

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

ATTACHMENT B
Implementation Procedures

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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.

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.