimbursement Amounts for Noncompliance with the UST Rules" are available from the Oil Inspector's Office, (303) 289-5643, or this author.

21. *Id.*; see generally CRS § 25-18-105(4)(d)(I).

22. CRS § 25-18-105(4)(d)(II).

23. *Id.*

24. See note 19, *supra*.

25. See Reimbursement Application Compliance Review guidelines, dated Sept. 1993 and adopted by the UST Advisory Committee on Oct. 1, 1993. Copies of these Guidelines are available from the CDH, (303) 692-3330, or this author.

26. *Id.*

27. See Minutes of UST Advisory Committee meetings held Dec. 3, 1993, and Dec. 17, 1993.

28. *Id.*

29. *Colorado Tank Reporter*, Vol. 1, No. 4 (Dec. 1993).