Leveraging State Funds To Increase Compliance

What Is "Leveraging," And Why Is It A Good Idea?

As the number of leaking underground storage tanks (LUST) sites continues to increase dramatically each year, so does the number of sites making claims against state cleanup funds. Funds soon find themselves facing rapidly depleting resources and the resultant increasing need for a variety of cost control methods. Funds can begin to make a dent in the number of LUST sites and can control costs at the same time by "leveraging" fund eligibility with leak detection compliance.

Using this approach, funds require the owner/operator (O/O) to be in compliance with the UST technical regulations, especially the leak detection requirements. The funds affect the O/O's limits of fund coverage, eligibility, payments, or reimbursements when the O/O is out of compliance. The funds send a "play or pay" message to the O/Os: Be protective of the environment by staying in compliance, or you may end up paying for the cleanup without the fund's help.

Several funds have found that this focus on prevention is a creative and effective means to control costs. By making sure that O/Os protect their tanks, funds may be able either to prevent leaks from occurring in the first place or to detect them earlier (when they have had less time to spread and to create more damage). Early detection of leaks results in fewer or less costly LUST sites. This leads to less draw on the fund's resources.

The Office of Underground Storage Tanks (OUST) of the U.S. Environmental Protection Agency (EPA) works with state underground storage tank (UST) financial assurance funds to help them find ways to increase compliance and to control cleanup costs. This bulletin is intended to explain methods that many states have found to be effective. Funds have found that early detection of leaks potentially results in fewer or less costly leaking UST (LUST) sites. By "leveraging" fund eligibility for increased compliance with the UST technical regulations, several states have successfully used their funds to promote technical compliance, still get sites cleaned up, and control costs at the same time. This bulletin will describe the basics of the leveraging approach that can achieve this level of success. EPA welcomes any suggestions on the leveraging approach or on this bullein and welcomes submissions of creative approaches to leveraging with UST financial assurance funds.

Who Does It?

Most funds have seen the value of the leveraging approach from their inception. All but four funds possess some form of statutory or regulatory authority to affect the limit of fund coverage based on whether the O/O is in compliance. State funds vary in their level of use of this approach, from

< those funds that deem the O/O completely ineligible for the fund when he is in non-compliance, to

< those funds that are required to check for technical compliance but that cannot or do not in practice.

Many funds fall somewhere in between.

Overall, it appears that about 70 percent of the funds use these tool, but not to the full degree allowed. The majority of funds are therefore not making full use of an effective cost control mechanism that might save them dollars in the long run.

What Approaches Can My Fund Take?

While they do not all do so in practice, most funds have the authority to take one or a combination of the following approaches to affect O/Os who are not in compliance with the UST technical regulations.

A. REJECTION OF CLAIM: Over 30 funds are able to reject any claim completely that a non-complying O/O brings to the fund for payment or reimbursement.

Rationale: To provide an incentive to the O/O to be in compliance, the fund lets the O/O know that he needs to be a good actor now and keep his tanks in shape. If the O/O does, the state will be willing to help him out and pay for a cleanup when it becomes necessary. A further incentive is the O/O's potential for additional vulnerability to enforcement: If an O/O's claim is rejected because of non-compliance, the O/O may not have adequate financial responsibility (FR) coverage as required by the federal UST regulations. The O/O is then subject to enforcement for violations of the FR requirements in addition to his technical violations.

Potential Drawbacks: Many O/Os do have some level of non-compliance. If the O/O knows up front that he will not get any help from the fund, this approach may, when taken in isolation, provide a great disincentive either to return to compliance or to clean up a release.

B. REDUCTION IN PAYMENT: About six funds will pay a claim in the event of non-compliance, but they use a variety of approaches to reduce the total amount of payment that the O/O will receive. Typically, the state creates a set of standard reductions for specific types of violations that will be applied to an O/O's claim. For instance, release detection violations may result in a standard 15 percent lower payment than the O/O would otherwise have received for the claim.

Rationale: The O/O has an incentive to be in compliance in order to get full help from the fund when he needs to clean up. Because the O/O knows that he will get at least some money even if he has some violations, the O/O will have less of a disincentive to report releases and begin a cleanup.

Potential Drawbacks: If the reductions are not large enough, they may not serve as a sufficient incentive to gain compliance. If they are too large, they could theoretically serve as a disincentive to clean up. Large reductions have not seemed to have caused such disincentives in practice.

C. ISSUANCE OF FINES: About five funds will pay a claim in the event of non-compliance, but they issue fines to the O/O for any violations of the technical regulations. This fine may be a civil fine associated with the enforcement authorities

in the UST/LUST statute or a separate penalty authority granted directly to the fund.

Rationale: The O/O will have an incentive to clean up because he knows that he will get the entire amount of the cleanup funds to which he is entitled. At the same time, the O/O knows that he will not be off the hook for other problems: he will either pay for those problems through the fines or start to operate properly and keep operating that way.

Potential Drawbacks: Even though the site may be cleaned up, compliance may not be achieved; if the O/O had been in non-compliance for financial reasons, fining him may make it even more difficult to return to compliance. Further, if the fines are too large, they might provide a disincentive for the O/O to report releases in the first place, in the hope that he will neither have to clean up or be fined for non-compliance.

D. LOSS OF COVERAGE: At least two funds refuse all or part of the coverage that would be available to the O/O if he were in compliance.

Rationale: This is similar to "Rejection of Claim" above. In order to provide an incentive to the O/O to be in compliance, the fund lets the O/O know that he needs to be a good actor now and keep his tanks in shape. If he does, the state will be willing to help him out and pay for a cleanup when it becomes necessary.

Potential Drawbacks: If this approach is taken alone, O/Os who are not covered because of violations have no incentive from the fund to return to compliance, no FR mechanism, and no financial incentive to report releases and to clean up sites.

E. COST RECOVERY: One fund pays the claim but threatens cost recovery of the full amount of the cleanup if the O/O is in violation of any of the technical regulations.

Rationale: As in "Issuance of Fines," the O/O will have an incentive to clean up because he knows that he will get the entire amount of the cleanup funds to which he is entitled. At the same time, he knows he will not be off the hook for other problems: he knows that he will have to get in compliance before he has a leak and needs to make a claim because he would owe the fund for the high cost loan of the cleanup dollars if he had not taken the steps to be in compliance before a release occurred. Also, this system would return dollars to the state if these dollars had been spent on an O/O who had been negligent by not being in compliance.

Potential Drawbacks: This approach may still be a disincentive to clean up if the O/O cannot get back in compliance before he has a release or makes a claim, because most O/Os know that they would not be able to refund the cleanup dollars in the event of a cost recovery action.

F. INCREASED DEDUCTIBLE: One fund pays part of the claim but raises the amount of the required deductible in proportion to the level of violation.

Rationale: The increased deductible approach shares essentially the same concept as "Reductions in Payment" above. This approach, however, would result in higher out-of-pocket costs for the O/O than a payment reduction. This fact could contribute to a greater incentive to be in compliance to avoid the need for more up-front financing for the cleanup.

Potential Drawbacks: Rather than providing the intended incentive to be in compliance, the higher out-of-pocket costs also could contribute to a greater disincentive to report releases and clean up if the O/O knows he cannot afford the higher out-of-pocket costs.

G. CONSENT AGREEMENT/ COMPLIANCE SCHEDULE: A few funds pay the claim in the event of non-compliance but mandate compliance by negotiating a consent agreement or compliance schedule under a civil or judicial enforcement authority. The authority may be associated with the enforcement authorities in the UST/LUST statue or regulations or with a separate authority granted directly to the fund.

Rationale: This approach shares essentially the same concept as "Issuance of Fines" above. In addition, the fund sends a strong enforcement message and has an enforceable schedule that can be elevated as necessary to follow through on non-compliance issues.

H. DEFERRAL OF PAYMENT UNTIL COMPLIANT: At least one fund agrees to pay a claim in the event of non-compliance but requires the O/O to return to compliance before the O/O receives payment.

Rationale: As in "Issuance of Fines" above, the O/O knows that he will get the entire amount of cleanup funding eventually, so he will still have an incentive to clean up. At the same time, he knows that he should comply as soon as possible in order to receive his reimbursements for the cleanup.

Potential Drawbacks: If the fund is not a reimbursement program, this approach would have to be conducted in conjunction with enforcement from the UST/LUST programs in order to pressure the O/O to move forward with the cleanup and not just wait out the fund. Even with enforcement, if the O/O had been in non-compliance for financial reasons, he still might not be able to return to compliance and the site cleanup might still be hindered.

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The key is to search for the right combination of approaches. In order to combat most of the potential drawbacks noted above, states use combinations of these methods. Few simply reject a claim. By combining methods, states can achieve the intended effects without as many of the disincentives to comply or to clean up. For example, a fund may use a reduction in payment and require a compliance schedule in order not to reward the O/O for violations, to make sure the O/O returns to compliance, and to make sure the site cleanup is still funded.

Further, in these combinations, funds differ as to whether they allow the O/O to be covered again once the O/O returns to compliance. Some feel that once you're out, you're out–no second chances. When they are well-publicized by using a few example cases, these actions can show the regulated community that the fund is serious and that the O/O will be stuck for the bill if he is negligent. Other funds (more often the case) want to do all they can to encourage compliance but recognize that the sites will not get cleaned up if they do not pay in the end. They believe that an O/O will not go to the trouble of complying if he still will have to pay for his cleanup. If the fund does not pay, the O/O has an incentive neither to comply nor to clean up.

Funds therefore use combinations of approaches to get closer to the desired result. Other actions also have been recommended, as outlined below.

Keys To Success

- Publicize your efforts in order to provide the incentive for O/Os to comply *prior to* their submission of claims. Publicize

actual accounts of what happens to the claims of the bad actors. If the O/O does not fully realize up-front the consequences that his non-compliance will have on his pocketbook (and his legal standing) in the event of a release, leveraging will not have the intended effect. It will just result in a group of recalcitrant O/Os who are surprised to find that their sites are not eligible for the fund and will not get cleaned up. Make sure they know that you are serious. Always follow up on non-compliance issues and make sure everyone knows about it.

- Structure the leveraging approach to provide the highest level of compliance with the fewest disincentives. Two means: Take the leveraging approach in conjunction with another program, or structure the leveraging program itself in creative ways.

    1. Try to take the leveraging approach in conjunction with an "amnesty program," low-interest loan program, or other steps that allow the recalcitrant O/Os to return to compliance prior to a release. Especially when used in combination with the leveraging approach, this might achieve the leak prevention that will lead to fewer sites (better cost control for the fund) without causing the huge disincentive for a large number of O/Os to clean up.

    2. Try to structure the leveraging program so that it does more than simply reject the claim when a recalcitrant O/O is discovered. For instance, some states have tied the leveraging approach to LUST program consent agreements or only pay the claim once the O/O returns to compliance, thus gaining compliance and still getting the sites cleaned up.

    Other states have taken other unique combinations of approaches, some examples of which appear on the last page. If you have found success with additional leverage methods, be sure to share them with us.

- Apply the leveraging approach consistently so that the fund is not seen as being arbitrary and the O/O knows that you are serious about requiring compliance before paying from the fund. Being consistent also means getting all state players on board. If you require compliance but your state fund board, for instance, does not, you will not succeed in making a true impact. Educate others early to get them on board, commit as many authorities and procedures as possible into statute, regulations, or guidance, and stick by your guns.

Can This Really Be Done?

State Accomplishments

Despite these problems and reasons for hesitation, several states have developed creative ways to overcome many barriers and use their funds to promote compliance. A few short examples of the leveraging approaches taken by states follow.

Examples of State Fund Leveraging Approaches		
State	Leveraging Approach	Administered by ....
Kansas	< Consent agreements with penalties to compel compliance prior to making fund payments < Subsequent failutre to comply can cause revocation of consent agreement; state can then cost recover	Kansas Department of Health and Environment
Minnesota	Standard set of reductions in reimbursements, ranging from 5%-50% for specific types of violations	Minnesota Department of Commerce and Minnesota Pollution Control Agency
North Carolina	< Reduction of payment or denial of eligibility for certain violations < Deducible amounts tied to compliance with the 1998 upgrade requirements	North Carolina Department of Environmental Health and Natural Resources
Vermont	< Pays for cleanup but fines non-compliers and requires consent agreement before paying < Alternatively, can cost recover < Has interest-free loan program < Held amnesty program	Vermont Department of Environmental Conservation

Where Can We Exchange Information?

OUST hopes to serve as an information resource for states that leverage their funds to promote compliance with the UST technical regulations. If you would like.....

- to share more information about the leveraging approach that your fund takes, *or*
- to be put in touch with other funds that use an approach that interests you, *or*
- to ask questions or provide comments on any aspect of the leveraging approach or this bulletin....

Please contact:

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EPA would like to provide you with as many additional details as possible about various unique and effective leveraging programs and the methods that states have used to overcome any barriers associated with them. Please feel free to share information about your leveraging approach at any time by contacting us as listed above. Your continued support will provide useful tools and information for you and your peers.