

STATE BOARD TO REVIEW CLAIMS
MEETING OF DECEMBER 6, 2007
RESOLUTION NO. 2007-10
Summary of Resolution

ITEM

V.A

SUBJECT: Resolution to Amend and Replace the Policy to Review Third Party Liability Claims (94-018 and 2005-02)

DISCUSSION: The Board to Review Claims (Board) adopted Resolution No. 94-018, which was revised by Resolution No. 2005-02.

Resolution No. 94-018 directed a consistent approach for State of Nevada Petroleum Fund (Fund) staff to follow in reviewing claims for third party liability. Clarification was needed because third party liability was not clearly defined in the relevant Nevada Revised Statutes, sections 590.880 and 590.890.

Resolution No. 2005-02 revised the limits of third party liability and deductible amounts as per the 1995 Nevada Legislature change of the fixed deductible used by the Fund to a 10 % copayment.

The proposed resolution addresses issues raised when the one million dollars is consumed by corrective actions and additional corrective actions are needed to reduce the potential for third party liability claims.

The proposed resolution allows the Board to further clarify the review of third party liability claims.

Attachment A shows the additions and deletions to Resolution No. 2005-02 with italics and brackets, respectively.

Attachment B will become the effective resolution upon adoption.

RECOMMENDATION: **Adoption** of Resolution No. 2007-10 as proposed, amending and replacing the Policy to Review Third Party Liability Claims

ATTACHMENT A

**PROPOSED CHANGES
TO RESOLUTION NO. 2005-02**

STATE BOARD TO REVIEW CLAIMS

RESOLUTION NO. ~~[94-018]~~ 2007-10

Resolution to ~~[Adopt]~~ *Amend and Replace the*
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 regulation~~[s()~~ 40 CFR 280.92 ~~)]~~ defines bodily injury *as*:

~~"[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 regulation~~[s(]~~ 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 1995 Legislature changed the deductible amounts to 10% and the Fund coverage limits to \$900,000 for the owner/operator, \$900,000 for impacted third parties, and \$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).
11. *Because of the potential increase in the total liability of the Fund, Petroleum Fund and Corrective Actions staff agree to jointly review each case requesting coverage of third party liability claims (Appendix C).*
12. *Nevada Division of Environmental Protection, therefore, recommends that the following policy be adopted.*

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 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.]~~

3. *Corrective action measures reduce the potential for third party liability action.*
4. *Reimbursement claims for off-site and on-site corrective actions need not be separated.*
5. *First and third party liability costs may be reimbursed simultaneously.*
6. *Third party liability coverage may be used for corrective actions.*

7. *Owners may access funds for third liability claims after acknowledging that this will reduce the total funds available in the case of a third party liability lawsuit.*

~~[4.]~~ 8. 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 \$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]~~

9. *Petroleum Fund and Corrective Actions staff should jointly review each case requesting coverage of third party liability claims.*

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]~~ *December 6, 2007.*

John Haycock, Chairman
State Board to Review Claims

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

ATTACHMENT "B"

PROPOSED RESOLUTION NO. 2007-10

STATE BOARD TO REVIEW CLAIMS

RESOLUTION NO. 2007-10

Resolution to Amend and Replace the
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 regulation 40 CFR 280.92 defines bodily injury as:

"... 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."

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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.
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12. Nevada Division of Environmental Protection, therefore, recommends that the following policy be adopted.

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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. Corrective action measures reduce the potential for third party liability action.
4. Reimbursement claims for off-site and on-site corrective actions need not be separated.
5. First and third party liability costs may be reimbursed simultaneously.
6. Third party liability coverage may be used for corrective actions.
7. Owners may access funds for third liability claims after acknowledging that this will reduce the total funds available in the case of a third party liability lawsuit.
8. The deductible for third party liability shall be assessed to the owner/operator once a request for reimbursement is recommended for coverage as third party liability.
9. Petroleum Fund and Corrective Actions staff should jointly review each case requesting coverage of third party liability claims.

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 December 6, 2007.

John Haycock, Chairman
State Board to Review Claims

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ATTACHMENT "C"

MEMO FROM
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION
BUREAU OF CORRECTIVE ACTIONS

INTEROFFICE MEMORANDUM

TO: JIM NAJIMA, CHIEF, BUREAU OF CORRECTIVE ACTIONS (BCA),
NEVADA DIVISION OF ENVIRONMENTAL PROTECTION (NDEP)

FROM: ART GRAVENSTEIN, LEAKING UNDERGROUND STORAGE TANK (LUST) -
UNDERGROUND STORAGE TANK (UST) BRANCH SUPERVISOR, AND
BENNETT KOTTLER, PETROLEUM CLAIMS BRANCH SUPERVISOR

SUBJECT: REVIEW OF CASES INVOLVING THIRD PARTY LIABILITY CLAIMS

DATE: NOVEMBER 13, 2007

The Petroleum Claims Branch (PET) is proposing to amend State of Nevada Petroleum Fund (Fund) Resolution No. 94-018, Resolution to Adopt Policy Regarding the Review of Third Party Liability Claims. A concern is that the time and cost spent on LUST cases may be increased by establishing a policy streamlining the allocation of additional funds for corrective actions beyond those typically provided for first party claims. In addition this policy has the potential to pose additional funding liability to the Fund. To address these concerns the LUST-UST and PET branches propose the following:

- A meeting with both branches to review the technical and financial status of each case requesting coverage for third party liability claims. This meeting is intended to be a collaborative effort to clarify the remediation goals of the NDEP and other parties.
- Responsible parties, their representatives, and where appropriate, other decision makers at the subject facility are encouraged to participate.
- Where feasible, we encourage the use of various approaches intended to promote improved speed, quality, and cost effectiveness of site characterization and cleanup.

- Although a review meeting may occur at any time coverage may be potentially sought for third party liability claims, it is most beneficial to hold a meeting before additional financial coverage is necessary.