PETROLEUM TANK RELEASE COMPENSATION BOARD
MINUTES
November 9, 2020
TELECONFERENCE MEETING

Board Members in attendance were Keith Schnider, Ed Thamke, Mark Johnson, Heather Smith, Jason Rorabaugh, and Gretchen Rupp. Also, in attendance were Terry Wadsworth, Executive Director; Kyle Chenoweth, Attorney for the Board; and Ann Root and Garnet Pirre, Board staff.

Presiding Officer Schnider called the meeting to order at 10:03 a.m.

Election of Presiding Officer

Ms. Rupp made a motion to elect Keith Schnider as Presiding Officer. Mr. Rorabaugh seconded. The motion was unanimously approved by roll call vote.

Election of Vice Presiding Officer

Mr. Johnson made a motion to elect Gretchen Rupp as Vice Presiding Officer. Ms. Smith seconded. The motion was unanimously approved by roll call vote.

Approval of Proposed Board Meeting Dates for 2021

Mr. Rorabaugh made a motion to approve the Proposed Meeting dates for 2021. Ms. Rupp seconded. The motion was unanimously approved by roll call vote.

Approval of Minutes August 17, 2020

Ms. Smith made a motion to approve the August 17, 2020 meeting minutes. Mr. Thamke seconded. The motion was unanimously approved by roll call vote.

Claim Adjustment Dispute, Swan Valley Centre, Facility #3203617, Release #4769, Claim #20190307F, Condon

Mr. Wadsworth presented the Board with the information provided by the Board staff for the claim adjustment dispute for Swan Valley Center, Claim #20190307F. He stated that the costs in question were related to operation and maintenance (O&M) and filter replacement for a water filtration system that had been installed on the South Well to prevent contamination of the water supply. The Board staff had denied the costs associated with the water filtration system, because they found the costs to be statutorily ineligible, and unnecessary:

- The water filtration system O&M and filter replacement was not included in a Department of Environmental Quality (Department) approved corrective action plan, as required in §75-11-309(1)(g), Montana Code Annotated (MCA), for the dates in which the costs were incurred for Claim ID #20190307F. There were no work plan modification request documents (Form 8s) submitted in relation to the costs, which totaled $4,346.16.

- The staff did not believe the costs were necessary, because
    - the water entering the well did not exceed Maximum Contaminant Levels (MCLs) during the period for which reimbursement is sought,
    - the well was not in use for the entire period for which costs are claimed,
    - The Air Sparge/Soil Vapor Extraction (AS/SVE) system should be designed to prevent migration to the well.

The site had two original water supply wells: The North Well, that supplied water to the northern half of the property; and the South Well, that supplied the owner's residence. In August of 2008, the North Well was shown to have Methyl tert-butyl ether (MTBE) and Benzene contamination exceeding the Risk Based Screening Levels (RBSLs), The Department recommended abandonment of the North Well and the use of the South Well, since it had

not been impacted. The owner plumbed the South Well to supply the store, garage, and cabins formerly supplied by the North Well and the North Well was abandoned.

The South Well was sampled in September 2008, and it was determined there were low levels of petroleum hydrocarbon concentrations detected at concentrations below RBSLs. A filtration system was installed on the South Well in May of 2010. The costs incurred for this activity were part of a corrective action plans and were paid accordingly, until the time for which the costs were incurred for Claim ID #20190307F, as already noted. The installation and invoicing for this system were directed to the owner of the property, because the owner had not hired a consultant to address the required investigation and remediation of the contamination at the site at that time the system was installed.

A February 22, 2010 work plan, WP ID#2805, had included costs for the installation of a carbon filtration system on the South Well, along with maintenance and monthly service of that system. The system was installed in May 2010. The incurred costs had been paid from May 4, 2011 through March 4, 2015. By 2015, the costs for maintenance and monthly service had reached 177.61% of the projected budget.

In June of 2011, a well was installed to replace the abandoned North Well (the Replacement Well). This Replacement Well was located northwest of the store and northwest of the release source area, and North of the original North Well. The South Well was still in service at the time the Replacement Well was installed. The South Well appeared to be impacted by increased demands due to abandonment of the North Well and showed increased levels of contamination during periods of high water periods.

In early 2015, the owner, Mr. Mike Smith, contracted with a new consultant. The following work plan, WP ID #1000, did not include a budget or activity related to maintenance and monthly service of the carbon filtration system. Two subsequent work plans, WP ID# 10207 and WP ID #10816, had also omitted a budget for these maintenance and monthly service activities. At this point, Claim #20190307F, for costs associated with service from February 2015 through February of 2019, was submitted to PTRCB. Board staff reviewed the claim, determined that the maintenance and monthly service activities we not part of an approved plan and in June 2019 notified the owner of the recommended denial of the claim.

In October of 2019, WP ID #716833942 was submitted, which, among other tasks, contained proposed costs for the maintenance and monthly service of the carbon filtration system on the South Well. Claims have been submitted for those tasks and been reimbursed consistent with the Department-approved corrective action plan.

Mr. Wadsworth summarized the denial of reimbursement. Mainly, the operation, maintenance, and filter replacement costs were not part of a department approved plan. He indicated that, because the South Well was not in use during the entire period for which costs are being claimed on Claim 20190307F, there were operation, maintenance, and filter replacement costs that were unnecessary. He also indicated that the operation, maintenance, and filter replacement costs were unnecessary, because the contamination entering the South Well did not exceed state standards during the time for which reimbursement is being claimed. He indicated there was an Air Sparging/Soil Vapor Extraction (AS/SVE) system installed in November of 2016 that would be expected to prevent contaminant migration to the South Well.

Mr. Wadsworth stated that there were several sampling events from 2010 through 2018. Results of some of those events showed that the AS/SVE system was successful in keeping the contamination from entering the South Well, thus making the filtration system unnecessary. A report prepared in 2018 indicated that the South Well was not operational for some portion of the time covered by the incurred charges for the filtration system, and that water was being supplied to all areas of the property from the Replacement Well. However, the amount of time it was non-operational had not determined. Mr. Wadsworth noted that the filtration would not have been necessary during the time the South Well was not in operation.

Mr. Wadsworth presented a series of figures showing the location of certain important features of the site: the former pump islands northeast of the North Well, the former underground storage tank (UST) basin, the North Well, the South Well, and the Replacement Well. There were also figures showing groundwater flow direction, and contaminant plumes for different periods of time. The figures depicted ground water flow predominantly south, on the south side of the Swan Valley Centre store, with one figure exhibiting a groundwater divide just behind the store.

Both the North Well and the South Well were shown as down gradient of the tank basin, with the South Well located 500 feet south of the petroleum impacted well (North Well).

Mr. Wadsworth stated the ground water contours on the figure showed the contaminated water had flowed south towards the North and South Wells. The images presented indicated that the petroleum plume was close to the South Well, based on sampling events from March 2010 through December 2010. Mr. Wadsworth noted that the AS/SVE system installed in November of 2016 and that there was a subsequent sampling event in April of 2017, which indicated the chemistry was quite a distance away from the South Well. The sampling data showed that contaminants were well below MCLs at the South Well. The Board staff felt the filtration system would not have been necessary at this point, as contamination was not present above MCLs.

Mr. Wadsworth stated that, on October 17, 2017, there was contamination depicted in the area of the abandoned North Well, but no chemistry was exhibited at the South Well where the water treatment system had operated. He stated that, on October 18, 2018, there was no chemistry shown to be at the South Well, but there was at the North Well that had been abandoned. He stated that, on April 25, 2019, there was no contamination depicted at the North or South Well. He noted that the concentration levels dropped off, below the MCLs, and that would render the filtration system unnecessary.

Mr. Wadsworth reiterated that because the costs were not a part of a Department approved work plan when they were incurred, as required in §75-11-309(1)(g), MCA, the costs were not legally reimbursable, and recommended they be denied. He said the number of trips to perform maintenance and filter replacements were unnecessary, because the well was not in use, and the water entering the well did not exceed MCLs during this time. He noted that the AS/SVE system was installed and should prevent the contamination from reaching the South Well, making the ongoing operation of the filtration system unnecessary.

Mr. Michel Smith, Owner, Swan Valley Centre, addressed the Board. Mr. Smith introduced Mr. Jim Rolle, Director of Environmental Service, West Central Environmental Consultant (WCEC), as his consultant. Mr. Smith thanked the Board for their time, and stated that during the time frame in question, he ran the system under his consultant's advice that the well remain with the filtration system. He stated that there was a period of time that the well pump had gone out.

Mr. Smith stated that at the end of October 2017 he had serious health issues that left him unable to properly run his business. He stated that a new pump was installed during the Summer of 2018. He had assumed that he had been advised to continue the filtration system. The claim requesting reimbursement for those costs was not submitted until much later, due to his health issues.

Mr. Rolle stated that in 2017 and 2018 there were no samples collected at the South Well. He stated that the levels depicted on the slides were an inferred plume depiction. He noted that, in October of 2018, MTBE was detected at a low concentration at the South Well, between one and two parts per billion (ppb). (Below MCLs)

Mr. Rolle stated that these wells that were operational are part of the public water supply that supplies Mr. Smith's cabins and residence with water. He stated that there was valving in the system to control which well distributed water to the cabins, in case one went down. Mr. Smith was directly in control of water filtration system maintenance with Culligan (provider of the water filtration system). Mr. Rolle stated Mr. Smith acted on his own, in good faith, to maintain compliance in the operation of the filtration system.

Mr. Rolle stated that the water filtration maintenance was required by the Department before and after the time in question. Maintenance of the carbon filter system, and sampling of the South Well was a component of the currently approved work plan, and the costs were reimbursed by the Board. The costs prior to the period in question were also reimbursed. The Department issued statements that the system should have been maintained throughout the period in question.

Mr. Rolle stated that, during the time in question, WCEC was hired and the Department's Case Manager for this site left, and site transferred to a new Case Manager. He stated that, along with Mr. Smith's health issues, there was a lot of shuffling around, which created a lack of communication between the stakeholders. He stated that the costs associated with a filtration system were approved in the work plan that was in place before the time in question, and are currently part of an approved work plan.

Ms. Marla Stremcha, Section Supervisor, Petroleum Tank Cleanup Section (PTCS), addressed the Board. She stated that the previous Case Manager was no longer with the Department. She did agree with Mr. Wadsworth that this work was not a part of an approved work plan. However, she noted that work for the filtration system was approved before the time in question, and was also approved after this time. She stated that the owner had explained that the well may or may not have been in use during this time. She stated this was a public water system, and was part of the same aquifer that had contamination.

Ms. Stremcha stated that Mr. Rolle had showed the water that entered the well didn't exceed the MCL, but she believed there was not enough data to determine that, because of seasonal fluctuations that had shown there was contamination that entered the well prior to the filtration system. The Department tried to finish up the work plans and determine the next steps. She stated that, because this was a public water supply system, the Department tried to be more conservative, and risks to the public are important.

With regard to the statement that the AS/SVE system was designed to prevent the migration, Ms. Stremcha stated that the system was designed to remediate the soil and groundwater impacts in the source area, and hopefully prevent the migration to the well. She stated that continued monitoring of the system and ground water impacts were needed to determine if there would be rebounding, or any other contaminants that may migrate again.

Mr. Thamke asked for clarification that the North Well, that was offline, and was a part of the public water supply inventory, was set up so the owner could go back and forth between those wells to supply water.

Mr. Smith responded that the Department installed a new well, the Replacement Well, and the North Well had been taken out of service. He plumbed in the Replacement Well, to be able to use its water supply, and that of the South Well, interchangeably. During the time that he lost the pump in the South Well, he was using the Replacement Well for his water supply at the site.

Mr. Thamke asked if this was a shallow aquifer, and under the influence of surface water. He said that it seemed there was connectivity between all of this, but the remediation had shrunk the plume.

Mr. Rolle responded that the impacted aquifer and drinking water aquifer were all one (1) aquifer. When the South Well was being operated as a primary well, it extended the dissolved phase plume towards the South Well. He stated that if you operated a drinking water well within the context of a greater remediation site of the same impacted aquifer, caution needed to be taken, because the well can draw in the contaminants during periods of operation. He stated it becomes a dynamic system in combination with the sampling frequency. The sampling frequency did not represent periods of operation of the well, and may not represent the full picture of potential impact to the well. He stated the well was a public drinking water supply, with detectable concentrations of contaminants. When WCEC sampled in June 2020, MTBE was still present between one (1) and two (2) ppb in the South Well (below MCLs). The data had not been reported to the Department, because WCEC was waiting on the next round of samples. He stated that there were contaminants in the aquifer that could make their way to a public water supply. He noted that there is a sub-surface water line that runs from the Replacement Well towards the North Well, and continues south to the cabin area. The South Well was connected to that water line, and the PVC water line runs through the heart of the plume. He stated it is a red flag for potential impacts to the water system.

Mr. Johnson asked if the figures that show the potentiometric surface on the aerial photos presented were prepared by WCEC. Mr. Rolle responded that the aerial photos were prepared by WCEC. The initial potentiometric surface map came from Eric Smart, Smart Consulting, that worked on this site before WCEC.

Mr. Johnson stated there was a ground water divide that drew his attention to an anomaly. He saw the gradient down toward the monitoring well to the north. He asked if the monitoring well to the north from when the North Well operated could have created a flow direction back up to the well.

Mr. Rolle responded that he did not have the data on the figure in question. WCEC had generally noted a ground water flow to the south. There were some anomalies, and he stated the Swan River flows next door to the site, and there was a seasonal ground water fluctuation greater than ten (10) feet. He said that with semi-annual monitoring there may be some anomalies, and flow direction to the river was expected. The river was a lower elevation than the site, even though the potentiometric surface may fluctuate.

Mr. Johnson noted that the North Well on the site seemed to create a steeper gradient as a result of some withdrawal. With the water level variations, it was possible that water and contaminates could be drawn toward a pumping well. He stated that the divide was a peculiar potentiometric surface.

Mr. Rolle stated that, at the time the for which the costs were submitted, the North Well was not in service, but, the South Well and the Replacement Well were in service. There were two (2) operating supply wells, one on either side of the groundwater ridge, which would illustrate a cone of depression influenced by both wells. There was pump testing as part of the remedial investigation, to measure the drawn down in that aquifer caused by the capacity of a supply well pump. He stated that the site is a mix of glacial alluvium, with some till underlain by alluvium, and there were enough fines that a well in the shallow aquifer could experience complete draw down with moderate pumping rates.

Mr. Johnson stated that the isopleths depicted on the plume maps presented to the Board may have been influenced by not having sampling data from all the wells. He stated that Mr. Rolle had mentioned that not all the wells to the south had samples collected during some of the events.

Mr. Rolle responded that, in 2017, there were no samples taken from the South Well. The images that had been presented would have to be relying on projections, not on actual data from the South Well. He stated that the samples taken in 2018 recorded the presence of MTBE in the pre-filter sample in the South Well.

Mr. Johnson asked if the maps that showed the contamination plume were from WCEC. Mr. Rolle stated that they were prepared by the Board staff.

Mr. Johnson asked if the requirement to have the water treatment system was discussed with the Department early on, and if the installation of that system was prompted by an abundance of caution to protect a public water supply. He asked if the filtration system somehow did not get budgeted into the work plan associated with the costs submitted, but there was still recognition by the Department that it was on-going to protect the public water supply.

Mr. Rolle stated that the transition from the previous consulting firm working at Swan Valley Centre was concurrent with the transition within the Department from one Case Manager to another. As the new consultant, the first action WCEC performed was an SVE pilot study. The sampling of the South Well and the maintenance of the filtration system were not a part of their work plan. Mr. Smith was Culligan's direct point of contact for the water filtration system's operation and maintenance (O&M), which included the billing. Mr. Rolle stated that, when the South Well was brought back into service, Mr. Smith assumed that the Department required him to maintain the filtration system on the well until the site was closed. Mr. Rolle stated that Mr. Smith had thought the carbon filter being changed out completed the Department's requirement, and acted in good faith to have that work done.

Mr. Rolle stated that the claim being denied sparked a series of events; WCEC took over as the direct point of contact for the system O&M and billing, and WCEC now pays the bill directly and submits the claims. He pointed out that Mr. Smith paid the bills out of his own pocket in good faith, believing that the filtration system was required by the Department. Mr. Rolle stated the filtration system had been proven to be needed before and after this period in question.

Mr. Johnson asked if the filtration system O&M was part of a current work plan. Mr. Rolle responded that it was, and the costs were reimbursed under the current work plan.

Mr. Thamke stated that three (3) of the four (4) issues had been addressed. He stated that the reason RCRA Subtitle-I exists was because of the Clean Water Act and Public Water Supply. (This subtitle is the federal statute that precipitated establishment of the State tank cleanup and Petroleum Board programs). The regulations were put into effect to guarantee there were leak prevention programs or a release response program that protects public water supply. He stated that he did not want to go contrary to statutory requirements of §75-11-309(1)(g). He stated that within the timing of this claim, it does not appear that the filtration system was part of an approved work plan. It seemed clear that it should have been a part of an approved work plan, but because of the oversights that were highlighted by Mr. Rolle and Mr. Smith, it was not.

Mr. Thamke asked Ms. Stremcha if it were reasonable for the Department to write a memo to file to clarify that there was a change in project management, but the Department considered the installation to be part of a longer-term work plan. Ms. Stremcha responded a memo could be prepared if it is deemed necessary.

Mr. Schnider asked Mr. Wadsworth if the Board staff would take a memo into consideration. Mr. Wadsworth stated that the claim was not a part of an approved work plan at the time the work was done. Neither the Department files nor the consultant indicated in their report that the concentrations that entered the South Well had exceeded the MCL, and the report indicated that there were concentrations of MTBE at two (2) ppb, which is below the MCL. He stated he was not aware this was a public supply well. If it was a public supply well, there should have been monthly monitoring at the well to confirm or deny whether there were concentrations, as required by public supply well sampling protocol.

Mr. Wadsworth stated he would add the memo to the file. He referenced §75-11-307(1)(j), MCA, which states that the Board will reimburse for remediation efforts that bring the contamination levels to the MCLs, not in excess of Department standards. To justify reimbursement for remediation efforts that are aimed at reducing MCLs below the accepted safety levels is difficult to do. He reiterated that the Department standards for a drinking water well had not been exceeded.

Mr. Rolle stated that one (1) of the issues that had been discussed with the Department Case Manager, the Board staff, and himself was that the sampling of the South Well both, before and after the installation of the filtration system, at a frequency that would be protective of human health, would cost more than maintaining the filtration system. There would be monthly trips, labs, sampling time, and reporting time, when it had been proven that the filtration system was effective in maintaining a non-detect constituent concentration at the point of consumption. The filtration system represents a much lower cost alternative then the monthly sampling events at both operating wells.

Mr. Johnson stated that this was not a remediation effort to cleanup to more than Department standards. This was a point-of-consumption treatment. He stated that it was commonly done on many different projects, to protect a water supply at the point of consumption. He said it was to prevent exposure of contaminants in a receptor.

Mr. Johnson stated that §75-11-307, MCA states what the Board must reimburse as part of a Department approved work plan. He stated that he did not see any verbiage to say that the Board may not or must not approve costs that were not a part of an approved work plan. He did not see anything in the statue that prevented the Board from granting eligibility or reimbursement for something that was deemed actual, reasonable, and necessary.

Mr. Schnider stated that if that rationale was applied, it wouldn't prevent anyone that wanted to submit claims that were not a part of an approved work plan. It would allow everyone to go back to the Department to get their claims approved.

Mr. Johnson stated that it would slow the claim process down. He said if work was done without a plan, it would make every claim into a Board claim. The Board staff has the obligation to bring these matters to the Board's attention. This dispute was a unique situation, because the filtration system was approved in work plans both before and after the time for which the claim had been submitted.

Mr. Kyle Chenoweth, attorney for the Board, stated that §75-11-307(2), MCA lists out the expenses that will not be reimbursed in the subsections. He stated that Mr. Johnson and he had a conversation a year or two ago about law of statutory construction, and that "may not" and "must not" are the same thing.

Mr. Chenoweth stated that §75-11-307(2)(j), MCA says that the Board may not, or must not, reimburse for costs that were not actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan, as provided for in 75-11-309, MCA, including costs in a department-approved corrective action plan for the purpose of remediating the release in excess of department standards. The Board had the ability to vote and allow these costs. The Board staff did not have that ability, which was why it was brought to the Board. He stated that a deviation from statutes with a vote needs to be done with mindfulness of consistency, and create certainty for the taxpayers and stakeholders.

Mr. Chenoweth stated Mr. Johnson's question could be answered by §75-11-307(2), MCA. He stated that the statutory construct needs to be looked at, as a whole, and the first part addresses if the Board determined the costs were not actual, reasonable, and necessary to respond to the release and implementation of the work plan. He stated that if the costs were considered actual, reasonable, and necessary, but not responding to a release and implementing an approved work plan, it would not meet the standards of the statute.

Mr. Schnider asked for a motion from the board.

Mr. Johnson made a motion to reject the Board staff's recommendation and allow full reimbursement. Ms. Rupp seconded.

Ms. Pirre asked Mr. Johnson if he would like to include his rationale for the motion made. Mr. Johnson declined.

Mr. Schnider stated that he did not believe this should be a full reimbursement. He would feel more comfortable with a percentage of the reimbursement, because if this claim had been done properly it would not have come before the Board. He believed there should be some repercussion, because if all parties would have worked together, they would not be in this situation. He stated there were several statutory laws that say the owner should not be reimbursed, and he did not believe there should be a full reimbursement.

Mr. Johnson stated he disagreed, but would look at reasonable costs, as determined by Board staff. He stated that it was said the operation of this system was now a part of an approved work plan. He stated that, as far as the necessity of the system, it had been established. It was not up to the Board or the Board staff to determine what would be necessary for cleanup, it was up to the Department.

Mr. Schnider stated that he understands that the Department was an expert. The Board oversees reimbursement. Mr. Johnson stated that the Department was not just the expert, they were the authority. He stated that if the Board decided that the cost was unnecessary, it would be contrary to the regulatory authority.

Mr. Wadsworth stated that the reason §75-11-307(2)(j), MCA was placed into law was because of the Sunburst Texaco case. The Judge rendered a decision in that case to require Texaco to clean-up the home owner's property to conditions beyond the State standards. He stated that under those conditions, the Department would have to agree to an approved work plan beyond the state standards. The Legislature granted the Board the authority to make that evaluation, and thus the word "necessary" is in the Board statute. He stated that necessity of an activity is a discussion that should take place at the time the work plan is prepared. Mr. Wadsworth stated that the word "necessary" can be found in §75-11-309, MCA subsections. The Legislature gave the Board the right to determine if costs were actual, reasonable, or necessary for implemented work plans or to clean up a release. He stated that the Board had the right to consider whether something is a necessary component of the work plan.

Mr. Johnson stated that we had not talked about remediation. The filtration system was at the point of use, not a part of the aquifer cleanup remediation. He stated that he did not believe this part of the MCA was applicable. He stated that this was a point-of-use to protect the receptor, rather than clean up to a standard that exceeded the Department requirements. The system does nothing for cleanup.

Mr. Schnider asked if there were any other questions from the Board. There were none.

Mr. Schnider restated the motion that was made by Mr. Johnson, to reject the Board staff's recommendation and allow full reimbursement.

Ms. Root stated that there needed to be a clearly stated rationale for the motion.

Ms. Rupp stated that she seconded the motion, because it seemed there was a miscommunication, or an error in the absence of this filtrations system's O&M within a work plan for the five (5) year period in question. She stated that if this was reasonable or necessary before and after, she approved the work for this period. She stated that she understood there was an oversight or a mistake, which was why it wasn't in the work plan.

Mr. Johnson stated he concurred with Ms. Rupp, and this situation was why the Board existed. He stated he would like to make an amendment or clarification, that the costs should be reasonable, and reviewed by the Board staff.

Mr. Schnider asked Mr. Johnson if he would like to send the claim back for review prior to approval. Mr. Johnson stated he believed it should be sent back to Board staff to be sure the right procedures were followed.

Mr. Schnider asked Mr. Wadsworth how to amend the previously stated motion. Mr. Schnider asked whether the Board should vote the motion down and restate it. Mr. Wadsworth stated Mr. Johnson could amend his motion, and get it seconded.

Mr. Thamke stated he did not think he could support this motion. The Swan Valley Center had been around for a very long time. He stated that if Mr. Smith paid for these costs out of his pocket, the costs should be decided. He would propose that we oppose the motion, amend it to say we would reject the staff recommendation, and support payment of the disputed amount because of a miscommunication between the Department and the owner, and that the Board feels the costs were reasonable costs incurred as part of the remedial action.

Mr. Schnider said that he didn't know if the costs were reasonable. He stated that the costs had not been reviewed. He stated this motion was going against the grain of the rules. While he wanted to reimburse the owner, he stated that he did not want to overstep the rules set up by law to do so.

Mr. Rorabaugh recused himself from any matters associated with Rocky Mountain Supply or its customers. Mr. Schnider recused himself from voting on any matters that are associated with Payne West Insurance and its clients. Mr. Johnson recused himself from voting on any matters associated with RTI and its clients, and Yellowstone Soil Treatment, and its clients. Ms. Smith recused herself from any matters pertaining to First Interstate Bank. Ms. Rupp recused herself from any matters associated with the Montana University System. Mr. Thamke recused himself from any matters regarding reimbursement to the Department of Environmental Quality.

Mr. Johnson amended his motion to reject the Board staff's recommendation and allow full reimbursement, and added that the claim would be sent back to the Board staff for review of reasonable costs. He stated that the resulting payment should be based on that review, because those costs were a part of an approved work plan prior to the period in question and after the period in question, and that is the stated basis for the costs being actual, reasonable, and necessary. Ms. Smith seconded. The motion was unanimously approved by roll call vote.

Reimbursement Adjustment Dispute, Lockwood Interstate Exxon, Facility #5605074, Release #4416 and #5058, Billings

Mr. Johnson recused himself from the Board, to act as a Representative for Stockton Oil Company.

Mr. Wadsworth presented the Board with the release reimbursement dispute of the Board staff recommendation of 0% reimbursement of all pending and future claims for Lockwood Interstate Exxon, Facility #56-05074, Releases #4416 and #5058, in Billings. Eligibility determination for Release #5058 was also before the Board, and addressed as an item in the table of eligibility recommendations (see, below).

Shortly after release #4416 was discovered, the Lockwood Interstate Exxon facility had been found to be in noncompliance, and exhibited noncompliance for ten (10) years. In July of 2014, the facility was among six (6) facilities listed in an Administrative Order (AO) issued by the Department. The AO was not satisfied until December of 2015. He cited §75-11-309(2), MCA, which required all claims to be suspended until the owner is back into compliance. He cited Administrative Rules of Montana (ARM) 17.58.336(7)(a), which states that there would be no reimbursement at sites that remain in noncompliance greater than 180 days. Due to the AO, issued for failure to comply with requirements imposed by or pursuant to 75-11, Part5, MCA, or rules adopted pursuant that Part, the staff recommended adjustments to reimbursement for both releases. For release #5058, the staff recommended the release be eligible; however, due to violations of UST Program rules, the release was recommended for 0% reimbursement. For release #4416, staff recommended no further reimbursement for this eligible release, due to violations of UST rules.

Jon Doak, Doak Law, Attorney for Stockton Oil Company, addressed the Board. He introduced Dan Stockton, Chairman of the Board and Principal Shareholder, Stockton Oil Company, and Mark Johnson, Resource Technologies, Inc. (RTI), Consultant for Stockton Oil Company.

Mr. Doak stated that Stockton Oil Company disputed the determination to suspend claims on release #4416 and the reduction of reimbursement to 0% on release #5058. He stated it was unjust and unwarranted, under the circumstances. This decision had the potential to damage not only Stockton Oil Company, but the interest of the

public and the Board. He stated that the facility was acquired by Stockton Oil Company. The tanks and piping associated with releases #4416 and #5058 were installed by the previous owner. At this point, the tanks and piping had been removed, and the facility is no longer a fuel dispensing facility.

Mr. Stockton thanked the Board for their time. He stated the history of Stockton Oil Company, and his personal history between 1946 and 2008, that included his grandfather and his father. He stated that his son, Mykel Stockton, had been promoted to President of Stockton Oil in 2008, and took over all of Dan Stockton's duties when Dan Stockton fell ill in 2009. Mr. Stockton recounted several health events suffered by his family, that had impacted his ability to run Stockton Oil. In 2013, he was informed that Stockton Oil was in severe financial trouble and had environmental problems.

Mr. Stockton stated that in 2014, his son Mykel Stockton had severe health issues. Mykel Stockton stepped down from his position as President. Stockton Oil was flooded with bills, cash flow issues, and were forced to shut down the entire sales division. They eventually closed their stores, and put them up for sale. Stockton Oil found buyers for the key locations, which allowed them to pay their creditors and reopen three (3) stores. After they received a Department violation letter, Jon Doak, Mark Johnson, Joe Stockton, and he met to identify and correct all the environmental issues. A meeting took place with the team just identified and Shasta Steinweden, Spill Response Coordinator, Enforcement Program, Department of Environmental Quality (DEQ), and a plan was formed to satisfy the AO and bring the sites back into compliance. He stated that in December of 2015, Stockton Oil received a letter of satisfaction for the AO. From that day on Stockton Oil and their attorney and consultant have worked diligently to be in compliance, and work toward closure. He stated that they had made it clear to the Department who was to be contacted if there were questions, problems, or notices that regarded Stockton Oil. He said they all thought they complied, and had moved towards resolution. He had a list of violations they had needed to work on, and the list had gotten shorter. In January of 2016, his wife was diagnosed with cancer, and passed away September of 2018. He stated that sometimes family needed to come first.

Mr. Stockton stated that he had felt their plan had gone well, as they had disposed of two (2) more problem sites. In the summer of 2019, he was informed they were once again in financial trouble with the three (3) stores that remained. He immediately put everything up for sale. Mr. Doak, Mr. Johnson, and himself met with Ms. Stremcha, then Case Manager, DEQ, on September 9, 2019, to discuss the three (3) facilities' progress and future plans. Ms. Stremcha had said she was pleased with how they progressed, and provided them a status of their sites, as of September 6, 2019. He stated everything complied except the Department had waited on the paperwork for the Five Corners Quik Stop, and at that time he presented the paperwork for the second time. He said that Stockton Oil had processed the sale of properties, but they needed paperwork from the Department that showed Stockton Oil compliance in order to close.

Mr. Stockton stated his options had dwindled. He stated his values had always been the highest standards. He said that he had never ignored or not responded to a question, request, or notice that regarded the issues at hand. He said he had not caused or added anything that caused damage to the environment. He had been financially responsible to his best ability. He stated he had taken responsibility for this issue, and he asked that the Board understand and help.

Mr. Doak stated that his involvement in Stockton Oil started after the previous Attorney retired. He stated that they strongly disputed that Lockwood Interstate Exxon had a ten (10) year period of noncompliance. He said that there were compliance issues with respect to this facility prior to 2014, that were addressed. The facility, to their knowledge, had been brought back into compliance. At the time the AO was issued in July of 2014, it was unknown to Mr. Stockton or himself that the order was entered until months later. The information had gone to Mykel Stockton, who had serious health concerns, and had not communicated the information to anyone.

Mr. Doak stated that, at the time the AO was issued, there were two (2) issues at the Lockwood Interstate Exxon facility. One was a lack of leak detection on a downstream portion of the piping, and an issue of the visibility of the leak detection system that required construction. The request from the Department was for the daylighting in the T-housing unit of the sump, and leak detection equipment which required construction. He stated that once they learned of the issues, they arranged a meeting with the Department, and asked them to lay out all the issues that needed to be corrected by Stockton Oil. They created an action plan, and a list of items that needed to be corrected at all their facilities. After they left that meeting, they had a plan that returned the facilities to full compliance. The items that were specific to the Lockwood Interstate Exxon were the installation of the daylighting in the T-housing unit of the sump, leak detection equipment, and the submission of a notice of inactive status of the facility.

Mr. Doak stated that all the tanks at the facility had been emptied of fuel in March of 2015, and they no longer dispensed fuel. The notice of inactive status was filed at the end of October 2015. There was an inspection report requested by the Department in the beginning of December 2015, and it confirmed the tanks had been emptied. He stated that there was not an acknowledgement of completion of the AO until December of 2015, which indicated issues at other facilities, not this facility. He stated that all the work requested by the Department at this facility was completed long before December of 2015.

Mr. Doak stated that Stockton Oil, as part of the process of closing the AO, was required to pay a penalty of $8,550.00 for the issues at this facility, and the others included in the AO. He said that upon receipt of the requirements of AO satisfaction letter from the Department in December of 2015, they believed that all the issues of compliance at this facility had been covered, cleared and released by the Department. He said that Stockton Oil then leased the facility to a third party, with the option to purchase the property. Their understanding was that they did not have compliance issues.

Mr. Doak stated that Stockton Oil received a letter from Board staff in March of 2020, that states the facility (sic - release #5058) was eligible with 0% reimbursement. The letter indicated there was a compliance inspection, on November 11, 2017, that resulted in eight (8) days noncompliance, because the inspection was due by November 2, 2017. He stated that the notice of inactive status was submitted and accepted by the Department at the end of October of 2015, and that the inspection was done within three (3) years of the notice of inactive status. He said that he was advised the compliance inspection had been delayed by a week, because the inspector was unavailable. Stockton Oil was advised it was not a material issue, so long as it was promptly done, and it was.

Mr. Doak stated they strongly disputed the issue of failure to conduct the required cathodic protection test resulting in 34 days of noncompliance. The notification from the Department, on May 18, 2018, gave a due date of September 2, 2018 to complete the cathodic protection test, and the test was completed June 21, 2018.

Mr. Doak stated that the items that were referenced in the AO in July of 2014 were technical issues that affected the facility. They did not present a significant increased threat to public health or the environment. He stated that neither the issues, nor the resolution of those issues, resulted in an increase of cost to the Fund. The compliance issues did not exacerbate a release that had already occurred. He stated that, in accordance with ARM 17.58.336, there seems to be some discretion for the Board to adjust the reduction of reimbursement amount, if the Board finds that the noncompliance didn't present a significant increased threat to public health, or the environment, there had been no significant increased cost to the Board, or delay in compliance was caused by circumstances outside of the control of the owner. He stated that he did not know if the circumstances that surrounded company management, particularly Mykel Stockton, would be considered outside of the control of the owner. Once it was discovered Mykel Stockton was impaired, Stockton Oil company made every effort to ensure that all communications went through Mr. Doak or Mr. Dan Stockton, so they would know if there was an issue. He said he understood, and expected, that the Board staff would also be made aware of the need to notify Mr. Stockton or Mr. Doak, if they wanted an immediate response. He stated that the Board staff was not made aware.

Mr. Doak stated that the other ameliorating factor was ARM 17.58.36(7)(e)(iv), error in issuance of an AO. He stated that one of the items he provided the Board was an email from the Underground Storage Tank (UST) Program that stated they had done follow up inspections with respect to the daylighting in the T-housing units. They advised Mr. Doak that there was not a violation for the visibility of the sump at the Lockwood Exxon facility, as referenced in the AO. He stated that perhaps there was an error in the issuance of the AO.

Mr. Doak stated that another ameliorating factor was ARM 17.58.36(7)(e)(v), addressing any other factor that would render the use of the reimbursement schedule in ARM 17.58.36(7)(a) demonstrably unjust. He stated that the application of the reduction schedule per ARM 17.58.36(7)(a), in this case to reduce reimbursement to 0% for release #4416 and to deem #5058 ineligible (sic, to receive no reimbursement), would be unjust. It would render these sites completely ineligible for reimbursement, and it would create a disincentive for administrative compliance with the Department. He stated that Stockton Oil and he worked diligently to bring all their facilities back into compliance, as soon as they knew there was a compliance issue.

Mr. Johnson stated his company, RTI, has appeared before the Board for the 30 years of the Board's existence, and had seen matters that prevented reimbursement of claims. He stated that, initially, substantial violations would factor under ARM 17.58.336(7)(e). RTI had been working on these releases, for Stockton Oil, and none of the

violations cited had an impact on the cleanup for releases that were eligible. He stated that there was no significant increased threat to public health, and no additional burden on the Fund.

Mr. Johnson said that Stockton Oil had paid fines, and will take a financial hit, because of the reimbursement denial. He stated that the financial hit or denial of reimbursement far exceeds the penalty accessed by the Department. Mr. Johnson stated that there were other situations the Board had been presented, in the last year, with technical violations that didn't have an impact on the Fund. He said that Stockton Oil had worked hard to resolve the issues that were presented to them in cooperation with the Department.

Mr. Rorabaugh stated that he had heard many times that Stockton Oil, Mr. Doak, and Mr. Johnson used the phrase "when they became aware". He did not fully understand what that meant. He said the Department had sent letters to them and asked why they had not received them.

Mr. Doak stated that the issue had to do with the responsiveness and capability of Mykel Stockton. The notifications were going to Mykel Stockton and not being acknowledged, even though they were picked up by another staff person. He said that the notifications were not getting to company management. The notifications in 2014, from the Department and the Board staff, were going exclusively to Mykel Stockton, and they were not being shared. He acknowledged that Stockton Oil Company bore some responsibility, since they knew the person receiving the information was incapacitated. He stated that, once they had discovered the problem, they had gone to the Department to include Mr. Stockton and Mr. Doak in any communications that were sent, so they could act promptly.

Mr. Johnson stated that Mr. Dan Stockton became aware of the issues when the notice of violation was sent in 2014. The notice of violation laid it all out, in legal terms, and the issues became serious. Mr. Stockton stepped in at that time.

Mr. Johnson stated that when a monitoring record is missing and is noted as a violation for compliance, an owner has to record a year's worth of completed monitoring records to come back into compliance. He stated that it was built into the system that the violation will exceed 180 days for the reimbursement percentage, and it had been routinely adjusted by the Board in the past. He stated that the other violations had occurred when the tanks were empty and inactive. He stated there had been no impact to the environment or public health.

Ms. Rupp summarized her understanding of the issues and discussion before the Board. The two releases for Stockton Oil were being held to 0% reimbursement by Board staff recommendation, and there was no specific claim application submitted. The reason the recommendation was made to the Board was because Stockton Oil failed to respond in a timely fashion to the communications sent by the Department. They had failed to conduct action in a timely fashion. Stockton Oil has approached the Board, and said there were breakdowns on their end, but they had acted in good faith, and attempted to rectify the issues to be eligible in the future.

Mr. Wadsworth clarified that the issue was for future reimbursement on the two (2) releases for the facility in question. He said that the decision the Board would make would not have an impact on future releases.

Mr. Wadsworth stated that because the monies that make up the Fund are collected as a fee on fuel, there is no way to raise the premiums of an owner that had not complied. He stated that one of the ways the Board, raises the premiums on one of their insureds, is to impact the reimbursement for releases that are eligible. He stated that when the Board sanctions a percent of reimbursement adjustment on a release, it is for the life of the release. He said that it does not affect future releases, but it does affect current releases, and would continue through the life of the current releases. He said that it would be valuable to consider how long it would take before the release was resolved, and the cost that would be incurred.

Mr. Johnson cited §75-11-309(2), MCA, that states that future claims may be reimbursed according to the criteria set by the Board, and the Board would consider the effect and the duration of the noncompliance. He reiterated that there was no effect on the environment. He said that this rule did not remove these releases from reimbursement status, but that they could come back to reimbursement status based on a determination by the Board. He stated that he recommended the Board consider the fact that there was no effect on the environment.

Mr. Rorabaugh stated that he understood there was no effect on the environment. He struggled with the notion that a decision to provide 100% reimbursement could send the message to owners that it would be okay to be out of

compliance, if they didn't have a release and hurt the environment. He said that he didn't see how that behavior could be condoned.

Mr. Johnson replied that he agreed that the rules were there to prevent releases. He said that as a good operator, it takes time, money, and effort to maintain compliance. He stated that the issue at this site was cleanup, rather than the operation of a system. Compliance issues were for the continued operation of the system. It did not give permission to operators that they did not need to stay in compliance, because they could be eligible for the Fund no matter what. He stated that he did not think this sent that message. He said that it was more a question of fair compensation verses the level of noncompliance. He stated that a diligent inspector could find a technical violation on most sites in Montana. He said that, historically, the major violations were because of non-reporting, blatant disregard, or not cooperating with the Department, and that would make a site not eligible for the Fund. He said that the Fund was there to provide incentive for owners to stay in compliance.

Mr. Doak stated that they disputed the 0% reimbursement, because they had tried to bring everything back into compliance, at considerable expense. They understood that once they brought the site back into compliance, it would be eligible. He said that, because of rote application of the schedule ARM 17.58.36 (7)(a), they were out of compliance for a period, they can never get back into compliance, because their reimbursement was set to 0%. It creates a disincentive to get the facility back in to compliance after there was a violation. He stated that Mr. Johnson said the leak detection monitoring record was missed, and they had to get a year's worth of records before they got back into compliance. He used the analogy that if capital punishment was the consequence for a violation that took more than a year to correct, it created a disincentive to resolution of compliance.

Ms. Heather Smith stated that there was a purchase of a store, and there was potentially faulty equipment that might have been the obligation of the previous owner. She stated she would like clarification on which store was purchased. Mr. Doak responded that the Lockwood facility, with tanks and piping, was purchased from Exxon. Ms. Smith asked for the date of the purchase. Mr. Doak responded that the purchase had been before release #4416, in 2005. Neither Mr. Doak or Mr. Stockton knew the exact date of purchase.

Ms. Smith stated that she would like clarification on awareness of the issue for the releases. She said that she can empathize that there was a breakdown from an employee, but release #4416 happened in 2005. She stated that they had indicated that communication broke down in 2014, and she asked what the lack of communication was, for the period between 2005 and 2014.

Mr. Doak stated that they would dispute that release #4416 was a result of failure to conduct a line leak test. There was a leak in a fiberglass line of diesel that occurred on February 4, 2005. It was reported, an application was submitted to the Board in May 2007, and it was determined to be fully eligible for reimbursement. He said that during this time Mr. Lonney Averill, who was Mr. Stockton's partner, oversaw environmental and compliance issues for Stockton Oil. He said that Mr. Averill was on top of it, but he retired in 2008. He stated that Mr. Stockton tried to retire in 2009, and even with the changes in the company, it functioned well up until 2014.

Mr. Johnson stated that RTI had been working on release #4416 since its discovery. He said that he was unaware of the compliance inspection notices in 2007 and 2012. He stated that every three (3) years a facility has to have an inspection and are given a list of issues to be corrected. He said that up until 2014, release #4416 had been fully reimbursed. He said that the AO had triggered the suspension of reimbursement.

Ms. Smith asked for clarification that the work plan was approved, everything was moving along, and the AO stopped the process. Mr. Johnson stated that it didn't stop the process of the investigation, and any work related to release #4416. He said that it did suspend all claims, until the Board could decide on the matter.

Ms. Smith stated that she would like to know the cost involved. She did not see anything that related to cost in the packet. Mr. Schnider stated that he did not see any costs involved either. He asked Mr. Wadsworth if he had any costs associated with these releases.

Mr. Wadsworth responded that the reason that there was no estimated cost for total cleanup was because the Board staff did not have any of the costs available. He said that the total costs were not routinely provided by the Department or the consultant, and that was one of the questions the Board staff would like to have answered, that it would be valuable to consider how long it would take before the release was resolved, and the cost that would be

incurred. He indicated the consultant may be able to give the Board some idea of how much cleanup remained at the site, and the remaining costs that might be incurred.

Mr. Schnider asked if there were any other questions. He heard none and asked for a motion from the Board.

Ms. Rupp asked if the Board should deal with the two (2) releases separately. She stated she would like to know what the other Board members thought.

Ms. Smith stated that the two (2) were linked and what was decided on one release would affect the other.

Mr. Rorabaugh asked for clarification of procedure. If there is no motion, and Mr. Schnider asked twice with no one responding, then they would move on to the next agenda item. Mr. Schnider stated that was his interpretation, and he could confirm with Mr. Wadsworth.

Mr. Wadsworth indicated that there are two separate issues on the Board's agenda concerning separate Stockton Oil facilities. The issue currently under discussion is the Lockwood Interstate Exxon, which has two (2) releases, #4416 and #5058. He recommended that the Board focus on the Lockwood Interstate Exxon, and address the Five Corners site after that. Not making a motion would leave the status with the staff recommendation.

Mr. Schnider asked for clarification on the process when there is a call for motion and no motion was brought forward. He asked Mr. Chenoweth for clarity. Mr. Chenoweth responded that he agreed that if there was a motion called, and there was no response, then the Board should move on to the next agenda item.

Ms. Rupp made a motion to authorize 75% reimbursement for pending and future claims for releases #4416 and #5058 until closure. Ms. Smith seconded.

Ms. Rupp stated that the circumstances surrounding the violations and failure of notifications were unfortunate. Due to the length of time, she did not want to authorize 100% reimbursement of claims.

Mr. Schnider stated that he would like to know the thought process behind the motion. He said that he wanted to know if there was any calculation to the percentage that was stated in the motion, or if it was just a starting point to have a discussion. Ms. Rupp stated that there was not a calculation behind the percentage, but she believed that Mr. Johnson made a good case that there were no environmental effects. She said that she believed the Board should split the difference.

Mr. Rorabaugh stated that he agreed with Ms. Rupp that this situation was unfortunate. He said that he was concerned about the failed inspections. He said that he understood that there was no immediate effect on the environment, but he still believed that it was a bad precedent, to let an owner get away with noncompliance, even if it had no effect on the environment. He stated he would not support the motion.

Ms. Smith stated that she looked at the minor violations, and noted that the minor violations were taken care of rather quickly. She said that she saw an attempt to comply and correct the violations on a relatively quick basis. She said that there were some major violations that were not corrected within a reasonable amount of time. She said that she would like to reduce reimbursement to 50%, based on the effort towards compliance, but also long periods of time between some major violations and completion.

Mr. Schnider stated that the motion was Ms. Rupp's and it would be up to her if it was changed.

Mr. Rorabaugh recused himself from any matters associated with Rocky Mountain Supply or its customers. Mr. Schnider recused himself from voting on any matters that are associated with Payne West Insurance and its clients. Mr. Johnson recused himself from voting on any matters associated with RTI and its clients, and Yellowstone Soil Treatment, and its clients. Ms. Smith recused herself from any matters pertaining to First Interstate Bank. Ms. Rupp recused herself from any matters associated with the Montana University System. Mr. Thamke recused himself from any matters regarding reimbursement to the Department of Environmental Quality.

Ms. Rupp made a motion to amend her motion to allow 50% reimbursement for pending and future claims for releases #4416 and #5058 until closure. Ms. Smith seconded. The motion was approved by roll call vote with 3 in favor and 2 opposed, for all acting members.

Reimbursement Adjustment Dispute, Five Corners, Facility #5600062, Rel #5134, Billings

Mr. Johnson recused himself from the Board to act as a Representative for Stockton Oil Company.

Mr. Wadsworth presented the Board with the reimbursement adjustment dispute pertaining to the Board staff recommendation of 0% reimbursement of all pending and future claims for Five Corners Quik Stop (Five Corners), Facility #56-00062, Release #5134. The eligibility determination was also before the Board for this release, with a Board staff recommendation that the release be eligible. The Five Corners Quik Stop was one of the six (6) facilities identified in the July 25, 2014 AO. Mr. Wadsworth stated that the release was discovered on April 19, 2016, shortly after the AO was satisfied in December of 2015. He said evidence indicates that an August 23, 2013 inspection identified that the facility failed to conduct monthly leak detection monitoring, and the site did not come back into compliance until November 29, 2016, when a subsequent inspection was conducted. He stated that the period of noncompliance was over three (3) years. He said that the AO, issued for failure to comply with the requirements, did not apply to release #5134, because the release was discovered after the AO was issued. He stated that the one (1) noncompliance that was discovered on August 23, 2013 and closed on November 29, 2016, was the reason the Board staff recommended 0% reimbursement, because it falls under the non-compliance statute, 75-11-309(3)(b)(ii), MCA, and was over the 180 days allowed by ARM 17.58.336 (7)(a).

Mr. Doak, continuing in his representation of Stockton Oil, stated that the compliance issue in this case was a missed leak detection record from February of 2013. He stated that, because there was one missed leak detection record, then there must be 12 months of consecutive leak detection records submitted before they could be back in compliance. In the chronology given to the Board, there was no mention of any leak detection records that were missed between February of 2013 and October of 2015, which was the time period during which a notice of inactive status was filed with the Department. The assumption that can be made is that the leak detection records after February 2013, up until the tanks were noticed as inactive in October 2015, were provided. He said that he did not know why there was not a notice from the Department showing that the facility was back in compliance.

Mr. Doak stated that the Board needs to understand the issues that preceded the inspection on October 29, 2016, which closed the issue of noncompliance. At the Five Corners facility, the leak detection system and the tanks that were there in 2013 were the tanks and piping that had been at the facility when Stockton Oil acquired the facility. He believed the tanks were installed in 1979. As part of the communication from Stockton Oil to the Department, it was made clear that the intent was to replace the fuel system at this facility in the spring of 2016. The tanks were put on inactive status in October of 2015, they were pulled out in April of 2016 when the release was discovered, and the entire system was replaced in May of 2016. They believed that the release had nothing to do with a missed leak detection record from February of 2013. He said that there was no indication there were other missed leak detection records, after February of 2013, that would indicate continued noncompliance at this facility. The missed leak detection record did not present a significant increased threat to public health or the environment, and it did not create any significant increased cost to the Fund. He said that it was unjust to recommend a 100% penalty, when there was not an affirmative indication that the leak detection records came back into compliance after February of 2013. He said that they had met with the Department, in the summer of 2015, and he did not recall the missed leak detection record brought up as an issue.

Mr. Johnson indicated that the chronology stated that the AO was satisfied in December of 2015 and the release was discovered in April of 2016. He said that, at the time of the release, the facility was in compliance. He said that Mr. Wadsworth stated that, if a facility was determined to have been in compliance, it would be eligible for reimbursement. He stated during the inspection on October 20, 2016, the comment was that the facility had complied. There was no impact to the severity of the release because of the noncompliance.

Mr. Johnson stated that there was not a demonstration to be noncompliant and still be eligible. The compliance of the tank systems was regulated by the Underground Storage Tank Leak Prevention (UST) Program, and they did the inspection. The Enforcement Division assessed the fines and penalties. He said that, the Board eligibility notwithstanding, it was still a violation with the Department, and assessed a fine. The fine discouraged owners from being out of compliance. He said that he worked with insurance companies that do cover petroleum releases, and they did not have these hurdles for reimbursement, because the compliance issue resides with the Department, who had oversight for the operation of the tanks.

Mr. Johnson stated that the release was discovered after the AO was satisfied. He reiterated that the leak record had no bearing on the severity of the release, and no impact to the Fund. The release would meet the criteria stated in ARM 17.58.336(7)(e).

Mr. Thamke asked Wally Jemmings, Acting Section Supervisor, UST Program, to answer a few questions. He asked Mr. Jemmings if he would agree with the characterizations Mr. Doak presented, that beyond the missed leak detection record, there were no other compliance issues. Mr. Jemmings stated that he agreed there were no other issues at this facility, except the missed leak detection record.

Mr. Thamke asked Mr. Jemmings to describe to the Board the process the UST Program went through when they considered enforcement requests. He would specifically like to know about significance criteria, corrective action plans, compliance and the basic protocol that is used when considering the pursuit of an enforcement action.

Mr. Jemmings stated that if a UST corrective action plan due date for a major or minor violation went past the due date included in the plan, that is when an AO would be issued. He stated that, in the case of one missed leak detection record, the due date for the corrective action plan would be the next inspection, or 90 days prior to the expiration date of the operating permit. UST issues operating permits every three (3) years. The reason he could see for this missing record not being included in the AO was that it wasn't due until 2016.

Mr. Thamke stated that his position on the Board was as a citizen member with regulatory knowledge. The reason he had that knowledge is that he has been with the Department for 29 years. He stated that, as a Bureau Chief with tanks under his umbrella, there had been a lot of discussion, but no resolution, and maybe he could get some support from the Board. Mr. Wadsworth was doing his job, and the Board staff was doing their job when they characterized noncompliance. They adhere to the position that if there was noncompliance, then there should be penalties for reimbursement. He said that there was a middle road that could be pursued, with Board support. There would need to be criteria to allow better flexibility for noncompliance. Then things like a missed leak detection record wouldn't necessarily result in reimbursement penalties. He stated that the UST program had level of significance criteria by which they evaluate if a violation was significant enough to pursue an enforcement action. He would like to see level of significance as a criterion for Board actions. He suggested formation of a work group that would address the issue, and work with the Board staff to provide some middle ground. He said that if the regulated community had some assurance that, if they missed a record, it might not result in automatic penalties, but rely on the UST significance criteria. He said that if they entered an AO or a consent decree where the parties can't agree on the path forward, then the Board could use their timed days for noncompliance, that would affect the reimbursement. He said he stated this for future consideration, but it did have an impact on the decision that they need to make. He thanked Mr. Stockton and Mr. Doak for their time. At the end of the day, it was the Department's job to ensure compliance, and he encouraged them to stay in compliance.

Mr. Rorabaugh stated that, with the inspection date of August 23, 2013, there was a period of 224 days in noncompliance, and he wanted to know how that figure was calculated. There was a discussion and Mr. Wadsworth stated he would check with the staff. It was later revealed that the 224 days was calculated from the date the release was discovered (April 19, 2016) to the date the tank violation was satisfied (November 29, 2016). Which reflects the number of days the facility was in noncompliance following release discovery.

Mr. Wadsworth reminded the Board about the tank months table the Board has used in the past. As Mr. Doak and Mr. Thamke mentioned, a site with a missed record could return to compliance until 11 months' worth of additional records were recorded. He said that the Board recognized this as a component of compliance and had taken this into consideration on prior actions they had taken. He said that a missed record would equate to a percentage adjustment for noncompliance.

Mr. Schnider acknowledged the fact that there was an issue with missing tank records. He said this could be something the Board looked at readdressing at another meeting. He said that a full year of records would automatically put the facility at 0% reimbursement for one missed record, and this didn't make sense.

Mr. Doak stated that he requested that the Board determine no penalty or minimal penalty due to ARM 17.58.336 (7) and their ability to adjust reimbursement.

Mr. Schnider asked for a motion from the Board.

Ms. Rupp made a motion to authorize 75% reimbursement for pending and future claims for release #5134 until closure. Ms. Smith seconded.

Mr. Rorabaugh stated that he felt that the failure on August 23, 2013 was minor, and the owner had until August 6, 2016 to fix the issue. During that time, they had the release, and the owner was late on getting the issue corrected. He said that he would be willing to go up to 90%, because they had complied when the release happened. He stated that according to the chart in the rule, the penalty would be 50%, so he would support the 75% reimbursement motion by Ms. Rupp.

Mr. Schnider stated that he agreed the violation was minor, and he felt they could do a little more than 75%. Mr. Schnider asked for any further discussion. Hearing none, he asked for a roll call vote.

Mr. Rorabaugh recused himself from any matters associated with Rocky Mountain Supply or its customers. Mr. Schnider recused himself from voting on any matters that are associated with Payne West Insurance and its clients. Mr. Johnson recused himself from voting on any matters associated with RTI and its clients, and Yellowstone Soil Treatment, and its clients. Ms. Smith recused herself from any matters pertaining to First Interstate Bank. Ms. Rupp recused herself from any matters associated with the Montana University System. Mr. Thamke recused himself from any matters regarding reimbursement to the Department of Environmental Quality.

For clarity, Ms. Rupp's motion to authorize 75% reimbursement for pending and future claims for release #5134 until closure was restated. The motion was unanimously approved per roll call vote for all acting members.

Mr. Doak and Mr. Stockton thanked the Board for their time.

<u>Eligibility Ratification</u>

Mr. Johnson rejoined the Board as an acting member.

Mr. Wadsworth presented the Board with the applications for eligibility that were tabulated in the Board packet (see, table below). The first two (2) releases were discussed and ratified during the Reimbursement Adjustment Disputes earlier in the meeting, and the table reflects the Board's ratified decisions.

Location	*Site Name*	*Facility ID #*	*DEQ Rel # Release Year*	*Eligibility Determination – Staff Recommendation Date*
Billings	Five Corners Quik Stop	5600062	5134 Apr 2016	Reviewed 2/25/2020. Ratified eligible with 75% reimbursement.
Billings	Lockwood Interstate Exxon	5605074	5058 Dec 2014	Reviewed 2/24/2020. Ratified eligible with 50% reimbursement.
Columbus	Montana Rail Link	4812059	4036 Oct 1992	Reviewed 10/4/2020. Recommended eligible.
Kalispell	Cenex Harvest States Kalispell	1509705	6241 July 2020	Reviewed 10/22/2020. Recommended eligible.
Laurel	Conomart #2	5606966	5411 Jan 2020	Reviewed 10/8/20. Recommended eligible.

Ms. Smith asked if the two facilities listed on the table would be changed to reflect the decisions of the Board as it affects their percentage of reimbursement. The table in these minutes reflects the ratified decisions of the Board, as shown during the earlier dispute discussions.

Mr. Rorabaugh recused himself from any matters associated with Rocky Mountain Supply or its customers. Mr. Schnider recused himself from voting on any matters that are associated with Payne West Insurance and its clients. Mr. Johnson recused himself from voting on any matters associated with RTI and its clients, and Yellowstone Soil Treatment, and its clients. Ms. Smith recused herself from any matters pertaining to First Interstate Bank. Ms. Rupp recused herself from any matters associated with the Montana University System. Mr. Thamke recused himself from any matters regarding reimbursement to the Department of Environmental Quality.

Mr. Schnider made a motion to accept the staff recommendation of eligibility for the five (5) releases, with the adjustments to Five Corners, Release #5134, at 75% reimbursement, and Lockwood Interstate Exxon, Releases #4416 and #5058, at 50% reimbursement, as ratified during the disputed issue discussions. Mr. Thamke seconded. The motion was unanimously approved by roll call vote.

Weekly Reimbursements

Mr. Wadsworth presented the summary of weekly claim reimbursements for the weeks of August 5, 2020 through October 7, 2020, and recommended the Board ratify the reimbursement of the 159 claims, which totaled $1,781,587.35 (see, table below). There were no denied claims.

WEEKLY CLAIM REIMBURSEMENTS November 9, 2020 BOARD MEETING		
Week of	**Number of Claims**	**Funds Reimbursed**
August 5, 2020	25	$90,115.95
August 12, 2020	19	$135,888.38
August 19, 2020	5	$135,779.19
September 2, 2020	32	$127,111.37
September 16, 2020	28	$90,642.17
September 23, 2020	10	$268,389.67
September 30, 2020	18	$538,941.89
October 7, 2020	22	$394,718.73
Total	**159**	**$1,781,587.35**

Mr. Rorabaugh recused himself from any matters associated with Rocky Mountain Supply or its customers. Mr. Schnider recused himself from voting on any matters that are associated with Payne West Insurance. Mr. Johnson recused himself from voting on any matters associated with RTI and its clients, and Yellowstone Soil Treatment, and its clients. Ms. Smith recused herself from any matters pertaining to First Interstate Bank. Ms. Rupp recused herself from any matters associated with the Montana University System. Mr. Thamke recused himself from any matters regarding reimbursement to the Department of Environmental Quality.

Mr. Rorabaugh made a motion to approve the weekly claims as presented. Mr. Johnson seconded. The motion was unanimously approved by a roll call vote.

Board Claims – Claims over $25,000

Mr. Wadsworth presented the Board with two (2) claims for an amount greater than $25,000 that had been reviewed by Board staff since the last board meeting (see, table below). He noted that the co-pays on the table were estimates.

Facility Name Location	Facility-Release ID#	Claim#	Claimed Amount	Adjustments	Penalty	Co-pay	**Estimated Reimbursement
WSPGB Mall LLC (Red Lion Hotels)	99-95040 5123	20200219A	$27,695.49	$4,552.39	-0-	$11,571.55	$11,571.55
WSPGB Mall LLC (Red Lion Hotels)	99-95040 5123	20200228D	$28,642.80	$328.41	-0-	$5,928.45	$22,385.94
Total			**$56,338.29**				**$33,957.49**

* In accordance with Board delegation of authority to the Executive Director signed on December 8, 2003, the Board staff will review the claims for the Board. If the dollar amount of the claim is $25,000.00 or greater, the claim must be approved and ratified by the Board at a regularly scheduled meeting before reimbursement can be made.

**In the event that other non-Board claims are paid in the period between preparation for this Board meeting and payment of the claim listed above, the amount of co-payment remaining may differ from that projected at this time, which may change the estimated reimbursement.

Mr. Rorabaugh recused himself from any matters associated with Rocky Mountain Supply or its customers. Mr. Schnider recused himself from voting on any matters that are associated with Payne West Insurance. Mr. Johnson recused himself from voting on any matters associated with RTI and its clients, and Yellowstone Soil Treatment, and its clients. Ms. Smith recused herself from any matters pertaining to First Interstate Bank. Ms. Rupp recused herself from any matters associated with the Montana University System. Mr. Thamke recused himself from any matters regarding reimbursement to the Department of Environmental Quality.

Ms. Smith made a motion to approve the claims over $25,000, as presented in the table. Ms. Rupp seconded. The motion was unanimously approved by a roll call vote.

Board Attorney Report

PTRCB Case Status Report as of October 21, 2020.

Location	Facility	Facility # & Release #	Disputed/ Appointment Date	Status
Great Falls	Cascade County Shops	07-05708 Release 3051-C1,3051-C2,3051-C3 AND 3051-C4	Denial of applications	Cascade County filed a notice of appeal on November 26, 2019. Cascade's opening brief has been filed with the Supreme Court. The Board's combined response brief and cross-appeal brief was filed June 25, 2020. Cascade's Reply/Response brief was filed September 25, 2020. Our Reply brief is due November 9, 2020.

Mr. Chenoweth stated that briefing had been completed for this case. He stated that there was nothing more to be done for this case but to wait for the court's decision. He said that the possible outcomes were wide, depending on what the court wanted to do. He said that the case could end in favor of the Board, it could go back to the District Court, or it could go against the Board. He said that he is waiting on the court decision.

Fiscal Report

Mr. Wadsworth presented the Fiscal Report to the Board, for the period ending September 30,2020.

Ms. Rupp asked if COVID-19 had diminished the Fund's revenue from what had been initially projected. Mr. Wadsworth responded that it had slightly affected revenue. He said that Fund revenue varied, due to its cyclic nature, and that total revenue had some variability. Revenue for this year would still be considered normal, but there was a bit of a drop-in commuter fuel. The trucking industry was still a strong contributor to the revenue.

Board Staff Report

Mr. Wadsworth introduced Sydney Elvbakken, hired to replace Janet Adolph, who retired.

Mr. Wadsworth presented the Board staff reports. There were no questions concerning the reports.

Mr. Johnson stated he thought it would be a good gesture for the Board to express gratitude for Ms. Adolph for her years of service. Chairman Schnider stated that he would approve sending Ms. Adolph a plant, a card, balloons or something else to show their appreciation.

Petroleum Tank Cleanup Section (PTCS) Report

Ms. Stremcha presented the Board with the PTCS Report. She stated that, since the last Board meeting, there have been 12 confirmed releases and 28 releases resolved. Since the beginning of 2020 to October 23rd, there have been 27 confirmed releases and 62 resolved releases. The total number of confirmed releases was 4,754, with a total resolved of 3,825, and the total number of active releases is 929. She stated that these totals included the EPA-lead clean-ups, and the Site Response Section releases.

Kernaghan's Pik N' Pak, Facility #0704508 (TID 18524), Rel #4005, Work Plan #716834168, Priority 1.1

Ms. Stremcha stated that the estimated cost for this work plan was $214,450.20. The purpose of the work plan was to continue cleanup of the persistent petroleum-impacted groundwater and soil in the saturated zone beneath the UST basin and dispenser islands on the west side of Kernaghan's Pik & Pump (Facility). The approved work plan included the following: operation of a high-vacuum dual-phase extraction (HVDPE) system for up to two months; concurrent monitoring of HVDPE-induced groundwater draw-down; review and interpretation of real-time HVDPE monitoring data to optimize the extraction and flow rates within the aquifer; one groundwater monitoring event completed before the HVDPE event, and one (1) round of post-HVDPE compliance monitoring of the groundwater plume.

Ms. Stremcha stated that the HVDPE system was mobile and self-contained; it removes both the submerged petroleum smear zone and the impacted groundwater. The system uses extraction wells to induce a high vacuum to lower the water table and subject the smear zone to air-flow. Extracted groundwater is treated through an oil-water separator (if needed), and then through carbon vessels in series, before it is discharged to surface water or a sanitary sewer system. Extracted soil vapor is treated through air burners. The system operates 24/7, and measures the total equivalent-amount of hydrocarbons recovered through the vapor extraction via a field organic vapor analyzer. The groundwater concentrations are measured by collecting weekly inlet-groundwater sample and analyzing it for volatile petroleum hydrocarbons.

Ms. Rupp asked if it was anticipated that the remediation would be complete what was needed at this site. She stated that she was shocked by the cost for a two (2) month project. She said that she wasn't accustomed to a project completed so quickly.

Ms. Stremcha stated that CalClean was on site 24-hours a day, seven (7) days a week, for this treatment system. She said that it was for soil vapor extraction and ground water treatment at the same time. She said that Cal-Clean is costly, but effective, and could quickly remove the contamination that was in the soil. She said that they had tried this system in other facilities throughout the state, with great results.

Ms. Smith stated that she looked at the work plan task costs and there were $172,837.10 in miscellaneous. She would like to know what the miscellaneous entailed. Mr. Wadsworth stated that the work plan miscellaneous costs were for subcontracted activity associated with CalClean. He said that it was common for the Board staff to put it under one task entitled "miscellaneous" in the work plan task lists.

Mr. Wadsworth stated that this technology was still new, and Board staff and PTCS are still exploring if this was an effective form of remediation. He said that, for this site, excavation was not an option the owner was interested in using. He said the Board staff had looked at CalClean as a technology, and are considering how the technology could be used in the future at other sites within the state.

Westgate Station, Facility #1603734 (TID 21256), Rel #4448, Work Plan #716834035, Priority 3.0

Ms. Stremcha stated that the estimated cost for DEQ-approved work plan 716834035 was $151,856.20. DEQ requested this work plan to remediate petroleum contaminated groundwater that persisted at this Facility. Work Plan tasks include the following: project management; installation and operation of an Ozone Chemical Oxidation System; collection of field data and samples; laboratory analyses and data validation; site restoration; and data analysis, conclusions, recommendations, and reporting. DEQ expect the proposed actions in the plan will remediate petroleum source areas, and promote resolution of the Release.

Public Forum

Mr. Schnider asked if there was anyone that would like to make a comment.

Trent Biggers, Environmental Services Manager, Town Pump, Butte, addressed the Board.

TB: Trent Biggers with Town Pump in Butte. I just wanted to reintroduce myself. I started working with the Department's UST section in 2001, and the Remediation Division and the Board, 2011 through 2015. Recently we have made a change within the Company, and the Environmental Services Team will be transferring over to my leadership. Just recently brought on two new hires, Tea Rainey will be leading our UST Compliance, and Paul Townsend will be leading our UST Remediation. So, we look forward to working with the Departments' Sections and the Board in the future. If anyone needs anything from us, just let me know.

The next proposed Board Meeting is February 8, 2021.

The meeting adjourned at 1:36 p.m.

Keith Schnider
Signature - Presiding Officer