

STATE BOARD TO REVIEW CLAIMS

MEETING OF FEBRUARY 29, 1996
Reno, Nevada

ITEM: IV.B.

SUBJECT: Resolution to adopt a policy regarding Petroleum Fund Coverage and Procedures for Abandoned and Orphaned Tanks

DISCUSSION: Abandoned and orphaned tanks have, in the past, been allowed petroleum fund coverage for any associated corrective action expense. Coverage for abandoned tanks is typically based upon the results of a tank tightness test pursuant to NAC 590.744 and NAC 459.994 (NDEP has the option to waive the requirement for a tightness test on a site-specific basis). Coverage for orphaned tanks has not been contingent upon a tightness test.

The issue to be determined is the extent of Petroleum Fund coverage to be allowed for abandoned and orphaned tanks. In the past, full coverage has been extended for such tanks, even though compliance with appropriate storage tank regulations was not maintained.

The proposed Resolution would require the Board to determine the extent of coverage for each abandoned and orphaned tank case. NDEP would consistently recommend a flat 20% reduction for each case as an initial point for Board discussion.

Comments on the proposed resolution were received by the Washoe County District Health Department (WCDHD), who generally supports the concept of reducing coverage for abandoned tanks. However, WCDHD does not support the application of the provision to orphaned, regulated USTs. They state that an owner or operator should be provided with an opportunity to act diligently and bring the orphaned tank into compliance in order to obtain full petroleum fund coverage. If the owner or operator does not act diligently to obtain UST compliance, then WCDHD supports the concept of reduced coverage for orphaned tanks.

RECOMMENDATION: Adoption of Resolution No. 96-002 as proposed.

STATE BOARD TO REVIEW CLAIMS

RESOLUTION NO. 96-002

Resolution to Adopt a Policy Regarding
Petroleum Fund Coverage and Procedures for
Abandoned and Orphaned Tanks

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

1. NAC 459.994 (referenced by NAC 590.740) defines an abandoned storage tank as, "...a storage tank that:
 - a. Is not maintained and whose owner or operator has not provided the division with a written statement of his intention to close the storage tank; or
 - b. Is not in service and does not comply with 40 CFR 280.70 or 280.71."
2. Petroleum Fund coverage is allowed for abandoned tanks pursuant to NAC 590.740. Abandoned tanks must first pass a tank tightness test or have the test waived by the Nevada Division of Environmental Protection (NDEP) in order to be eligible for Petroleum Fund coverage. The tightness test must be in conformance with the provisions of NAC 459.994 and 40 CFR 280.40 through 280.45.
3. An orphaned tank is described in a May 14, 1991, Attorney General Letter Opinion (see Attachment "A", which is made a part of this Resolution) to include, "...cases in which a discharge has occurred before the present owner or person in control of the tank comes into (perhaps unwitting) ownership or control of a tank..."
4. The State Petroleum Fund may be used to clean up discharges from orphaned tanks, as concluded in Attachment "A".
5. Although orphaned tanks include those tanks without an owner and those tanks that have discharged prior to being controlled by a responsible party, orphaned tanks typically are not maintained, have not had an intent to close notification filed with NDEP, are not in service, and do not comply with the current federal underground storage tank regulations. Orphaned tanks may therefore be considered a subset of abandoned tanks.

6. Resolution No. 94-023, adopted by the Board on November 30, 1994, requires NDEP to recommend a reduction in reimbursement for failure to comply with the federal UST regulations. The reductions to be recommended include 20% for failure to comply with release detection requirements, and 10% for failure to comply with change of service (closure) notification or for failure to comply with general operating requirements.
7. By their very nature, abandoned and orphaned tanks are out of compliance with the change of service notification requirements and with the release detection requirements.
8. The declaration of purpose of the Petroleum Fund sets out two principal objectives in the implementing statute:
 - a. Protection of Nevada's environment, particularly its supplies of water, requires the prompt remediation of petroleum storage tank discharges.
 - b. Federal financial responsibility requirements of storage tank operators and free competitive access to the business of distributing petroleum mandate the fund as a means for meeting the federal requirements and preserving competition in the industry.
9. Petroleum Fund coverage to owners and operators of abandoned and orphaned storage tanks helps to achieve the legislative objective of the Fund.
10. Full Petroleum Fund coverage to owners and operators of abandoned and orphaned storage tanks would be inequitable to those owners and operators who diligently maintain compliance with the regulations governing the operation of storage tanks.
11. The specific circumstance of each abandoned and orphaned tank case should be considered in determining the extent of Petroleum Fund Coverage.

THEREFORE BE IT RESOLVED:

1. That the State Board to Review Claims shall require for all requests for coverage submitted on or after February 29, 1996:
 - a. All abandoned and orphaned storage tanks must be tested (and pass) for tightness pursuant to NAC 590.740, NAC 459.994, and 40 CFR 280.40 through 40 CFR 280.45 in order to be eligible for Petroleum Fund reimbursement for associated corrective action costs;

- b. The NDEP shall present each abandoned and orphaned tank request for Petroleum Fund coverage directly to the Board for concurrence; and
 - c. The NDEP to recommend a 20% reduction in reimbursement for all such cases presented to the Board. Any reduction in reimbursement shall be calculated prior to the calculation of any deductible or co-payment amount.
2. The provisions of this resolution do not apply to storage tanks used to store heating oil for consumption on the same premises where the oil is stored.
 3. The Board reserves the right to adjust each staff recommendation based upon the facts of each case. Petroleum Fund coverage for abandoned and orphaned tanks is contingent upon compliance with NRS 590.700 through 590.920, and upon NAC 590.700 through 590.790.

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 February 29, 1996.

John Haycock, Chairman
State Board to Review Claims

ATTACHMENT "A"

ATTORNEY GENERAL LETTER OPINION



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
ENVIRONMENTAL DIVISION
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Carson City, Nevada 89710

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May 14, 1991

Mr. John L. Haycock
Chairman
Board to Review Claims
123 West Nye Lane
Carson City, Nevada 89710 -

Dear Mr. Haycock:

At the March 22, 1991 meeting, the Board to Review Claims requested an opinion concerning coverage of orphan underground storage tanks. The issue raised is addressed below.

QUESTION

May the fund for cleaning up petroleum discharges—be used to clean up discharges from orphan tanks?

ANALYSIS

The fund for cleaning up petroleum discharges was established by the 1989 legislature. Act of July 5, 1989, ch. 731, 1989 Nev. Stat. 1686 (codified at Nev.Rev.Stat. §§ 459.700-.920). The title of the act states:

AN ACT relating to pollution; creating a fund to be used to clean up discharged petroleum; imposing a fee upon distributors and operators of storage tanks to support the fund; limiting payments and the amount of the fund; and providing other matters properly

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relating thereto.

Id.

The statute's legislative declaration of purpose sets out two principal objectives of the statute. First, that "[p]rotection of this state's environment, particularly its supplies of water, requires the prompt cleaning up of any discharge of petroleum from a storage tank." Nev.Rev.Stat. § 590.810(1). Second, that recently imposed federal financial responsibility requirements for storage tank operators and "free competitive access to the business of distributing petroleum" mandate the fund as a means for meeting the federal requirements and preserving competition in the industry. Nev.Rev.Stat. §§ 590.810(2), (3).

Both the title of the act and the legislative declaration of purpose emphasize the act's first objective--that clean ups of petroleum discharges, which ameliorate the effects of pollution and protect the environment, are a central goal of the legislation. Such an unequivocal and repeated statement of legislative intent is, of course, a recognized factor in construing statutes, and, in this case, is a persuasive factor. Roberts v. State, Univ. of Nevada Sys., 104 Nev. 33, 37, 752 P.2d 221 (1988) (title of act); Hotel Employees & Restaurant Employees Int'l Union v. State ex rel. Nevada Gaming Control Bd., 103 Nev. 588, 591, 747 P.2d 878 (1987) (expressly stated purpose).

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The text of the statute is broadly stated to reach the intent of cleaning up all petroleum discharges from tanks. The legislation applies to "any release" and "any discharge" from "any tank" which an "operator" (i.e., a person, including the United States and the State or its agencies or political subdivisions) is responsible for operating, or owns, or controls. Nev.Rev.Stat. §§ 590.730, 590.810(1), 590.800, 590.770, 590.780; see Nev.Rev.Stat. § 590.870 (operator required to report discharge "of which he is aware or has reason to believe has occurred"); cf. 590.920 (certain tanks exempted from statute). Orphan tanks, which may involve cases in which a discharge has occurred before the present owner or person in control of the tank comes into (perhaps unwitting) ownership or control of a tank, are not excluded by the terms of the statute. In re Bailey's Estate, 31 Nev. 377, 381, 103 P. 232 (1909) (where specific disqualifications are enumerated, other types of unenumerated disqualifications are precluded as "expressed in the maxim, "expressio unius est exclusio alterius."). Therefore, the fund for cleaning up petroleum discharges may be used to clean up discharges from orphan tanks.

CONCLUSION

The statute creating the fund for cleaning up petroleum discharges has as one of its primary objectives the protection and remediation of the environment. Clean ups of discharges from


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orphan tanks fit within this objective. The Board to Review Claims may apply the fund to clean up discharges from orphan tanks.

Sincerely,

FRANKIE SUE DEL PAPA
Attorney General

By



Brian Chally
Senior Deputy
Attorney General

BC/kk