STATE BOARD TO REVIEW CLAIMS

Meeting of June 11, 2009
Videoconferenced in Carson City and Las Vegas, Nevada
Summary of Resolution

ITEM VI.A

SUBJECT: Resolution to Provide Reduced Petroleum Fund Coverage to Armored Transport, 1685 South Palm Street, Las Vegas, Nevada; State Facility ID No. 8-000042, Petroleum Fund Case ID No. 1996000037.

DISCUSSION: On November, 7, 1995 the above-referenced facility was previously recommended full coverage from the State of Nevada Petroleum Fund (Fund) for piping releases from two underground storage tank (UST) systems. On August 5, 1996 an initial reimbursement claim was received; however, because of deficiencies, the claim was returned. The initial claim was not resubmitted until November 20, 2000.

The delay in resubmitting the initial claim led staff to review the Fund file. The review noted that the facility was not compliant with UST regulations until February 15, 1995. Staff concluded that the UST violations were proximate cause of the contamination found at the facility, and denied coverage pursuant to Fund Resolution 94-023.

On March 3, 2009, the current owner of the facility requested that the Fund reevaluate the decision to deny coverage to the facility. While acknowledging that the facility was noncompliant with release detection requirements, the current owner noted that prior to the release, the UST systems tested tight with a more sensitive annual line tightness test.

Resolution No. 94-023, requires NDEP staff to recommend a 20% reduction for failure to comply with the release detection requirements of Code of Federal Regulations 40 CFR §280.40 to §280.45. NDEP, therefore, recommends that the previously closed Fund ID 1996000037 be reopened with a 20% reimbursement reduction.

RECOMMENDATION: **Adoption** of Resolution No. 2009-04 as proposed, reopening Fund Case 1996000037 with a 20% reduction, in addition to a 10% co-payment.

STATE BOARD TO REVIEW CLAIMS

RESOLUTION NO. 2009-04

Resolution to Provide Reduced Petroleum Fund Coverage
Armored Transport
1685 South Palm Street, Las Vegas, Nevada
Petroleum Fund Case ID No. 1996000037
State Facility ID No. 8-000042

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

1. Code of Federal Regulations (CFR) 40 CFR §280.40 to §280.45 addresses release detection requirements. The subject Armored Transport facility (AT) did not comply with the required installation of automatic line leak detectors (ALLDs) on UST system piping until February 15, 1995.

2. On August 3, 1995 AT reported a suspected release to the Nevada Division of Environmental Protection (NDEP). Subsequently two 6,000 gallon single-wall steel underground storage tank (UST) systems, one of which contained gasoline and another contained diesel, were emptied and removed from the ground by September 3, 1995.

3. On November 7, 1995 AT received full coverage from the State of Nevada Petroleum Fund (Fund) for piping releases from the two UST systems.

4. An initial claim was received on August 5, 1996; however, the claim was returned pending receipt of several documents including the appropriate Not-to-Exceed Proposals (NTEPs). On July 21, 1997 NDEP received a revised claim; however, the requested NTEPs were not included.

5. On November 20, 2000, NDEP received a third submittal of the reimbursement request. Because more than five years had passed since the release was discovered, NDEP reviewed the case file. Subsequently in a February 28, 2001 letter, NDEP denied Fund coverage due to the conclusion that AT's lack of compliance with release detection requirements was proximate cause of the release.

6. On March 3, 2009, the new owner of the facility requested that Fund review the decision to deny coverage.

7. In the most recent review of the case file, although it has been determined that the facility was noncompliant with release detection requirement until February 15, 1995, NDEP concludes that it was not proximate cause of the release. Although preceding the release, the UST systems were not monitored with ALLDs, annual line tightness tests were performed (Attachment A). Annual line tightness tests are more sensitive tests than ALLDs and detect releases of 0.1 gallons per hour (gph) whereas ALLDs must detect releases of 3.0 gph. Because within 6 months of the releases, more sensitive annual line tightness tests were performed and unable to detect a release, the lack of ALLDs was not proximate cause of the releases.

8. Continuous compliance has been maintained with NDEP's leaking underground storage tank program.

9. Pursuant to Board Resolution No. 94-023 (Attachment B), NDEP may recommend to the Board a standard 20% reimbursement reduction for sites that fail to comply with General Requirements for all UST Systems, Release Detection. (CFR §280.40 to §280.45). Therefore, NDEP is recommending that the subject facility receives Fund coverage with a 20% reduction in addition to a 10% co-payment.

10. In a May 7, 2009 letter, the responsible party confirmed support for the recommendation in this resolution.

THEREFORE BE IT RESOLVED:

The Board finds that:

1. The subject Armored Transport facility (AT) was noncompliant with installing automatic line leak detectors (ALLDs) as part of release detection requirement (40 CFR §280.40 to §280.45) until February 15, 1995.

2. The two UST systems were emptied and removed from the ground by September 3, 1995.

3. AT received full coverage from the State of Nevada Petroleum Fund (Fund) on November 7, 1995 for piping releases from the two UST systems.

4. An initial claim was received within one year of release discovery on August 5, 1996. On November 20, 2000 upon review of the case, Fund coverage was denied after concluding that lack of compliance with release detection requirements was proximate cause of the release.

5. On March 3, 2009, the new owner of the facility requested that the Fund review the coverage denial decision.

6. In the most recent case review, although the facility was determined to be noncompliant with release detection requirement until February 15, 1995, the lack of compliance was not proximate cause of the release. Within 6 months of the release, annual line tightness tests, more sensitive tests than ALLDs, were performed on the UST systems and unable to detect a release (Attachment A).

7. Continuous compliance has been maintained with NDEP's leaking underground storage tank program.

8. Pursuant to Board Resolution No. 94-023 (Attachment B), NDEP may recommend to the Board a standard 20% reimbursement reduction for sites that fail to comply with General Requirements for all UST Systems, Release Detection. (CFR §280.40 to §280.45). Therefore, NDEP is recommending that the subject facility receives Fund coverage with a 20% reduction.

9. In a May 7, 2009 letter, the responsible party confirmed support for the recommendation in this resolution.

10. The previously closed Fund ID 1996000037 is reopened with a 20% reimbursement reduction pursuant to Resolution No. 94-023.

11. The maximum reimbursable amount for the subject facility is $1,440,000 which reflects $1,000,000 in Fund coverage for each of the two leaking UST minus a 20% reduction and 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 June 11, 2009.

_____

John Haycock, Chairman
State Board to Review Claims

ATTACHMENT A

Tank and Piping tightness test results
February 14, 1995

EARTH SCIENCE TECHNOLOGY

RECEIVED
FEB 17 1995
CCHD ENV HEALTH

TEST CERTIFICATE

TANK OWNER: Armored Transport

CONTACT PERSON: Michaelyne Klym

ADDRESS: 3021 Gilroy

CITY, STATE: Los Angeles, California 90039

TELEPHONE: 213/668-9282

TANK ADDRESS: 1685 South Palm

CITY, STATE: Las Vegas, Nevada 89104

TEST METHOD: Horner EZY-Chek Method I

TEST DATE: February 14, 1995

TANK	CAPACITY	PRODUCT	PASS/FAIL	TEST RESULTS
1	6,000	Gasoline	Pass	-.01242
2	5,000	Diesel	Pass	-.00075

REMARKS: This is to certify that the above tank(s) and product lines are certified product tight and meet the criteria established by the N.F.P.A. pamphlet 329.

APPROVAL: [signature] LICENSE #: UTT 1007

9648 NINTH STREET, SUITE 6, HESPERIA, CALIFORNIA 92345 ☐ 619-949-4638

ATTACHMENT B

Nevada State Board to Review Claims
Resolution No. 94-023

STATE BOARD TO REVIEW CLAIMS

MEETING OF NOVEMBER 30, 1994
Las Vegas, Nevada

ITEM: VI.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 theunderground 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 noncompliance 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 noncompliant. 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 noncompliant.

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 noncompliance.

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.

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.