STATE BOARD TO REVIEW CLAIMS

MEETING OF JUNE 14, 2012 AMENDED SEPTEMBER 15, 2016
Video-conferenced in Carson City & Las Vegas, Nevada

ITEM: VII.A 10

SUBJECT: Resolution No. 2012-06 – Addresses criteria for the Nevada Board to Review Claims (Board) to reconsider a previously established Site Specific Board Determination (SSBD).

DISCUSSION: A typical SSBD establishes the Petroleum Fund (Fund) coverage reduction that a tank owner/operator will realize, in most cases, as a result of noncompliance. At the March 8, 2012 Board meeting, the Board requested that NDEP draft a resolution which outlines criteria to be evaluated when a tank owner/operator requests the Board to reconsider a previously established SSBD.

The Board puts forth a significant level of effort on each of its SSBDs. It weighs NDEP's position, the tank owner's position, and then thoughtfully deliberates with an eye toward equity, fairness and consistency before voting and establishing a formal determination on the given issue. Because the Board gives such serious consideration to each SSBD brought before it, it makes sense that a request for reconsideration of an existing SSBD should be based on guidance criteria to increase consistency and minimize duplication of effort by the Board. The current Board Policy Resolution No. 2012-06 provides for two guidance criteria for reconsideration of an existing SSBD, when requested.

As a result of the discussions and decisions made in the June 2, 2016 Board meeting, NDEP is proposing to add a third guidance criterion that will allow for reconsideration of an existing SSBD. This additional criterion requires the storage tank owner/operator to prepare and comply with an NDEP approved Compliance Plan and Schedule (Plan) for site assessment, corrective action, and closure. This guidance criterion may be applied at any subsequent Board meeting following the Board meeting whereby the reduction in Fund coverage was established by the Board.

The proposed resolution amendment recommends a new guidance criterion for NDEP to apply when recommending the Board reconsider an existing SSBD.

RECOMMENDATION: Adoption of Amended Policy Resolution No. 2012-06 as proposed, clarifying criteria to be considered when a request is made for the Board to reconsider an existing Site Specific Board Determination.

STATE BOARD TO REVIEW CLAIMS

RESOLUTION No. 2012-06 - Amended

Resolution to Establish Criteria for Reconsideration of a Site Specific Board Determination

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

1. Although not the key objective, the Petroleum Fund (Fund) has historically been effective in serving as an Underground Storage Tank (UST) compliance encouragement tool. UST regulations address storage tank system integrity, which is necessary to help prevent petroleum releases into the environment. The NDEP UST regulations are NAC 459.9921 through 459.999 [Storage Tanks] and include 40 CFR 280 [Storage Tank Regulations]. The general approach of the Fund is to reward petroleum storage tank owners/operators who maintain UST compliance with full Fund coverage when an accidental release occurs and reduce, or in some cases, deny Fund coverage to owners/operators whose lack of compliance causes the release.

2. This resolution allows the Fund to also function as a compliance encouragement tool for Leaking Underground Storage Tank (LUST) requirements. LUST regulations address the corrective actions, or remediation activities, which must be employed to clean up a petroleum release in the environment. The NDEP LUST regulations are NAC 445A.226 through 445A.22755 [Action Levels for Contaminated Sites] and include 40 CFR 280 [Storage Tank Regulations].

3. The Board gives thoughtful consideration and exerts a significant level of effort for each Site Specific Board Determination (SSBD) it deliberates and votes on. These SSBDs typically include Petroleum Fund (Fund) coverage decisions.

4. The Board has, on occasion, reconsidered an existing SSBD when requested.

5. The Board should not be tasked with unduly duplicating its work unless:

    a. New information associated with the release is provided and good reason exists for why that information was not presented to the Board when it deliberated and voted on the original SSBD.

    b. The storage tank owner/operator is actively implementing a NDEP-approved Corrective Action Plan (CAP) and can demonstrate five consecutive years of compliance, simultaneously, with both the UST regulations and the LUST regulations.

        i. This entails the direct implementation of the approved CAP for a minimum of five consecutive years wherein corrective actions (remediation activities) are conducted and UST compliance is concurrently maintained.

ii. Compliance with the UST/LUST regulations is determined by demonstrating the site has not received a formal enforcement action (Finding of Alleged Violation and Order), the site has not had a Delivery Prohibition (Red Tag) put on its tanks, and the site has not had NDEP-led cleanup costs expended on it or associated with it.

c. The storage tank owner/operator agrees to prepare and comply with an NDEP-approved Compliance Plan and Schedule (Plan) that outlines deadlines and associated requirements for expedited source delineation, site characterization, cleanup and closure. An owner/operator may request the Board to reconsider a reduction determination following NDEP approval of his/her Plan, which may be as soon as the Board meeting following the initial reduction determination. The Plan shall:

i. Establish aggressive, but realistic, deadlines for work plan submittals and initiation of corrective actions;

ii. Include full-scale free product recovery, if applicable;

iii. Address potentially mobile sources of petroleum hydrocarbon contamination via excavation, to the extent practicable;

iv. Aggressively address, using alternate approach, any petroleum hydrocarbon contamination not accessible via reasonable excavation efforts;

v. Effectively reduce groundwater impacts through successful completion of a representative pilot test and operation of an engineered treatment system subject to NDEP design review;

vi. Outline how operation, monitoring and maintenance of the remediation system will be conducted and reported to ensure the effectiveness of the remediation efforts;

vii. Include a UST compliance training policy and management plan designed to ensure that all employees responsible for activities related to the on-site UST system(s) are properly trained in UST compliance items, including but not limited to, periodic inspections, release detection, release response and release reporting;

viii. Require a semiannual meeting, at a minimum, with NDEP to ensure the Plan remains viable, providing an approvable updated/revised Plan when required that adequately addresses changed conditions; and

ix. Failure to comply with the NDEP-approved Plan will result in the reinstatement of the original coverage reduction and render the owner/operator ineligible for future requests for a Board reconsideration related to the site's coverage reduction status.

6. Dissatisfaction with the amount of Fund coverage approved in an existing SSBD should not constitute grounds for reconsideration.

7. The Board recognizes that varying economic conditions can affect a tank owner's ability to fund a clean-up, however, it is unclear which, if any, economic indicator should trigger the Board to reconsider an existing SSBD. Also, to ensure fair treatment of all Fund-covered tank owners/operators, both small businesses and large corporations would be eligible for the same economic reduction reconsideration. The economy and economic distress realized by tank owners should therefore not constitute grounds for reconsideration.

8. The Board has predominantly taken into consideration UST compliance when making past SSBDs, which has enabled the Fund to maintain its effectiveness as a compliance encouragement tool. This resolution will expand the compliance encouragement to LUST activities which address the NDEP-required corrective actions that are implemented when a release to the environment occurs.

9. A storage tank owner/operator may request the Board to reconsider an existing SSBD at any time. NDEP will use the criteria specified in this resolution to facilitate a recommendation to the Board whether the SSBD should be reconsidered.

THEREFORE BE IT RESOLVED THAT:

In response to a storage tank owner/operator's request for the Nevada Board to Review Claims (Board) to reconsider an existing Site Specific Board Determination (SSBD), NDEP will use the following criteria to recommend to the Board whether to reconsider or not reconsider the SSBD:

1. NDEP recommends the Board reconsider an existing SSBD if one of the following three criteria is met:

   a. New information associated with the release is provided and good reason exists for why that information was not presented to the Board when it deliberated and voted on the original SSBD.

   b. The storage tank owner/operator is actively implementing a NDEP-approved Corrective Action Plan (CAP) and can demonstrate five consecutive years of compliance, simultaneously, with both the Underground Storage Tank (UST) regulations and the Leaking Underground Storage Tank (LUST) regulations.

i. This entails the direct implementation of the approved CAP for a minimum of five consecutive years wherein corrective actions (remediation efforts) are conducted while concurrently maintaining UST compliance.

ii. Compliance with the UST/LUST regulations is determined by demonstrating the site has not received a formal enforcement action (Finding of Alleged Violation and Order), the site has not had a Delivery Prohibition (Red Tag) on its tanks, and the site has not had NDEP-led cleanup costs expended on it or associated with it.

c. The storage tank owner/operator agrees to prepare and comply with an NDEP-approved Compliance Plan and Schedule (Plan) that outlines deadlines and associated requirements for expedited source delineation, site characterization, cleanup and closure. An owner/operator may request the Board to reconsider a reduction determination following NDEP approval of his/her Plan, which may be as soon as the Board meeting following the initial reduction determination. The Plan shall:

i. Establish aggressive, but realistic, deadlines for work plan submittals and initiation of corrective actions;

ii. Include full-scale free product recovery, if applicable;

iii. Address potentially mobile sources of petroleum hydrocarbon contamination via excavation, to the extent practicable;

iv. Aggressively address, using alternate approach, petroleum hydrocarbon contamination not accessible via reasonable excavation efforts;

v. Effectively reduce groundwater impacts through successful completion of a representative pilot test and operation of an engineered treatment system subject to NDEP design review;

vi. Outline how operation, monitoring and maintenance of the remediation system will be conducted and reported to ensure the effectiveness of the remediation efforts;

vii. Include a UST compliance training policy and management plan designed to ensure that all employees responsible for activities related to the on-site UST system(s) are properly trained in UST compliance items, including but not limited to, periodic inspections, release detection, release response and release reporting;

viii. Require a semiannual meeting, at a minimum, with NDEP to ensure the Plan remains viable, providing an approvable updated/revised Plan when required that adequately addresses changed conditions; and

ix. Failure to comply with the NDEP-approved Plan will result in the reinstatement of the original coverage reduction and render the owner/operator ineligible for future requests for a Board reconsideration related to the site's coverage reduction status.

2. NDEP recommends the Board does not consider the following criteria to constitute grounds for reconsideration of an existing SSBD:

   a. Dissatisfaction with an existing Fund coverage determination made by the Board

   b. Economic conditions

3. Upon reconsideration, if the Board approves to reduce or eliminate an existing SSBD Fund coverage reduction, the new Fund coverage conditions will be applied to all reimbursable costs incurred beginning on the day of Board approval.

I, George Ross, 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 September 15, 2016.

George Ross, Chairman
State Board to Review Claims