

STATE BOARD TO REVIEW CLAIMS

MEETING OF March 6, 2008
Videoconferenced in Carson City & Las Vegas, Nevada

- ITEM V.C.
- SUBJECT: Resolution to Grant Petroleum Fund (Fund) coverage with a 40% reduction to 7-Eleven #29643, 15 North Lamb Boulevard, Las Vegas, Nevada; State Facility ID #8-000432, Petroleum Fund Case ID #2007000023.
- DISCUSSION: On April 13, 2006, free-phase petroleum product (free product) was identified in an onsite monitoring well during closure monitoring activities for a previous underground storage tank (UST) release at the site. The discovery of free product was considered to evidence a new UST system release and NDEP subsequently provided regulatory closure to remediation of the earlier release. After reviewing inventory records which indicated that the unleaded mid-grade (MUL) gasoline UST may have been leaking during the months of January through March, 2006, 7-Eleven, Inc. (7-Eleven) removed it from service on August 1, 2006, at which time free product diminished in the nearby monitoring well. After the MUL UST passed subsequent Petroscope and Tracer integrity testing, 7-Eleven returned the tank to service on November 13, 2006, after which time free product returned to the nearby monitoring well. 7-Eleven again removed the MUL UST from service on December 1, 2006. On May 9 & 10, 2007, 7-Eleven removed all four motor fuel USTs from the site. Inspection of the removed MUL UST revealed a tear in its outer shell. Inspection of the inner steel MUL tank, following removal of its outer shell, did not reveal potential release points. Inspection of the other removed USTs did not reveal potential leak sources. Inspection of the UST system product piping, which was removed at a date following tank removal, did not identify potential release sources. Chemical analyses of free product subsequently recovered from the monitoring well indicated its chemical composition to be moderately weathered premium or mid-grade gasoline. On April 9, 2007, NDEP received a Fund coverage application from 7-Eleven indicating that the free product had emanated from the MUL UST.
- As summarized above, there is evidence that both supports and refutes the potential that the free product at the subject site emanated from the MUL UST. 7-Eleven, however, eliminated all potential release sources by removing the entire UST system from the ground approximately 14 months following discovery of the free product.
- 7-Eleven operated the MUL UST system for 3.5 months following the discovery of free product, in violation of 40 Code of Federal Regulations (CFR) 280.61(b) and 280.62(a)(1). State Board to Review Claims Resolution #94-023 (Attachment A) requires NDEP to recommend a 40% reduction in reimbursement for violation of both above-referenced regulations, but prohibits the recommendation of a reduction based on the sum of multiple regulatory violations. NDEP, therefore, recommends that the subject site receive Fund coverage with a 40% reduction.
- RECOMMENDATION: **Adoption** of Resolution #2008-03 as Proposed, Granting 7-Eleven Facility #29643 Coverage Under the State of Nevada Petroleum Fund with a 40% Reduction.

STATE BOARD TO REVIEW CLAIMS

RESOLUTION #2008-03

Resolution to Provide Reduced Petroleum Fund Coverage
7-Eleven Facility #29643
15 North Lamb Boulevard, Las Vegas, Nevada
Petroleum Fund Case ID #2007000023
State Facility ID #8-000432

Whereas, the State Board to Review Claims (hereinafter referred to as the Board) Finds:

1. In 1992, the Nevada Division of Environmental Protection (NDEP) granted full coverage under the State Petroleum Fund (Fund) for a release of petroleum hydrocarbons at the subject site under case #1991000039.
2. On April 13, 2006, 4th quarter post-remediation groundwater sampling activities were performed at the site for Fund case #1991000039, during which time approximately 0.68-feet of free-phase petroleum product (free product) was discovered in onsite monitoring well MW-5B, located hydraulically down-gradient from the underground storage tank (UST) system. Because free product had never appeared in this well during assessment and remediation activities prior to this date, 7-Eleven reported this event to NDEP as a new release.
3. On April 13, 2006, mechanical line leak detectors and product piping for all four UST systems at the site were integrity tested, and passed. Additionally, the automatic tank gauging system was inspected and verified to be working properly. On April 28, 2006, all four USTs were integrity tested, and passed.
4. On July 21, 2006, NDEP provided regulatory closure to the cleanup associated with Fund case #1991000039.
5. On July 27, 2006, 7-Eleven reviewed UST system inventory records for the site and discovered that the mid-grade unleaded (MUL) UST had exceeded allowable variances for the months of January, February and March, 2006, indicating that it may have been leaking.
6. On August 1, 2006, the MUL UST was pumped free of product and removed from service, after which time free product diminished in well MW-5B.
7. On August 17, 2006, a Petroscope investigation was performed on the MUL UST. Results of the testing did not provide evidence that the UST had failed. On October 26 & 27, 2006, the MUL UST and associated product piping were integrity tested using Tracer technology, and passed. Additionally, it was verified that the MUL UST vapor recovery system, spill bucket and under dispenser containment were free of leaks. Pursuant to results of the Petroscope and integrity testing, on November 13, 2006, 7-Eleven returned the MUL UST system to service. On November 30, 2006, free product was again identified in well MW-5B, prompting 7-Eleven to empty the MUL UST and remove it from service on December 1, 2006.
8. On April 9, 2007, NDEP received an application for Fund coverage for the free product release, indicating that the release had emanated from the MUL tank. The project was assigned Fund case #2007000023.

9. On May 9 & 10, 2007, all four double-walled USTs and associated product dispensers were removed from the site. Inspection of the removed MUL UST revealed a perforation and staining on its lower exterior lining. Inspection of the other USTs did not identify any potential release sources. The outer shell was removed from the MUL UST to facilitate inspection of the inner steel tank. No holes, perforations or release points were noted. Laboratory analyses of soil samples recovered from beneath the removed USTs did not reveal detectable concentrations of petroleum hydrocarbon contamination.
10. UST system (double-walled) product piping was removed at a later date, following removal of the tanks and dispensers. The contractor who removed the piping did not note any potential release points. Soil sampling from the former UST product piping trenches revealed areas of contamination, but field observations and laboratory analyses suggested that the contamination was aged and not related to the release associated with the free product.
11. On July 11, 2007, samples of free product were recovered from well MW-5B and submitted to an analytical laboratory for “fingerprinting” analyses to determine its chemical makeup (i.e. diesel or gasoline). Analytical results indicated that the product was characteristic of moderately weathered mid-grade or premium gasoline.
12. The MUL UST system passed Petroscope and integrity testing and no release points were observed on the tank’s inner steel shell. Evidence that the MUL UST had leaked, however, is provided by the three consecutive months of failed inventory reconciliation, the fact that free product appeared in a nearby well when this UST was in service, and results of product fingerprinting analyses. Additionally, 7-Eleven eliminated the release source by removing the entire UST system approximately 14 months following discovery of free product.
13. 40 CFR 280.61(b) states that upon confirmation of a release pursuant to 40 CFR 280.52, within 24 hours or within another time frame deemed reasonable by the implementing regulatory agency, owners and operators must: “*take immediate action to prevent any further release of the regulated substance to the environment...*” 7-Eleven continued to operate the suspected leaking MUL UST system for 3.5 months following the April 13, 2006 discovery of free product, in violation of 40 CFR 280.61(b).
14. 40 CFR 280.62(a)(1) states: “*Unless directed to do otherwise by the implementing agency, owners and operators must ...Remove as much of the regulated substance from the UST system as is necessary to prevent further release to the environment...*” 7-Eleven did not remove product from the suspected leaking MUL UST until 3.5 months following discovery of the free product, in violation of 40 CFR 280.62(a)(1).
15. Pursuant to Board Resolution #94-023 (Attachment A), NDEP is required to recommend a reduction in reimbursement pursuant to violations of UST and leaking UST regulations. The subject resolution requires a recommendation of a 40% reimbursement reduction for violation of both of the above-referenced regulations. Resolution #94-023 prohibits the recommendation of a reduction based on the sum of multiple regulatory violations. NDEP, therefore, is recommending that the subject facility receives Fund coverage with a 40% reduction.

THEREFORE BE IT RESOLVED:

1. The Board finds that on April 13, 2006, free-phase petroleum product (free product) was identified in an onsite groundwater monitoring well at 7-Eleven #29643 (the site) during closure monitoring activities associated with a previous underground storage tank (UST) system release at the site [Petroleum Fund (Fund) case #1991000039].

2. The Board finds that the Nevada Division of Environmental Protection (NDEP) considered the discovery of free product to be evidence of a new release from the UST system at the site.
3. The Board finds that on April 13 & 28, 2006, the UST system, including all four motor fuel tanks, associated conveyance piping, mechanical line leak detectors and automatic tank gauging system, was integrity tested and passed.
4. The Board finds that on July 21, 2006, NDEP granted regulatory closure to the remediation project associated with the earlier UST system release at the site (Fund case #1991000039).
5. The Board finds that on July 27, 2006, pursuant to review of inventory records, 7-Eleven, Inc. (7-Eleven) became aware that the mid-grade unleaded (MUL) UST may have been leaking during January, February and March of 2006.
6. The Board finds that on August 1, 2006, 7-Eleven emptied the MUL UST and removed it from service, after which time the presence of free product in the onsite monitoring well diminished.
7. The Board finds that between August 17 & October 27, 2006, the MUL UST system underwent Petroscope and Tracer integrity testing, and passed, prompting 7-Eleven to return the tank to service on November 13, 2006, after which time free product re-appeared in the onsite monitoring well, prompting 7-Eleven to again remove the tank from service on December 1, 2006.
8. The Board finds that on April 9, 2007, NDEP received a Fund coverage application from 7-Eleven indicating that the free product identified in the onsite monitoring well had emanated from the MUL UST.
9. The Board finds that on May 9 & 10, 2007, 7-Eleven removed all four USTs from the ground, and that inspection of the removed tanks revealed a tear in the outer shell of the MUL UST.
10. The Board finds that following removal of the MUL UST outer shell, inspection of the inner steel tank did not identify potential release sources.
11. The Board finds that inspection of the UST system product piping, which was removed at a date following removal of the tanks, did not identify potential release sources.
12. The Board finds that on July 11, 2007, chemical analyses of free product recovered from the onsite monitoring well indicated its chemical composition to be that of moderately weathered mid-grade or premium gasoline.
13. The Board finds that even though some evidence (passing integrity and Petroscope testing; visual inspection following removal) indicates that the MUL UST did not leak, other evidence (review of inventory records; the appearance of free product in a nearby monitoring well coincidental to the UST being in service; results of free product chemical analyses) indicates that the MUL UST did leak.
14. The Board finds that 7-Eleven eliminated all possible release sources by removing the entire UST system from the ground, approximately 14 months following discovery of free product in the onsite monitoring well.
15. The Board finds that 7-Eleven violated 40 Code of Federal Regulations (CFR) 280.61(b) and 280.62(a)(1) by continuing to operate the suspect MUL UST for 3.5 months following discovery of free product at the site.

16. The Board finds that Resolution #94-023 (Attachment A) requires NDEP to recommend a 40% reduction in reimbursement for violation of each of the above-referenced regulations, but prohibits the recommendation of a reduction based on the sum of multiple regulatory violations.
17. The Board grants Fund coverage to the subject facility with a 40% reimbursement reduction, pursuant to Resolution #94-023.
18. The Board finds that the maximum reimbursable amount for the subject facility is \$540,000, which reflects \$1,000,000 in Fund coverage, minus the 40% reduction, minus a 10% co-payment.

I, John Haycock, Chairman, do hereby certify that the foregoing is a full, true, and correct copy of a Resolution adopted by the Nevada State Board to Review Claims on March 6, 2008.

John Haycock, Chairperson
State Board to Review Claims

**Administrator's Note: Staff proposed a 40% reduction based upon an existing Board Resolution; however, the Board modified the proposal to a 20% reduction..*

ATTACHMENT “A”

STATE BOARD TO REVIEW CLAIMS

Resolution No. 94-023

**Resolution to Adopt a Policy Regarding the Reduction in Reimbursement for Failure to
Comply with Regulatory Guidelines**

STATE BOARD TO REVIEW CLAIMS

MEETING OF NOVEMBER 30, 1994
Las Vegas, Nevada

ITEM: IV. A.

SUBJECT: Proposed policy on the reduction in reimbursement for failure to comply with regulatory guidelines

DISCUSSION: While a majority of underground storage tank owners/operators fall into the category of being in compliance with the regulations governing underground storage tanks, a sub-population exists of owners/operators who are not in compliance.

Compliance with the regulatory requirements ensures that the environmental damage accompanying a release and the concurrent remediation costs will be held to a minimum. In the absence of compliance, the probability that environmental damage and cost will be larger tends to increase. This is based on analyses of remediations within the State of Nevada and is taken in the context of the entire underground storage tank population as a whole, and not to any one site.

The costs of cleanups have been greater where ongoing contamination has been undetected and has increased its boundaries over time due to gradient-driven migration. To extend the Petroleum Fund benefits in an equitable and fair manner, a determination may be made as to what contributions, if any, an owner/operator's action or inactions may have made to the cleanup cost. A key element in this determination is the owner/operator's compliance with the pollution prevention provisions of the UST regulations at the time of and leading up to leak discovery.

The Board is required to deny all reimbursements for a claim when a person's actions are proximate cause to a discharge to the environment (NRS 590.900(1)). However, the Board may choose to apply a reduction in reimbursement relative to the impact of a claimant's noncompliance for issues that are not proximate cause for a discharge. In order to reduce staff bias, a Board-directed reduction schedule is proposed. Such a schedule could then be adjusted by the Board at its discretion based upon the facts warranted by each case.

A draft policy was distributed to all Certified Environmental Consultants in April, 1994. Comments received were incorporated in a revision that was re-distributed in August, 1994. The draft policy presented at the September 29, 1994, Board meeting incorporated the comments received.

At its September 29, 1994, meeting, the Board decided to defer decision on this issue until after a designated task force meeting discussed the issue further. The task force was formed in order to discuss significant issues raised during the meeting and to allow additional opportunity for input.

The task force met on October 11, 1994, and consisted of members from industry, the consulting community, the Board, and NDEP. Consensus was achieved on many items which have been included in the revised draft policy. However, significant issues which still remain include:

1. The use of a reimbursement reduction when other fines/enforcement mechanisms exist.
2. Reducing reimbursement levels may limit or stop cleanups.
3. Consultants may feel the impacts of reimbursement reductions since they often delay billings to coincide with reimbursements.
4. Delaying implementation of a reimbursement policy to allow for additional regulatory education for small owners in rural areas.
5. Using a fine-based penalty rather than a reduction in reimbursement.

RECOMMENDATION: Adoption of Resolution No. 94-023 as proposed.

STATE BOARD TO REVIEW CLAIMS

RESOLUTION NO. 94-023

Resolution to Adopt a Policy
Regarding the Reduction in Reimbursement for Failure to Comply
with Regulatory Guidelines

Whereas, the State Board to Review Claims (the Board) Finds:

1. NRS 590.900(1) requires:

"Any person who, through willful or wanton misconduct, through gross negligence or through violation of any applicable statute or regulation including specifically any state or federal standard pertaining to the preparation or maintenance of sites for storage tanks, proximately causes a discharge is liable to the division for any cost in cleaning up the discharge or paying for it to be cleaned up."

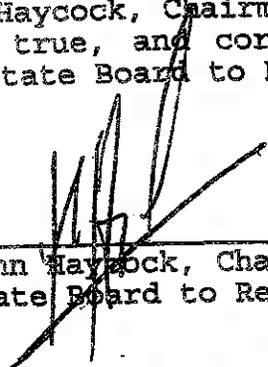
2. Non-compliance to certain regulations may not necessarily be proximate cause for a discharge as defined in Finding No. 1, but may still result in increased costs for site remediation.
3. Delays in the discovery and/or remediation of a contamination may not be a proximate cause as defined in Finding No. 1, but may still result in increased costs for site remediation.
4. NRS 590.830(1) requires the Board to, "...review each claim presented and authorize payment to the extent warranted by the facts of the case." [emphasis added]
5. Attachment "A", which is made a part of this Resolution, contains a Reimbursement Reduction Schedule for failure to comply with pertinent underground storage tank regulations.
6. Attachment "B", which is made a part of this Resolution, contains the procedures for the staff of the Nevada Division of Environmental Protection Agency to implement a reimbursement reduction policy.

THEREFORE BE IT RESOLVED:

1. That a determination (using the procedures outlined in Attachment "B" of this Resolution) be made of claimants applying for reimbursement from the State of Nevada Petroleum Fund as to that claimant's compliance to the underground storage tank regulations.

2. That when a determination of non-compliance is made, the staff of the Nevada Division of Environmental Protection will recommend to the Board that any reimbursement awarded be reduced in accordance with the Reimbursement Reduction Schedule specified in Attachment "A" of this Resolution.
3. That the Board reserves the right to adjust each staff recommendation based upon the facts of each case.
4. That the staff of the NDEP apply this policy on all outstanding unreviewed reimbursement requests upon the date of adoption.

I, John Haycock, Chairman, do hereby certify that the foregoing is a full, true, and correct copy of a Resolution adopted by the Nevada State Board to Review Claims on November 30, 1994.



John Haycock, Chairman
State Board to Review Claims

ATTACHMENT A

NEVADA STATE BOARD TO REVIEW CLAIMS
REIMBURSEMENT REDUCTION POLICY

Staff recommendations for reduction(s) in reimbursement will be submitted to the State of Nevada Board to Review Claims if a determination of non-compliance with the Underground Storage Tank Regulations is made pursuant to the procedures in Attachment B. Recommendations to the Board will be based on the following criteria:

Leaking Underground Storage Tank (LUST) Regulations.

Non-compliance with the LUST regulations for preventing petroleum releases will be assessed as follows:

LUST.001 Failure to comply with Release Reporting, Investigation and Confirmation. 40 CFR 280.50 - 280.53.

* 40 percent reduction

LUST.002 Failure to comply with Release Response and Corrective Action. 40 CFR 280.60 - 280.65; 280.67.

* 40 percent reduction

LUST.003 Failure to comply with the Corrective Action Plan as evidenced by a Finding of Alleged Violation. 40 CFR 280.66.

* 40 percent reduction

Underground Storage Tank (UST) Regulations.

Non-compliance at the time of leak discovery with the UST regulations for preventing petroleum releases will be assessed as follows:

- UST.001 Failure to comply with UST Design, Construction, Installation, Notification, or Change in Service. 40 CFR 280.20 - 280.21; 280.70 - 280.71
* 10 percent reduction
- UST.002 Failure to comply with UST General Operating Requirements. 40 CFR 280.30 - 280.34
* 10 percent reduction
- UST.003 Failure to comply with General Requirements for all UST Systems, Release Detection. 40 CFR 280.40 - 280.45
* 20 percent reduction
- UST.004 Failure to comply with Out-of-Service UST Systems and Closure Requirements. 40 CFR 280.72 - 280.74.
* 10 percent reduction
- UST.005 Failure to comply with Financial Responsibility when required. 40 CFR 280.90 - 280.111; NRS 590.850.
(Responsible parties of tanks not enrolled in the Petroleum Fund are not eligible for reimbursement)
* 20 percent reduction

Note: Where non-compliance was the proximate cause of a discharge to the environment, the responsible party is not eligible for reimbursement.

ATTACHMENT B

**STATE BOARD TO REVIEW CLAIMS
REIMBURSEMENT REDUCTION POLICY - IMPLEMENTATION PROCEDURES**

NON-COMPLIANCE - definition

Non-compliance is the determination by NDEP staff that the requirement(s) of the regulation(s) cited (40 CFR 280; NAC 459) has/have not been fulfilled as described below.

DATE OF LEAK DISCOVERY - definition

Date of leak discovery is the date that the responsible party knew or should have known that there was contamination caused as a result of his tank system.

CLAIM REVIEW AND DETERMINATION

Prior to presentation to the Board, each claim and/or case evaluation shall be reviewed by the technical case manager for any factual evidence of non-compliance existing at the time of or any time after leak discovery.

The review process shall include but not be limited to the review of any

- a. FOAV's, 14 day notices, or notification letters of non-compliance issued by a regulatory entity,
- b. Information supplied by a regulatory entity or certified environmental manager (CEM),
- c. Information obtained from an inspection of the facility,
- d. Statements containing material facts.

The regulatory staff shall make a determination of compliance based on his/her review and send the owner a notification letter of apparent non-compliance as described in these procedures.

In the absence of information to the contrary, the facility will be determined to be in compliance at the time of, or after, leak discovery.

The owner, with a copy to both the owner's agent and appropriate regulatory staff, will be advised by certified mail of a determination of apparent non-compliance no less than 30 days prior to presentation of a claim to the Board. This notification will advise the owner that his claim(s) for reimbursement will not be presented to the Board until there has been resolution of the non-compliance issue in accordance with applicable enforcement policy.

ACTION TAKEN FOR APPARENT NON-COMPLIANCE (LUST - Leaking underground storage tank)

Upon making the determination that a facility is in apparent non-compliance, the regulatory entity will notify the facility owner in writing of this determination and the reasons for such determination based on policy. The owner will be allowed 15 days to submit an intent to comply, and 90 days to comply.

At the end of 90 days, if such evidence has not been received by the regulatory entity, a notification will be sent by certified mail to the owner advising him that he has been found to be non-compliant. This may result in the issuance of a Finding of Alleged Violation (FOAV).

A LUST notification and a FOAV will contain the advisory that the processing of any claim for reimbursement will be delayed pending the receipt of a response from the owner, and any Petroleum Fund reimbursement may be reduced for a FOAV or determination of non-compliance.

ACTION TAKEN FOR APPARENT NON-COMPLIANCE (UST - underground storage tank)

Upon making the determination (in accordance with UST regulations) that a federally regulated facility is in apparent non-compliance, the regulatory entity will notify the facility owner in writing of this determination and the reasons for such determination based on regulations. The owner will be allowed 30 days to comply, submit an intent to comply, or show proof that he was in compliance.

At the end of 30 days, if such evidence has not been received by the regulatory entity, notification will be sent by certified mail to the owner advising him that he has been found to be non-compliant.

A UST notification will contain the advisory that the processing of any claim for reimbursement will be delayed pending the receipt of a response from the owner, and any Petroleum Fund reimbursement may be reduced for a determination of non-compliance.

PRESENTATION TO THE BOARD

The staff of the Petroleum Fund shall present to the Board, as a non-consensual agenda item, all claims where the claim review has resulted in a reimbursement reduction recommendation. All reimbursement reduction recommendations will be made according to the schedule of reductions as defined in Attachment A.

An owner may request and be granted a postponement of the presentation of his/her case to the Board at any time.

ATTACHMENT B
Implementation Procedures

3

BOARD DETERMINATION OF REIMBURSEMENT REDUCTION

Any reimbursement reduction determined by the Board shall become effective commencing with the claim such determination was made.

The reimbursement reduction will also apply to all subsequent claims for that case, unless otherwise directed by the Board.

Both the owner and the owner's agent will be notified of the Board's action.

PROCEDURES FOR USING AND MODIFYING THE SCHEDULE OF REIMBURSEMENT REDUCTION RECOMMENDATIONS (ATTACHMENT A)

Attachment A shall set forth the percentage reduction recommendations that the staff of the Petroleum Fund shall present to the Board.

In the case of more than one non-compliance determination, the staff recommendation to the Board will list each as a separate item for the Board's consideration and will recommend to the Board that any reimbursement awarded be reduced by the largest percentage associated with any single item.

Modification of attachment A shall be by Board action.

Prior to any modification becoming effective, a 90 day period shall elapse from the time of the Board action revising Attachment A. Any revision shall not be retroactive, but apply only to those claims submitted or reviewed by the Board from the effective date onward.

APPEAL

The Board to Review Claims is the final authority within the NDEP of the reimbursement awarded to each claimant. In cases of disagreement with recommendations or conclusions made by the staff of NDEP, the case will be placed on the agenda of a regularly scheduled Board meeting so that evidence and other information may be presented to the Board for their review.