

**PUBLIC WORKSHOP TO SOLICIT COMMENTS ON PROPOSED
REGULATION AMENDMENTS: NEVADA ADMINISTRATIVE CODE 445C
PETROLEUM FUND PROGRAM
SEPTEMBER 2, 2021**

1) CALL TO ORDER

Mike Cabble, Petroleum Fund Supervisor and Executive Secretary to the Board to Review Claims, welcomed participants to the workshop to solicit comments on proposed regulation amendments to the Nevada Administrative Code, Chapter 445C. All comments received will be considered by NDEP prior to finalization of the draft and submission to the Legislative Council Bureau. No changes are being made to the regulations today. This is not a hearing to adopt the regulations. **Mr. Cabble** provided a brief overview of the meeting process and agenda.

2) PUBLIC COMMENT

There were no public comments for the initial comment period.

3) PRESENTATION OF PROPOSED AMENDMENTS TO NAC 445C (PETROLEUM FUND)

Mr. Cabble provided background on the purpose and need for the proposed revisions, including: (1) Revising the definition of small business as it pertains to coverage of petroleum discharges from storage tank systems and eligibility of operators to obtain grants to defray storage tank infrastructure upgrade costs; (2) Clarifying storage tank testing and record keeping requirements, (3) Establishing deadlines for application submittals for coverage and claims for reimbursement, (4) Revisions to requirements for operators to demonstrate proof of payment to contractors and vendors following reimbursement of a claim, (5) Clarification of grant allocations to operators that have demonstrated a financial need to defray costs to upgrade storage tanks, and (6) Updating general citations and dates within the current language.

The main reason for the regulation change was to update the small business definition (Section 1, NAC 445C.210.1(f)), which was originally included in both statute and regulation, and has not changed since the program's inception. The original financial cap was \$500,000 in gross income. By today's standards, this number is substantially low. In revising the definition, the value was increased to \$4 million. The small business definition was solely used in the past to determine coverage conditions for small business sites. The new definition would also be used to demonstrate an operator's financial need if they wish to request a grant from the Petroleum Fund to upgrade their underground storage tank (UST) systems. The amount of financial information required to designate an operator as a small business is being reduced from five years to three years. The Petroleum Fund will generally look at an average over the three years.

NDEP also added new criteria to the small business definition. One such criteria is with regard to an operator's fuel throughput. The proposed value is one million gallons per year or less, averaged over the previous two years. This is important in terms of using the definition as a grant eligibility requirement. The Petroleum Fund is required by statute to not only assess financial need but also determine how much fuel a station is actually selling. In addition to fuel throughput, the definition includes employment of 150 or fewer full-time and part-time employees. This is in agreement with the State's administrative regulations for a small business. Lastly, if a business is receiving money from the Petroleum Fund as a small business, it must be registered with the Secretary of State.

Under federal storage tank rules, heating oil tanks are generally exempt from all compliance requirements. The Petroleum Fund covers these tanks voluntarily. If they will be discussed within the regulations, they must be included as an exception under the definition (Section 1, NAC 445C.210.1(g)).

Section 2, NAC 445C.220 lists how the Petroleum Fund would designate or verify a small business. A few changes have been made, including how much federal tax information is required to determine gross income. The Petroleum Fund will be asking for three years instead of five years. The Petroleum Fund must also see sales volumes to determine throughput. If an operator is applying for coverage from the Petroleum Fund after having a release from the site, the application must include the small business designation documentation, if the operator intends to be designated as such. One of the benefits for this designation as a small business for cleanup is that the copayment is reduced, and the operator is capped on out-of-pocket costs for the cleanup. Generally, the Secretary of State's website will be used to verify registration of the business. If it cannot be verified on the website, the Petroleum Fund staff may specifically ask that the operator provide confirmation of registration with the Secretary of State prior to designating the business as a small business.

Section 3, NAC 445C.230 includes an adoption by reference of the Federal UST requirements. These requirements have been included in some of the program's Board Policy Resolutions. Additional sections of the Federal requirements were added, such as the operator training subsection, which was not previously part of the original regulation.

Section 4, NAC 445C.250 already had in place many requirements with regard to testing of storage tanks when registering with the Petroleum Fund. One of the areas lacking and subsequently approved under a Board Policy Resolution in 2017 has been included for consistency and to keep all testing requirements in one place. Essentially, if an operator has an above ground storage tank system which uses underground piping that cannot be visually inspected, these requirements must be implemented in conjunction with annual registration into the Fund. If piping is above ground and can be visually inspected, the requirements do not apply. Regarding records retention, operators of underground storage tank systems must follow the Federal 40 CFR 280 requirements, which means they must keep all records for no less than a year. For above ground storage tanks, records should be kept for three years. Records will be reviewed if the system has a release, and the operator is applying for coverage from the Fund.

Section 5, NAC 445C.270 includes changes made for clarification. In submitting an application for coverage, the previous requirement was to apply as soon as possible after the release event; however, there is an initial claim submittal deadline of 12 months. The deadlines have now been matched to require submission of the application and the claim within 12 months of the release discovery. If at the time of application submission the operator wants to be designated as a small business, they must provide the small business records referenced in NAC 445C.220. For any corrective action work that must be done onsite, the original qualifying value for reimbursement was \$3,000. It has been updated to \$6,000.

Section 7, NAC 445C.310 includes updates to the rules regarding claim reimbursement submittals. The existing rule is that the first claim must be submitted within 12 months of the release discovery. This will remain the same. However, a requirement is being added that any subsequent claims must also be submitted within 12 months of performed cleanup activities. There are exceptions from time to time and these can be heard with an accompanying waiver request. Also in this section, there is clarification regarding to whom the Board can pay a reimbursement after a claim has been reviewed and approved. In the past, emphasis has been on the operator or subcontractor. There have been situations where an operator's certified environmental manager (CEM) has been paid on behalf of the operator in order to facilitate cleanup activities. The requirements did not originally address the CEM when they were paid directly. These updates are meant to close that loop.

Subsection 5(c) is a new requirement put in place to directly address an audit finding in the program. The finding indicates that the Fund does not have a mechanism to require verification that the copayment is being made by an operator for cleanup work. The first part of paragraph (c) requires the operator to demonstrate they have paid the required copayment and includes language used in statute. The second part of paragraph (c) allows staff to require proof of the operator copayment prior to the Fund providing a reimbursement payment of the final claim submittal. Subsection 6 further clarifies the CEM must demonstrate proof of payment when they receive reimbursement from the Fund. The Fund must be able to verify that payment has been made to a subcontractor through an operator or a CEM, and they have 60 days to provide the payment documentation. If it is not provided or does not substantiate that the funds paid by the Board have gone to contractors, the Board will require reimbursement, either for the amount not verified or for the entire claim total.

The remaining sections focus on UST upgrade grants, which are more applicable to an operator with a current service station in use. The grant guidelines will now be using the small business definition as criteria to demonstrate financial need. Under Section 9, NAC 445C.340, the Fund has extended the application submittal time from July 1 through April 1 of the following year. This was done to allow operators more time to apply for a grant during the year. Operators had been turned away in the past because the timing of their upgrades were outside of the current 3 month application period. Additionally, some application requirements were removed based on comments and confusion of previous grant applicants and recipients. Specifically, permitting will be left to the certified tank

handlers and the requirements of Subsection 1(f) are no longer needed to demonstrate financial need. Operators who qualify as a small business under the new definition are eligible to apply for grants from the Fund for UST upgrades. Three bids will still be required for upgrade requests.

Section 10, NAC 445C.350 includes amended language to address previous grant recipient concerns regarding a single grant allocation to be used at their facility. Some operators had the ability to do some upgrades, but not as many as they would have liked. This has been adjusted to allow multiple grant application submissions, as long as eligibility requirements continue to be met, and the facility cap in Subsection 2 has not been reached. Subsection 5 expands beyond this. Some operators that qualify as a small business may have more than one facility that they operate. This section will provide a cost limitation. The Fund will pay no more than \$180,000 to a single operator with more than one facility. Each facility would be subject to its respective cap.

Section 11, NAC 445C.360 removes redundant language regarding notifying the Division prior to commencing purchase and installation. Once the application is submitted and if the operator is approved for the grant, staff will contact the tank handler to ensure there is a schedule and plan to move forward with the upgrades. The Fund endeavors to release funding as close to the start date as possible. Instead this section was amended to focus on requiring grant eligible equipment to be installed in accordance with State and Federal UST corrosion requirements, testing requirements, and must be compatible with the fuel stored in the system. After equipment is installed, verification is required as to integrity and future testability of the equipment. It should and must be tested routinely in accordance with 40 CFR 280.35, which outlines the periodic testing requirements for operators of UST systems.

4) QUESTION AND ANSWER PERIOD

Peter Krueger, Nevada Petroleum Marketers & Convenience Store Association, thanked the Fund for the revisions. His members support the language in Sections 3 through 7, 10 and 11. The small business definition still does not hit the mark in Section 1, Sub 1(f). Raising the limit is appreciated, however, the reference is to gross annual receipts or total income, whichever is greater. Today, businesses consist of more than just a gas station. They are a convenience store and sell propane and may have allied businesses under one company name. For example, separating a bowling alley that is part of the corporate section of a gas station is impossible by gross receipts. Their membership has no objection to the throughput gallon requirement and number of employees. It should be clearly stated that a state business license is required.

Mr. Cabble addressed the \$4 million figure for gross income, noting that it was based on staff research. It is difficult to set dollar amounts in terms of business. Definitions of small businesses according to government agencies or private organizations are varied. Many focus solely on the number of employees. The Fund has to look at small business from the perspective of how the definition will be used within the program. It comes up in two

areas. In terms of cleanup, when an operator meets this definition, they receive a substantial break in the copayment amount, dropping from 10 percent to 5 percent. There is also a \$50,000 cap on out-of-pocket expenses on initial coverage for cleanup and third party damages. With these advantages over other operators reimbursed for cleanup by the Fund, staff has to be mindful in how it defines small business. If an operator is taking on a cleanup that either is no longer operating a gas station or if they are the property owner and have never operated a gas station, the Fund cannot rely on fuel throughput alone and needs to establish a financial cap to define a small business. For operators currently selling fuel and applying for a grant for UST upgrades, the Fund must also satisfy State statute that states there needs to be a financial need by the operator. If \$4 million is not believed to be sufficient, the Fund would require additional information be provided that supports values that the operator feels are appropriate.

Mr. Cabbie provided the following justifications for the \$4 million small business cap: Previous statute and regulation both require a monetary cap to establish the designation of small business. This was vetted by the previous legislature and Board to Review Claims.

In terms of funds used for grants, the Fund previously used a different approach to establish financial need. It was found that requiring income statements and balance sheets without having a consistent standard to compare those figures against (e.g. tax records), creates problems in terms of defensibility for financial need.

The \$4 million cap is the same threshold value used by Nevada's Department of Taxation in establishing a commerce tax charged to Nevada businesses. If the threshold is exceeded in gross annual receipt reporting, the business is subject to additional taxes, based on their NAICS business category.

There was a Nevada-specific financial assistance program implemented during the pandemic for small businesses in the state. The value used for that program was also \$4 million in gross annual receipts.

Mr. Krueger stated that the Association has no issue with the \$4 million value. The issue is with the gross annual receipts and total income. The Association is more concerned with the grant program and would be supportive of the \$4 million and its definitions as they apply to cleanup, as this supports the function of the Fund. The grant program has been in place four to five years and has provided approximately three grants, which is an abysmal number. The Association would like to see separate definitions of small business for the cleanup and the grant programs. **Mr. Cabbie** surmised that the Fund will need to see examples of data demonstrating how a business making more than \$4 million in gross annual income becomes a small business if deductions were to be taken into account. He used a theoretical example of a business making \$6 million dollars in gross income but has \$3 million in deductions, he questioned should that business be qualified as a small business. Probably not, but the State would look at any examples provided where a small

business case could be made for an operator with \$4 million in gross annual receipts or income. **Mr. Krueger** indicated he will try to provide those examples and concluded that an operator with a million gallon fuel throughput at \$5 per gallon versus \$2 per gallon, it is not hard to reach the \$4 million dollar cap.

Mr. Krueger addressed Sections 8 and 9. The Association agreed with expanding the grant application window from three months to nine months. In Section 9, they do not agree with the requirement for three bids and the Association would like to submit an alternative suggestion. At the end of Section 10, the Association is in agreement with the new language. **Mr. Cabbie** said that he was recording the comments and would follow up.

5) **PUBLIC COMMENT**

There were no further comments.

6) **ADJOURNMENT**

The meeting was adjourned.