

**STATE PETROLEUM BOARD TO REVIEW CLAIMS
BOARD MEETING MINUTES
September 18, 2002**

Note: This meeting was recorded on a Verbatim CD using a computer program called FTS Player Plus. A copy of the CD from this Board meeting can be obtained by contacting Karen Fleming, NDEP, 333 W. Nye Lane, Room 206, Carson City, Nevada 89706-0851 or by calling (775) 687-9367.

CALL TO ORDER

Mr. John Haycock, Chairman, called the meeting to order at 10:00 a.m. The meeting was held at the Legislative Counsel Bureau, Room 4401, Grant Sawyer Building, 555 E. Washington Ave., Las Vegas, Nevada 89101.

BOARD MEMBERS PRESENT

John Haycock, Chairman, Joanne Blystone, Linda Bowman, Mike Miller, Allen Biaggi, Karen Winchell.

BOARD MEMBERS ABSENT

Mike Dzyak, Fire Marshall's Office

STAFF PRESENT

Gil Cerruti, Doug Zimmerman, Bennett Kottler, Karen Fleming, Todd Croft, Sara Piper, Shannon Harbour and Susan Gray (Legal Representative to the Board).

I. APPROVAL OF THE AGENDA

Mr. Haycock began the meeting by calling upon the Board to approve the agenda. Mr. Gil Cerruti informed the Board that there was a change to the agenda. Under agenda Item Number IV, "Old Cases", Item Number 88 -

Case No. 99-219, Lake Tahoe Oil, has been changed to a non-consent item. The agenda was unanimously approved with the exception of Item Number 88 - Case No. 99-219, Lake Tahoe Oil.

II. MINUTES

Mr. Haycock requested the Board's approval of the minutes from the June 11, 2002 Board meeting. The minutes were unanimously approved.

III. STATUS OF THE FUND STATEMENT

Mr. Gil Cerruti introduced NDEP staff in attendance at the meeting including the newest Board member, Karen Winchell, from the Department of Motor Vehicles. Mr. Cerruti mentioned that Mr. Bennett Kottler of the Carson City office would be giving a presentation later on in the meeting. Mr. Cerruti then presented the Status of the Fund Statement (See Attachment A). Forwarded from the previous fiscal year, (FY2001) is \$4 million. So far, \$416,000 has been collected from the \$100 dollar tank fee and \$11.5 million has been collected from the Petroleum Fuel fee. The total expenditures are \$7.6 million of which \$7 million are for reimbursement of Petroleum Fund claims. The current liabilities amount to \$400,000 for a total liability of \$8 million. Subtracting that from the total revenue leaves \$8.3 million dollars available. Mr. Cerruti further stated that recommendation for claims for this meeting totaled \$1.6 million, which will be paid in full based on the Fund balance.

IV. DETERMINATION OF FUND COVERAGE

IV.A. Resolution to Reduce Petroleum Fund Coverage for the Beatty General Store, Highway 95, Beatty, Nevada. Petroleum Fund Case #99-237 - Resolution No. 2002-01:

Mr. Cerruti informed the Board of a correction to this resolution. He stated that in the discussion of this item, under the second paragraph, there was an inaccurate date. The date should state April 27, 2001 instead of September 1999. Mr. Cerruti stated tank #1 was enrolled in the Petroleum Fund for FY 2001 & 2002. On March 25, 2002 soil samples revealed contamination at tank #1 (a gasoline tank). A tank tightness test was performed on tank #1 on May 24, 2002, which failed so the tank was taken out of service. Our records indicate that in December 1999, February 2000 and October of 2000 tank system #1 failed the SIR tests. These failures were not reported as required by 40 CFR 280.50 but were determined from an NDEP inspection performed in April 2001. Additionally, the annual automatic line leak detector testing had not been done as required by 40 CFR 280.44. It was recommended to perform a tank tightness test on tank #2, which was suspected to also have a leak. Tank #2 was installed about the same time as tank #1. Upon testing tank #2 it was determined that there was a leak, but since then tank #2 has been repaired and is now in service. Mr. Cerruti stated that Resolution 94-023 stipulates NDEP recommend a 40% reduction for any case determined to be non-compliant with the Leaking Underground Storage Tank Regulations and a 20% reduction for any case determined to be non-compliant with the Underground Storage Tank Regulations. Mr. Cerruti stated that the resolutions the Board passes have the effect of law and he requested that the Board get an interpretation of that. Mr. Cerruti maintained that NDEP staff recommends a 40% reduction in reimbursement for the Beatty General Store. Ms. Linda Bowman asked if there had been any enforcement action taken by an inspector. Mr. Cerruti stated that NDEP was not notified of anything. Mr. Cerruti replied that a letter from NDEP was sent out which led to the testing. Ms. Bowman asked if the testing took place in March of 2002. Mr. Cerruti replied that the latest test was performed on May 24, 2001.

Mr. Haycock called on Mr. Scott McNulty to speak on behalf of the Beatty General Store. Mr. Scott McNulty, a Certified Environmental Manager, with Broadbent and Associates stated that NDEP staff was correct in recommending a 40% reduction. However, the Board has the right to adjust staff's recommendations based on the facts of the case. Mr. McNulty distributed a packet of information to the Board members and staff explaining the circumstances and facts involved with this case. Mr. McNulty stated that Mr. Matheny, the previous operator of the Beatty General Store, had operated the tank systems for fifteen years. In December of 1999, in accordance with the 1998 underground storage tank requirements for UST's, Mr. Matheny had brought in an engineer to do an assessment of the tanks. The engineer's report stated that cathodic protection was a viable means to achieve compliance. The tanks were then operated for a year without any problems. The first failed SIR (Statistical Inventory Reconciliation) was in December 1999. Mr. McNulty referred the Board to the letter on page 2, submitted by the Verde Company. The Verde Company was the entity performing the statistical analysis (SIR). There was nothing in the letter from The Verde Company stating that the failed SIR be reported to NDEP. Mr. McNulty stated this was not an excuse for Mr. Matheny not reporting the failed test, however, the Verde Company was not necessarily obligated to notify Mr. Matheny of the requirement to report the failed tests. Mr. Matheny did not know that reporting failures was a requirement and the letter from the Verde Company did not assist in that process. The operator should know the rules and regulations of the system, but Mr. Matheny did not do that. In January 2000, Mr. Matheny re-submitted January's SIR documentation, and then received a passed SIR result so he assumed the problem was solved. Then in February 2000 there was a second failed SIR test. A resubmittal of delivery date documentation and the SIR was redone and that one had passed. Mr. Matheny did not submit the failed SIR. In the following 7 months April through September, there had been passing SIR results. Therefore, Mr. Matheny did not think there was a problem. The level of product in the tank was the same over the time period. In October 2000 there was a second failed SIR and the next month it passed. Mr. Matheny was still not aware there was a

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problem. Mr. Bill Micklish of NDEP inspected the facility and requested to see the records. Mr. Matheny showed Mr. Micklish all of the records along with the previous failed SIR test records. Mr. McNulty stated that this is not a case where Mr. Matheny was trying to hide anything or cover up a release. Once Mr. Micklish realized the test failures had not been reported, he notified Mr. Matheny of this. It was requested to have a tank tightness test done and that was complied with in May 2001. That tank tightness test failed, so the tank was taken out of service. In addition, a line tightness test was then done which passed. Mr. McNulty stated that staff has recommended that in addition to the 40% reduction that there be a 20% reduction based on the fact that annual line testing was not conducted. In 2001 and 2002 the test on the lines passed and there is no release based on the lines. Mr. McNulty stated that there was poor record keeping and the operator was not paying close attention to the facility. One reason may have been that Mr. Matheny was diagnosed with cancer and was dying during that time. Operating the tanks may not have been something he had on his mind. Mr. McNulty emphasized again that this is certainly not an excuse and that Mr. Matheny should have kept the records up and reported the failed tests. Mr. McNulty stated that Mr. Matheny had passed away in December 2001. In January 2002, Mrs. Patty Matheny had just recently taken over operation of the facility. Mrs. Matheny and Mr. Matheny were married just prior to his death. In March 2002, Broadbent and Associates conducted a site characterization and installed a well. An application to the Petroleum Fund was submitted. From June 2002 through September 2002, there have been additional characterizations done as requested by NDEP. All of NDEP's requests have been accomplished and things are moving forward. Mr. McNulty referred the Board and staff to the handout for the results of the characterization as shown on pages 7 and 8. Ms. Bowman asked if the reason for this was to show that the delay in time did not exacerbate the problem. Mr. McNulty stated further that five monitoring wells were installed, groundwater samples collected and a soil/gas survey was done. Groundwater velocities were done based on soil characteristics. Significant contaminant migration has not occurred at this facility and there has not been any free product discovered in any of the monitoring wells. Mr. McNulty stated that there were no added costs to the remediation. The estimated groundwater flow velocity is 0.25 feet per day, which is 128 feet of down gradient migration from the time of the initial SIR failure until the tanks were taken out of service. Mr. McNulty stated the SIR results indicated a one-time, potentially two-time release of product slug. The tanks extend beneath the building. The tanks were installed in 1968 and the building was expanded over the tanks. Mr. McNulty explained that the tanks couldn't be pulled as he has tried to find a contractor to pull the tanks but no one wants to do it because of the liabilities involved. Pulling the tanks is not a practical remedial option at this point. Remediation is being performed using wells down gradient and around the excavation area. Ms. Bowman asked why the tanks were not taken out of service sooner. The SIR results indicate that the release may have happened in December 1999 or October 2000, one or both could have been a one-time or two-time release. Mr. Haycock inquired as to how the slug releases could have happened. Mr. Cerruti explained that the SIR tests leave some degree of tolerance and deviation in the results and when you get a result such as that, it is a call to action to perform a more refined test on the tank. It could be possible in this case that there was a leak in the top 10 percent of the tank that only leaked resulting from a delivery that brought the level higher. The tank would not leak most of the time because it was not filled to the 5 or 10 percent of the tank. Mr. Cerruti stated there is no evidence of that other than the slug releases. This is an explanation of how a one time or two-time leak could happen. The purpose of the SIR test is not to see if you get a few passed tests, the prudent thing to do would be to go to the next level of testing to establish that the tank does not leak. Mr. McNulty stated that he does not know for sure why there was a release. The plume has moved from under the building out into the open area, which makes it more accessible. Ms. Bowman stated that there would be less to deal with if the tank had been taken out of service. Mr. Haycock discussed the dates that the SIR tests were performed and wanted to know Mr. McNulty's speculation as to how the leaks could possibly have been caused. Mr. McNulty stated that it appears there was a slug release and since the tanks can't be pulled to determine if there is a hole then an acoustical extraction test was performed. A man from Arizona was hired to perform the acoustical extraction test. The extraction test works by dropping a microphone down through the

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tank in order to determine where the hole is by listening for a vacuum or suction sound. Mr. McNulty stated that he was told there was definitely a hole in the tank but it was still inconclusive as to where the hole was located. Mr. McNulty stated that Mr. Ralph Lyles, the owner of the facility was not able to be at this meeting, as he is suffering from Alzheimer's. Mr. Lyles is going to be going to be put into a "home" some time soon. Mr. McNulty stated that John and Jim Lyles were in attendance at the meeting in the audience and they have been involved in getting this case resolved. Mr. Haycock inquired as to when Mr. Matheny's cancer had been diagnosed. Mr. McNulty replied that Mr. Matheny had been diagnosed with cancer for years, though it became much worse in the last months of his life. Mr. Biaggi wanted to know what the depth of the groundwater was at the site. Mr. McNulty replied that it was 13 or 14 feet. Mr. Biaggi asked NDEP staff what prompted the inspection by Mr. Micklish. Mr. Cerruti replied that there is an inspection schedule set up to inspect all of the sites in the state on a regular basis which means facilities are being inspected about once every two years. Mr. Cerruti stated that he was not sure why The Beatty Store was chosen other than just being part of the normal inspection schedule. Mr. Biaggi stated that he was having a hard time believing that these were just slug releases. Mr. McNulty replied that he did not understand the process and how that could have happened other than operator error and poor record keeping. Ms. Bowman asked if these tanks met the 1998 deadline. Mr. Cerruti replied, yes, with the corrosion protection installed. It was concluded that the tanks were allowably leaking even though they passed the SIR test. The fact that there is a plume indicates that there was a leak of some kind. Mr. Haycock stated that he had sympathy for Mr. Matheny's dilemma and asked, however, with being diagnosed with cancer, was he really fit to take on the responsibility of operating a store where underground storage was part of his duties? Ms. Bowman asked Ms. Susan Gray to clarify legally what the Board is able or unable to do in regards to the resolution.

Verbatim of Ms. Susan Gray's statement:

Ms. Gray: "Mr. McNulty is correct when he said that the staff has an obligation based on your Resolution 94-023 to present this claim with the forty percent reduction. However, in that Resolution it does say that the board reserves the right to adjust each staff's recommendation based upon the facts of each case. So if the board finds that the facts of this case - if the situation warrants a reduction of that forty percent - they have the discretion to do so (meaning to adjust staff's recommendation). However, whenever a board has discretion, I always caution that your discretion should be applied consistently and fairly for each claimant."

Mr. Haycock asked if there were any more comments from the Board. Mr. Haycock stated that an adjustment to the reduction is in order. Ms. Bowman made a motion to approve the resolution, but to reduce the reduction in coverage to ten percent instead of forty percent. Ms. Bowman explained that her reasoning was based on the facts of the case and based on the violations. It was proposed that a ten percent reduction be implemented instead of the forty percent. Mr. Haycock stated there were no further comments from the board. The motion was carried unanimously.

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West Charleston Blvd., Las Vegas, Nevada. Petroleum Fund Case #96-064 – Resolution No. 2002-02:

Mr. Cerruti stated that the subject site owned by Mr. Allen Esslinger had two documented releases of petroleum hydrocarbons from the underground storage tank system located at the property. The first release was discovered in 1993 and was not qualified for coverage by the Petroleum Fund. There was a second release in 1995, which the Board granted coverage at the rate of 79% Fund coverage via a resolution. In August of 1996, Charleston Lindell C. Partnership, owners of the property located down gradient from the subject site, filed suit against Mr. Esslinger claiming that the groundwater contamination from Mr. Esslinger's site had migrated beneath their property preventing its potential sale. Broadbent and Associates had confirmed that there was a migration of Mr. Esslinger's plume onto the adjoining property. Mr. Cerruti explained that Board Resolution 94-018 states the NDEP may recommend third party fund coverage to parties who have suffered property damage as a result of contamination which has migrated beneath their property from a Fund covered site. In January 2002, Mr. Esslinger's consultant, who is now Converse Consultants, submitted a third party reimbursement claim to NDEP for a \$25,000 settlement. Converse Consultants contended that Mr. Esslinger was unaware of the potential third party fund reimbursement at the time of settlement and did not file a third party claim at that time. Additionally, NDEP did pass NAC 597.065, which required NDEP to be party to those third party settlements. However, NAC 597.065 was not in effect at the time Mr. Esslinger made his settlement. Mr. Cerruti stated that staff is recommending awarding Mr. Esslinger the third party damages, less the 21% reduction and the 10% co-payment which amounts to around \$17,000.00. Ms. Bowman asked what the consultant was doing between April 1999 and January 2002. Mr. Cerruti stated that he did not know. Ms. Bowman stated that they had settled in 1999. Mr. Cerruti replied that they had a different consultant at that time. When Converse Consultants became the consultant, they had only been involved in the cleanup at that time. Mr. Cerruti requested clarification from legal counsel for the Board that the resolution does have the enforcement of law behind it.

Verbatim of Ms. Susan Gray's statement:

Ms. Gray: "That is correct and the Board may know this, that the Board is exempt from NRS 233B - The Administrative Procedures Act which would normally require a board to adopt a regulation. Instead, this board is allowed to adopt resolutions without having to go through the formal procedures of doing so under 233B - which means these resolutions do have the same effect as a regulation that would have been enacted under that chapter."

Mr. Cerruti stated in Resolution 94-018, Item number 7, property damage therefore includes the impacts of contamination that has migrated underground. Additionally, any corrective action measures performed off site may be considered as a third party liability action. Mr. Cerruti read for the Board under where it says "therefore be it resolved" stating the first reimbursement allotment described by NRS 590.088 and 590.089 shall be recommended for reimbursement for corrective action measures that are performed without respect to the extent of plume migration from the UST release. It is clear according to the resolution that third party property damage is entitled to coverage and on that basis NDEP is recommending Mr. Esslinger be reimbursed the \$17,000. Ms. Bowman stated that she has a problem when a case is settled before filing the claim. Ms. Karen Salamon, stepped forward to explain that new counsel had to be retained because the original counsel

had "dropped the ball" and they had a new litigator who was not aware enough of the rules in order to follow them. Ms. Salamon stated that it would have cost more than \$25,000 to repair the damage caused by those attorneys. Mr. Biaggi agreed with staff's recommendation for this resolution and contended how important it is that settlements be negotiated with the presence of NDEP as per the regulation or else problems between parties could happen. Motion was made to approve the resolution. Motion was carried unanimously.

IV.C. Resolution to Designate Lightning Lube, 1 South Main Street, Fallon, Nevada as a Small

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Business

Fund Case No. 99-048 – Resolution #2002-03

Mr. Bennett Kottler stated to the Board that there was a change in the resolution. On page 2, the second paragraph, it should say “the attorney for the estate has submitted a ‘letter’...” the word “affidavit” should be changed to “letter” since it was not a sworn testimony. “Small business” is defined in NAC 790.710 as a business which receives less than \$500,000 in gross annual receipts from the site where the tank is located based upon average annual gross receipts for the following: (1) if the business has been operating for 5 or more fiscal years on the date which the discharge was discovered the five fiscal years preceding the date which the discharge was discovered or (2) if the business has been in operation less than 5 fiscal years on the date the discharge was discovered the total number of years the business has been in operation. In order to be classified as a small business, NAC 590.714 states that an operator must submit the copies of forms reporting federal income tax showing the operator’s gross annual receipts. Mr. Kottler indicated that NAC 590.714 also states the Division has the discretion to use any additional information which is necessary to determine whether a facility is a small business. On March 2, 2001, the owner, Mr. Bob Cowan, passed away and the site became the property of the Estate of Bob Cowan. Mr. Mike Mackedon, an attorney from Mackedon, McCormick and King, is representing the estate. The attorney has requested that Lightning Lube be classified as a small business, which will establish the deductible amount at 10% of the approved reimbursable claims capped at \$50,000. The estate has been unable to produce the requested federal tax records required by 590.714. The attorney for the estate has submitted a letter stating that according to all records available from the estate and to the best of his knowledge, Lightning Lube has operated as both a service station and as a lease property and was a business which received significantly less than \$500,000 of gross annual receipts during the 5 preceding years. Ms. Bowman asked if NDEP had asked for the federal tax returns. Mr. Kottler stated yes. Ms. Bowman indicated that those records could have been requested directly from the IRS for a ten-dollar fee. Mr. Cerruti stated that it would have been nice had he filed his taxes. Mr. Cerruti stated that most of the time the facility was leased and it was not operating as a service station and also it had been shut down due to the contamination. Mr. Cerruti stated that there is a remediation system on the site and that a lot of work has gone into the characterization of the site and remediation is ready to begin. Mr. Biaggi asked if this was the facility discussed at the last meeting in Reno in regards to putting a lien on the property. Mr. Cerruti replied that it was discussed to have the Board approve a loan for the deductible then get the money back later when the property was sold. The adjoining property, Bootleggers, which has just been re-opened also has contamination. There is going to be a joint clean-up effort between the two properties, which would be more cost effective. Mr. Biaggi asked if there was still intent to put a lien on the property. Mr. Cerruti replied that there is no longer intent to put a lien on the property. The facility is being requested to become classified as a small business, in case it should cost more than \$500,000, then the deductible can be capped at \$50,000. Mr. Haycock clarified that the issue is whether the Board is willing to accept testimony in the form of a letter that would indicate the facility be classified as a small business. Ms. Blystone moved for adoption of the resolution. Motion was carried unanimously.

ADOPTION OF CONSENT ITEMS - REVIEW OF CLEANUP CLAIMS

Mr. Biaggi made a motion to adopt cleanup claims for Heating Oil cases numbers 1 through 5 and New Cases, Other Products, numbers 1 through 4. Motion was carried unanimously. Mr. Cerruti mentioned to the Board that there was a change to the agenda in Old Cases, Other Products. Mr. Cerruti informed the Board that the Red Rock Mini Mart, Case number 96-064, under Non-Consent Items be moved as a consent item since the Board previously passed the resolution addressing that site. Ms. Blystone moved for adoption of Old Cases Other Products, numbers 1 through 88, with the exception of 99-219 as a non-consent item and with the addition of 96-064 as a consent item. Ms. Bowman abstained from voting on Item 6 - Allied Washoe; Item 24 - Avis Rent-A-Car and Item 49 - Allstate-Rent-A-Car and voted for approval of the remaining consent items. Mr. Haycock abstained from voting on Item 64 – Case No. 99-066 and Item 69 – Case No. 99-090. Motion was carried unanimously.

ADOPTION OF CONSENT ITEMS - REVIEW OF CLEANUP CLAIMS (continued)

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NON-CONSENT ITEMS:

Mr. Cerruti then discussed Item 1 – under Non-Consent Items, FBF Texaco, Inc., Case No. 95-042. Mr. Cerruti stated that this case has exceeded the \$1 million statutory limit for remediation efforts. To date, with approval of the items today, they will exceed \$900,000 in reimbursements so NDEP staff has denied the remaining requested amount. The resolution for third party provides off-site damages but only after \$1 million dollars has been expended which is the point where FBF Texaco is at now. Mr. Cerruti stated that per the resolution there have been no claims showing separation of the off-site and on-site remediation. Mr. Greg Walsh was called forward by Mr. Haycock to speak on behalf of FBF Texaco, Inc. Mr. Walsh introduced himself and distributed handouts for the Board members showing his argument. The letter from staff was a re-interpretation of NRS 598.090 - Resolution 94-018 to which he stated they felt it was contrary to the public welfare, contrary in this specific case, not fair in this case and inconsistent with the historic practice of staff. Of the million dollars spent, \$650,000 was spent off-site and the remaining \$350,000 spent on-site. Mr. Walsh quoted an interpretation of the language of NRS 598.090 stating there are two categories of coverage: one is, \$1 million for cleaning up each tank and \$1 million of liability for damages from each tank. Mr. Walsh referred to the resolution which states the a third party liability shall also be assigned for all reimbursement requests related to corrective action measures performed on any property not owned by the storage tank owner. The dollars spent, \$650,000, on off-sites are accounted for as liability for damages and not charged against the \$1 million for cleanup. Mr. Walsh stated that what is happening is there is a denial of the claim for \$16,457.00 because it then amounts to over \$1 million. Mr. Walsh stated that in this specific case, under tab 4 of the handout, there is a letter from Mr. Biaggi stating that this site had a very high potential for impacting a municipal well in North Las Vegas. Mr. Walsh stated that it was very important to concentrate efforts off-site initially. Ms. Bowman asked if they paid one deductible even though they have received coverage for both. Mr. Walsh replied that they would have to pay another deductible for the second million dollars. Mr. Walsh added that the \$16,457 dollars should not be rejected should there be a split-out of the off-site vs. on-site costs. Ms. Bowman stated that she has been concerned about this issue for a long time and is not comfortable deciding this type of issue. Mr. Cerruti added comments stating that in question here is the \$16,457 being rejected for going over the \$1 million-dollar mark. Resolution 94-018, approved by the Board, states that the first reimbursement allotment described by NRS 590.088 and 590.890 shall be recommended for reimbursement for corrective action measures that are performed without respect to the extent of plume migration from the underground storage tank system release. Which means that it is either for on-site or off-site remediation. Without respect to the extent of plume migration, the first million is used for the remediation effort. What Mr. Walsh is asking for is not consistent with this resolution. The second reimbursement allotment described by NRS will be recommended for reimbursement for either bodily injury or for property damage, which includes the cost to remediate the property off-site once the first \$1 million is used up. As Mr. Walsh refers to the Magic Wand case, NDEP only did that because we entered into a contract in 1993. There were conditions to that agreement and NDEP agreed to split the costs on the basis of cost effectiveness. This agreement was entered into prior to this resolution (94-018) where the purpose of the resolution was to clarify situations like this so it will not happen again. Mr. Haycock stated that based on the resolution, it seems that it is encouraging the claimant to neglect third party claims until the remediation of the property is taken care of. Mr. Cerruti stated that the reason for this was to protect the third party so there will be money to cover for property damage and bodily injury claims. Mr. Haycock stated that there is no back-up information on this case and would like to see the breakout of the first party and the third party claim. Mr. Walsh stated that it was ninety percent completed. Mr. Haycock asked Mr. Biaggi when the letter in the packet was written was the intent to get things cleaned up to avoid impact to groundwater and was he aware of the third party claim at the time? Mr. Biaggi stated that at that time it was a public health concern and the monetary issues were secondary to that. Mr. Haycock stated he was not prepared to make a decision on this case. Ms. Blystone suggested

going back through the information and then present a rebuttal to that. Mr. Cerruti read from the resolution

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stating 'corrective action measures will be included as property damage once the first reimbursement allotment has been exhausted'. Ms. Gray stated there might be an issue with the way this resolution is drafted regarding the on-site and off-site and if this is the case, the resolution may have to be amended. Mr. Walsh stated that would be fine for a future case, and would advise not to change the resolution. Mr. Walsh requested that the board approve the \$16,457.00 for FBF, Texaco. Mr. Haycock stated that he would like to defer this matter. Mr. Cerruti asked the Board if they were going to approve the \$7,617.00 to FBF, Texaco. The Board approved the amount of \$7,617.00 for FBF Texaco, Inc.

Mr. Haycock announced Lake Tahoe Oil Company, Case No. 99-219, was the next non-consent item to be discussed. Mr. Cerruti explained the reason this is a non-consent item is they are contesting what NDEP staff has denied which is \$8,080.00. Mr. Cerruti further explained the handout information. He directed the Board to look at the summary done by the attorney for Lake Tahoe Oil which shows the NDEP staff disallowances. He discussed where column number 5 shows their voluntary claim reduction and the last column shows the supplemental claim request totaling \$21,000. Mr. Cerruti referred the board to the numbers typed in to the right of the last column, which are the actual amounts that were awarded based on Lake Tahoe Oil's re-submittal, except for the \$8,080.00. Lake Tahoe Oil is contesting this on the basis that the company should not be forced to pay without Fund reimbursement of the \$8,080.00 in standby costs charged to accommodate NDEP. On the original invoice itemization sheet, under where it says Buckeye Excavating, they are requesting \$16,803.00 and on the next page, the actual Buckeye Excavating invoice is for \$24,883.00. The difference between the invoice and what they were requesting is the \$8,080.00. Mr. Cerruti stated that the reason this case is before the Board is because an agreement could not be reached on whether or not standby time is reimbursable. On the invoice it appears they had equipment and laborers maintaining this site for two weeks. There have been discussions with their attorney regarding this site. The attorney advised NDEP that during that time they were waiting for NDEP to review some analytical results and to get back to them. There is no evidence that NDEP concurred with any standby time. Mr. Cerruti indicated that the consultant did call, but the evidence indicates that it was a unilateral decision made by the consultant to keep the equipment and laborers on site pending NDEP's review of the results. NDEP did not agree with the decision made by the consultant. Mr. Biaggi asked who the consultant was on this case? Mr. Cerruti replied that it was Steve Richey of Harding ESE. Ms. Laura Granier, from Lionel, Sawyer and Collins, addressed the Board on behalf of Lake Tahoe Oil Company. Ms. Granier presented the facts provided by the CEM on the case. On October 3, 2001 the day the soil contamination was discovered, Mr. Steve Richey, the CEM, advised Ms. Jennifer Carr of the situation. Ms. Carr requested that analytical results be submitted promptly and the following afternoon she would review the test results so Harding ESE could be instructed how to proceed with the remediation. The analytical tests were performed promptly and submitted to NDEP the following day. Phone calls to Ms. Carr's office on October 5, 2001 disclosed she was on leave and would not be returning to the office until October 12, 2001. After being informed of her absence, Harding ESE attempted to contact Scott Smale at NDEP on October 5, 2001, unsuccessfully. Finally, Mr. Doug Zimmerman, Bureau Chief of NDEP was contacted on October 8, 2001. Mr. Zimmerman advised Harding ESE that NDEP could not determine the extent of horizontal remediation required until Ms. Carr returned. On October 12, 2001, Ms. Carr advised Harding ESE that no further vertical or horizontal soil remediation was required. The records indicate that the delay between October 3, 2001 and October 12, 2001 was because Harding was waiting on a determination by NDEP to direct the remediation that was then undertaken. Ms. Granier stated that the Board should approve the reimbursement of the \$8,080.00. Ms. Granier indicated that this was the first time they were advised of the reasons for the opposition of the reimbursement. Ms. Bowman asked why the standby time was not included in the cost invoice itemization sheet dated February 28, 2002. Ms. Granier stated she did not have that information with her. Ms. Bowman stated that Buckeye Excavating was listed at \$16,803.00 for Emergency Response and there were no bids and that is what they had written in - it was not for the \$24,000.00.

Ms. Bowman gave Ms. Granier a copy of the invoice itemization to look at. Ms. Granier stated that the

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original invoice was dated October 18, 2001 and invoice number 2320 was re-submitted based on NDEP's request for clarification to exclude items that were not reimbursable. Ms. Granier stated the original costs were always there and apparently Harding ESE had submitted the wrong invoice. Ms. Granier added that these charges were not made-up or incurred after-the-fact. Mr. Haycock stated that was how it seemed. Mr. Cerruti stated that he did not think it was made up after-the-fact. The invoice was submitted knowing that these were not reimbursable costs. Ms. Bowman stated that it did not make any sense as to why they would have equipment and laborers on standby for that length of time. Mr. Cerruti stated that they did it because they self-described the site as an emergency action at the time as there was a permitting deadline with the Tahoe Regency Planning Association. NDEP did not agree with an emergency action as there was no immediate threat to health or the environment. Mr. Haycock wanted to know what was meant by where it states "maintaining the site"? He also asked about the two laborers who were there on the site for 80 hours - what did they do? Was the equipment running? Mr. Kevin Lane of Lake Tahoe Oil Company came forward to the Board and replied that the equipment was not running. Mr. Lane explained that the reason they kept the equipment and laborers on site was because there was a grading deadline to be met by October 15, 2001 with the Tahoe Regency Planning Agency. LA Perks was the company who sub-contracted Buckeye Excavating. Mr. Lane stated that they kept the equipment and laborers on site, as it is not easy to find contractors in Tahoe to do excavating during that time of year, which was why they kept the equipment and laborers on the site. Mr. Haycock stated that the laborers are being paid and doubted the laborers stayed on the site even though it says that they "maintained the site" they did not really maintain the site. Mr. Haycock contended that they kept the equipment and laborers on the site thinking the Board would cover the expenses and there was nothing to worry about and the Board is very sensitive to that. Mr. Lane stated that three months ago, the Board approved LA Perks' standby time for their foreman on site and has been reimbursed for that. This was resulting from a claim submitted to NDEP for the last Board meeting, which was June 11, 2002. Ms. Bowman stated that was only because it wasn't itemized as standby time. Mr. Cerruti stated that NDEP would have to check into that and if that were the case, then NDEP would reverse it. Mr. Haycock stated that the supervisor and laborers did not stay on the site for the hours mentioned in the invoice. Mr. Lane stated that originally there was a one-lump sum in the original invoice then NDEP requested that the invoice be itemized, so it was re-invoiced. Ms. Bowman stated that Mr. Richey's submittal says it all - Mr. Richey did not think the standby time was reimbursable and the original invoice did not include the \$8080.00. Ms. Bowman asked if Mr. Richey was in attendance at the meeting. Mr. Lane stated that he was not available. Ms. Granier stated that Lake Tahoe Oil Company should not have to incur the costs that were charged as a result of waiting on a decision from NDEP. Ms. Bowman stated that Mr. Richey knows where the NDEP's office is located and in this type of situation he has the direct phone number to contact the Administrator, Mr. Biaggi, if he could not get an answer from the Bureau or from Mr. Zimmerman. Ms. Bowman asked Ms. Granier if anyone mentioned to Mr. Zimmerman had they were going to keep the equipment and laborers on site until Ms Carr had returned - probably not. Mr. Haycock summarized the sequence of events in this case and the reason the excavation company stayed on the site in regard to the deadline and he questioned the invoice dated October 18, 2001. Mr. Lane explained that the \$16,000 amount was for excavation work that was done to remove the tanks. After that excavation was complete, the site was shut down then the site was re-opened after Ms. Carr said to continue. There was an additional cost for excavation for removal and replacement of the new piping that was included in the 16 thousand dollar amount. Mr. Lane stated that they still had to acquire a grading extension from the Tahoe Regional Planning Agency. Buckeye Excavation worked for about ten days to two weeks after the October 15, 2001 deadline. After the grading was completed, the business re-opened on November 8, 2001. Ms. Granier stated that there would have been additional costs to de-mobilize and return to the site if Buckeye Excavation was able to return to the site. Mr. Haycock stated that it would have been interesting if Buckeye Excavation had been at the meeting to represent themselves. Mr. Haycock stated that he understood there were not many choices in the situation. Mr. Cerruti stated that this was a case of owner's convenience as they were not under

any orders to complete the job within a certain time frame. They could have de-mobilized and returned the

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following year. Mr. Biaggi asked if the business was closed down during the excavation. Mr. Lane stated that the business was closed down from September 8, 2001 through November 8, 2001. Mr. Cerruti stated there were new tanks ready at the site to be installed and there was obviously an economic reason to get the business operating again. Mr. Haycock contended that it made sense as the expenses incurred in order to keep the contractor on the site had been compensated as a result of the business operating again. Ms. Granier stated again that the expenses incurred were as a result of the delay in waiting for a response from NDEP. Ms. Bowman stated that she did not believe that. Ms. Granier continued stating that Harding Lawson and Associates made calls to NDEP on October 5, 2001 and October 8, 2001 and spoke with Mr. Zimmerman who stated that no one could give an answer until Ms. Carr returned on October 12, 2001. Mr. Lane stated that they were making phone calls daily and not just on October 3 and October 8. Mr. Lane's legal counsel, Mr. Lewis Beldman (who referred Mr. Lane to Lionel Sawyer and Collins), had written a letter to Lionel Sawyer & Collins which stated that they were not receiving a response from NDEP. Ms. Bowman asked if he had a copy of the letter. Mr. Lane stated that he did. It was discussed among the Board members to defer this non-consent item. It was suggested by Mr. Zimmerman to have Ms. Carr in attendance at the next meeting. Motion was made for deferral of this item. Ms. Granier requested that the Board proceed with the recommended amount. Ms. Bowman stated that they would do that. The motion to defer was carried unanimously.

VI. EXECUTIVE SUMMARY REPORT

Mr. Cerruti stated for FY 2003, NDEP has received 13 new cases for evaluation for a total of 1,125 cases since the inception of the program. There currently are 280 active remediation sites, 708 closed cases, 79 cases denied coverage, 41 cases expired and 26 cases currently in a pending status awaiting submittal of additional information or initial staff evaluation for coverage. To date, a total of \$93.8 million has been reimbursed from the Petroleum Fund. As of this Board meeting \$1.6 million in reimbursements is recommended bringing the total to \$94.4 million. In addition, on May 30, 2002 the final projection for the ending balance of the Fund for FY 2002 was estimated in order to notify the Department of Motor Vehicles whether or not to discontinue the tank fee. The estimated balance of \$8,455,000 exceeded the \$7.5 million allowed. The Department of Motor Vehicles was notified to suspend the fee collection for FY 2003. The actual balance in the Fund is \$8,604,000, which is very close to what was estimated.

Mr. Bennett Kottler discussed his attendance at The Annual Petroleum Fund Administrator's Conference in Boise, Idaho. Mr. Kottler distributed a hand out to the Board members, which compared the activities of the petroleum fund in Nevada with petroleum funds in other states. He stated the meeting was an opportunity for state petroleum fund administrators to network and learn from each another. Also in attendance were federal regulators from the Environmental Protection Agency and members from the regulated community such as the Petroleum Marketer's Association of America. Mr. Kottler stated that one of the conclusions he gathered from the conference was that Nevada's petroleum fund was good compared with other state petroleum funds. The first criterion for a well-managed petroleum fund was that Nevada is solvent. Nevada's cleanup of sites was somewhat less than the national average. There are nine state petroleum funds that are not solvent. He stated that other petroleum funds struggle with problems that Nevada does not have. Nevada can keep the fund solvent in part because it has the approval of cleanup costs whereas other funds do not. Some petroleum funds do not have any idea of how many facilities or underground storage tanks they are working with whereas Nevada does. In other states they do not have certified environmental professionals. All of these things combined make Nevada a well-managed fund. Mr. Kottler also noted that the California State Water Resources Control Board manages seventeen regional boards, which makes it more complicated to get effective cleanups. The stated funds overall have collected a billion dollars annually and have cleaned up over a quarter of a million sites. He mentioned that petroleum funds are entering a period of transition. Tens of thousands UST's are closed every year according to graph #1 on page 2 of the hand out. Mr. Kottler further reported that some owners decided it was better to close the UST systems rather than continue to operate them. In contrast to other states, Nevada was one of the states that did meet and comply with the

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1998 tank deadline. Mr. Kottler indicated that prevention of releases is the next wave of tank management now that the older leaking tanks have been taken care of due to the 1998 deadline. Future trends in preventing releases likely to emerge are leniency and helping the small business owners/operators to comply with the regulations. Prevention measures can include certification of UST systems and components as well as the installation process. System upgrades are supported by many petroleum retailers as many retailers are already putting in dispensers and incurring an additional expense. Mr. Kottler reported forty-six percent of leaks discovered by personnel are by visual and olfactory methods and that it is important to have owners and operators who are knowledgeable and who pay attention to their UST systems. Releases from dispensers are still an area of concern. The majority of releases from the newer systems are not liquid but vapor releases. The problem with vapor releases is that if they are at a high enough concentration, they can condense back into a liquid form and can contaminate groundwater supplies. Mr. Kottler mentioned that California is about to sponsor a bill where UST systems installed after 2003 have to be vapor tight. Members of the industry are concerned as to what that means and if it is achievable. Mr. Kottler concluded by noting that state petroleum funds are entering a period of transition where prevention of releases will play a larger role than in the past. Staff in the field will also be important. Mr. Haycock had concerns about the pie chart, 5A of the hand out. He inquired that out of 182 releases detected 38 percent were still releasing? Mr. Kottler stated that was not correct, out of 182 system releases 38% of them were not leaking. Mr. Cerruti stated this was all done on a voluntary basis. There were 182 sites that agreed to be tested. The test results revealed that 62% of the UST systems showed the presence of a release. They were not sure if some of the oxidants or MTBE's were diffusing through the tank. Mr. Cerruti stated that releases in the vapor phase are to be expected whether they are old systems or newer systems and that dispensers are notorious for leaking. The Fund does not cover dispenser releases above the shear valve. There is no provision in Nevada for having under-dispenser containment. Mr. Haycock stated to Mr. Kottler that it was a good presentation. Mr. Biaggi thanked Mr. Kottler for his presentation and was pleased that Nevada was below the national average. Mr. Biaggi agreed that an increase in field presence of petroleum staff is critical for the future. He has been discussing with Mr. Zimmerman using Fund monies in order to increase petroleum fund staff in the field.

VII. PUBLIC FORUM

None

VIII. CONFIRMATION OF NEXT BOARD MEETING

The Board agreed that the next meeting would be held December 12, 2002 in Reno. It has been discussed that the meeting will be teleconferenced.

IX. ADJOURNMENT

The Chairman adjourned the meeting at 12:35 p.m.