

Resolution No. 2005-02

**RESOLUTION OF THE BOARD TO REVIEW CLAIMS OF THE
DIVISION OF ENVIRONMENTAL PROTECTION OF THE
STATE DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES**

Adopted on March 10, 2005

Authority: NRS 590.830

Resolution to Amend State Board to Review Claims Resolution 94-018.

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

1. Resolution 94-018 is titled Policy on the Review of Third Party Liability Claims.
2. Resolution 94-018 (Attachment "B", made a part of this Resolution) was adopted by the Board to Review Claims on February 9, 1995.
3. In 1995, the Legislature enacted legislation that changed the Limits of Third Party Liability and Deductible Amounts specified in Resolution 94-018.
4. The fixed deductible amount specified in Resolution 94-018 was changed to a 10% copay. This change had the effect of changing the statutory limit on third party liability.
5. This Resolution amends Resolution 94-018 pursuant to Attachment "A", which is made a part of this Resolution, by inserting the italicized underlined clarifications and deleting the bracketed items.

THEREFORE BE IT RESOLVED:

That the Board adopt the proposed Resolution which amends Resolution 94-018 pursuant to Attachment "A".

I, John Haycock, Chairman, do hereby certify that the foregoing is a full, true and correct copy of a Resolution adopted by the Nevada Board to Review Claims on March 10, 2005.

John Haycock, Chairman
State Board to Review Claims

ATTACHMENT A

STATE BOARD TO REVIEW CLAIMS

MEETING OF FEBRUARY 9, 1995

Reno, Nevada

ITEM: IV.A.

SUBJECT: Policy on the Review of Third Party Liability Claims

DISCUSSION: NRS Sections 590.880 and 590.890 discuss the allocation of Petroleum Fund monies to reimburse liabilities for damages to a person other than this state or the operator of the leaking storage tank (third party liability).

However, the statutes are not clear in defining third party liability. In the past, the staff of the Petroleum Fund have interpreted the statute to mean that there is an additional liability to the responsible party and to the Fund whenever a contamination plume migrates off of the responsible party's premises ("off-site"). However, staff has enforced this requirement only in cases where the cost of cleanup exceeds the statutory limits for an "on-site" cleanup.

The proposed policy statement affords an opportunity for the Board to formalize this method as a consistent approach for staff to follow in reviewing claims for third party liability.

This Resolution was discussed at the July 7, 1994, Board meeting. It was decided at that time to table this issue in order to solicit comments from the U.S. Environmental Protection Agency. NDEP received comments from the U.S. EPA on November 1, 1994. The policy statement was deferred to February 1995, to allow the Board's legal counsel to discuss this issue further with the U.S. EPA. EPA's comments have been incorporated in this Resolution.

RECOMMENDATION: Adoption of Resolution No. 94-018 as proposed.

STATE BOARD TO REVIEW CLAIMS

RESOLUTION NO. 94-018

Resolution to Adopt Policy Regarding the Review of Third Party Liability Claims

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

1. NRS 590.880 and NRS 590.890 discuss the reimbursement, "... for damages to a person other than this state or the operator of the tank ..." Such types of reimbursement are hereinafter referred to as Third Party Liability Claims.
2. In the past, the staff of the Petroleum Fund have interpreted the statute to mean that there is an additional liability to the responsible party and to the Fund whenever a contamination plume migrates off of the responsible party's premises ("offsite"). However, staff has enforced this requirement only in cases where the cost of cleanup exceeds the statutory limits for an "on-site" cleanup.
3. NAC 590.710(1)(b) defines damages as:

"... any money the operator of a storage tank becomes legally obligated to pay as damages because of bodily injury or property damage to any person other than the state..."
4. The federal UST regulations (40 CFR 280.92) defines bodily injury

"Bodily injury shall have the meaning given to this term by applicable state law; however, this term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liability insurance policies for bodily injury."
5. NAC 590.710(2)(b) defines property damage as:

"... any actual injury to real or tangible personal property, loss of use of the property, or both, occurring as a proximate result of a discharge."
6. Real property is defined by Black's Law Dictionary, 1096 (5th-Edition, 1979) as:

"Land, and generally whatever is erected or growing upon or affixed to land. Also rights issuing out of, annexed to, and exercisable within or about land. A general term for lands, tenements, and hereditaments; property which, on the death of the owner intestate, passes to his heir.

Real or immovable property consists of: Land, that which is affixed to land; that

which is incidental or appurtenant to land; that which is immovable by law..."

7. Property damage therefore includes the impacts of contamination that has migrated underground. Additionally, any corrective action measures that are performed off-site may be considered as a third party liability action.
8. NRS 590.880(1) and NRS 590.890(1) describe the deductible payments that are to be paid by the storage tank operator prior to receiving any reimbursements from the Fund for third party liability claims. The first allotment described by these sections is for the cleanup of a contamination, and the second allotment described is for third party liability claims.
9. The federal UST regulations (40 CFR 280.93(a)) establishes the required amount of third party liability:

"Owners or operators of petroleum underground storage tanks must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks in at least the following per-occurrence amounts:

(1) For owners or operators of petroleum underground storage tanks that are located at petroleum marketing facilities, or that handle an average of more than 10,000 gallons of petroleum per month...\$1 million."

10. The ~~[1994]~~ 1995 Legislature ~~[reduced]~~ changed the deductible amounts to ~~[\$10,000]~~ 10% and the Fund coverage limits to ~~[\$990,000]~~ \$900,000 for the owner/operator, ~~[\$990,000]~~ \$900,000 for impacted third parties, and ~~[\$1,980,000]~~ \$1,800,000 annually for storage tanks in order to be consistent to the minimum financial assurances required by federal regulations. (Similar changes were implemented for heating oil storage tank coverage.) The statute is not clear as to whether multiple third party liability claims can be approved for a release, with each claim at the maximum allowed. However, it appears from reviewing the committee minutes that the Legislative intent is to provide no more coverage than is mandated by federal law (for tanks other than tanks for heating oil to be consumed on the premises).

THEREFORE BE IT RESOLVED:

That the State Board to Review Claims directs the staff of the Petroleum Fund to review third party liability claims in the following manner:

1. Third Party Damages ~~[shall]~~ may include both bodily injury and property damage that an owner/operator of a storage tank becomes legally obligated to pay.
2. Third Party Liability shall be recommended for coverage for all reimbursement requests

related to legal obligations to pay for either bodily injury or for property damage, as described in this Resolution.

3. The first reimbursement allotment described by NRS 590.880(1) and 590.890(1) shall be recommended for reimbursement for corrective action measures that are performed without respect to the extent of plume migration from the underground storage tank system release.

The second reimbursement allotment described by NRS 590.880(1) and 590.890(1) will be recommended for reimbursement for either bodily injury or for property damage, as described in the findings of this Resolution. Off-site Corrective Action measures will be included as property damage (as a cost to remediate the property to state cleanup levels for those constituents released from the underground storage tank system) once the first reimbursement allotment has been exhausted.

4. The deductible for third party liability shall be assessed to the owner/operator once a request for reimbursement is made that is recommended for coverage as third party liability.
5. The per occurrence (i.e., per spill) aggregate limit of third party liability is [~~\$990,000~~ \$900,000], irrespective of the number of third party liability claims.
6. The staff of the Petroleum Fund will recommend for coverage third party liability status to all reimbursement requests that have not been reviewed by the Board using the above-listed guidance.

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 9, 1995.

John Haycock, Chairman
State Board to Review Claims

(Amended by the Board to Review Claims, Resolution 2005-02, March 10, 2005)