

BEFORE THE PETROLEUM TANK RELEASE COMPENSATION BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.58.326, 17.58.336, and 17.58.340)
pertaining to operation and management)
of petroleum storage tanks, review and)
determination of claims for)
reimbursement, and third-party damages)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

(PETROLEUM TANK RELEASE
COMPENSATION BOARD)

TO: All Concerned Persons

1. On June 1, 2011, at 9:30 a.m., the Petroleum Tank Release Compensation Board will hold a public hearing in Room 122, 1100 North Last Chance Gulch, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., May 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

3. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.58.326 APPLICABLE RULES GOVERNING THE OPERATION AND MANAGEMENT OF PETROLEUM STORAGE TANKS (1) through (1)(f)(vi) remain the same.

~~(2) An owner or operator shall be considered in compliance with the requirements of (1)(f)(i) through (iv), if the owner's underground storage tank, as defined in 75-11-503, MCA, has one of the following permits issued by the department in accordance with 75-11-509, MCA:~~

~~(a) a valid operating permit as provided in 75-11-509(8), MCA; or~~

~~(b) a valid conditional permit, one-time fill, or emergency operating permit as provided in ARM 17.56.310.~~

AUTH: 75-11-318, 75-11-319, MCA

IMP: 75-11-308, MCA

REASON: The board proposes to amend ARM 17.58.326 by deleting (2) of that rule. This amendment is needed to bring ARM 17.58.326 into alignment with statutory changes made by the 2005 Legislature, and changes made by the board to ARM 17.58.336 in 2006.

Section (2) as it currently reads was promulgated by the board in December 2004. At that time, 75-11-308, MCA, provided the sanction of loss of eligibility for an incident of post-release noncompliance. Then, and now, owners and operators were required to comply with certain state rules related to protection of the environment and safe operation of petroleum storage tanks. Those rules, then and now, are listed in ARM 17.58.326. In particular, ARM 17.58.326 specifies that owners and operators must comply with various sections of ARM Title 17, chapter 56, which is where Department of Environmental Quality's (DEQ) rules for underground storage tanks (USTs) are set forth. Those compliance requirements apply at the time of discovery of a release, and also to the period following discovery of a release.

Before 2005, the penalty provided for post-release noncompliance was potentially severe, as the statute in those circumstances rendered ineligible a release which had previously been found eligible by the board. To avoid the extreme sanction of loss of eligibility for relatively minor violations, the board amended ARM 17.58.326 by adding (2). Section (2) provides that when an owner has a current and valid operating permit issued by DEQ pursuant to 75-11-509, MCA, that owner is deemed in compliance with several of the DEQ ARM requirements in Title 17, chapter 56, subchapters 1 through 4. The promulgation of (2) ameliorated the sanction of ineligibility for certain post-release noncompliance by deeming an owner of an eligible release compliant even if that owner had violated the DEQ UST rules mentioned above, as long as the owner had a valid operating permit.

The statute governing post-release noncompliance changed significantly in 2005. The board requested and obtained legislation that repealed the subsection of 75-11-308, MCA, which rendered a previously eligible release ineligible if an owner went out of compliance with the rules listed in ARM 17.58.326. After the 2005 legislative session, the eligibility statute, 75-11-308, MCA, no longer addressed post-release noncompliance at all. In its stead, 75-11-309, MCA, was amended during the same legislative session by the addition of current (2) and (3)(b)(ii). Those provisions allow the board to sanction an owner of a release that was previously determined to be eligible and who then became noncompliant after the release occurred by adjusting the rate and amount the owner could be reimbursed for corrective action costs. After the 2005 legislative changes, the harsher sanction of deeming a previously eligible release ineligible was no longer applicable.

In response to the 2005 legislative changes, the board in 2006 promulgated amendments to ARM 17.58.336 which provided a procedure for sanctioning reimbursement payments to an owner who became noncompliant after a release was determined to be eligible, depending principally on the length of time the owner was out of compliance. For such owners and operators, the 2006 amendments provided for a downward adjustment of the rate of reimbursement, depending on the circumstances attending the noncompliance.

In summary, after the 2005 legislative changes and the 2006 rule changes, the threat of losing eligibility after the board initially has determined a release to be eligible no longer exists. Pursuant to those changes, eligibility is now a one-time decision, which is made based on circumstances at the time of the release. Once an owner's release is determined eligible it maintains that status permanently, regardless of post-release noncompliance. If an owner becomes noncompliant after

a release is determined to be eligible, the sanction applied is the one provided by the sliding scale set forth in ARM 17.58.336(7), which results in diminution of the reimbursement rate based on specific circumstances, rather than changing an eligible release to an ineligible one.

Although the sanction of ineligibility for post-release noncompliance was eliminated by these changes in 2005 and 2006, ARM 17.58.326(2) was inadvertently left in place. It is no longer needed because the board and owners and operators now have a much more nuanced process to deal with post-release noncompliance, and owners and operators no longer face the extreme sanction of loss of eligibility for post-release violations of DEQ's UST rules.

It is important to change ARM 17.58.326 by repealing (2) because as that rule now applies, an owner with an eligible release in noncompliance with the DEQ UST rules mentioned above escapes any sanction and must be reimbursed for eligible corrective action costs. Under the current rule, the Petroleum Tank Release Cleanup Fund could be subject to major liability for significant release events caused by egregious post-release noncompliance. This jeopardy is unwarranted and (2) is inconsistent with the intent of the 2005 legislative changes and the rule changes that followed in 2006. Owners and operators should be required to follow the DEQ's UST rules, and if there is post-release noncompliance, a sanction against the rate of reimbursement can be fairly determined under the procedure in ARM 17.58.336(7). For these reasons (2) should be deleted.

17.58.336 REVIEW AND DETERMINATION OF CLAIMS FOR REIMBURSEMENT (1) through (4) remain the same.

(5) The recommendations of the board staff must be mailed to each board member at least seven days ~~prior to a~~ before the date of the board meeting ~~that at which the claim~~ is scheduled to be considered ~~the claim~~.

(6) through (8) remain the same.

AUTH: 75-11-318, MCA

IMP: 75-11-309, MCA

REASON: The wording of the current rule could be read as suggesting that claims are considered by "board meetings" rather than by the board. The proposed amendment clarifies the language of this section and makes clear that the timing of the mailing to board members is dependent on the date of the board meeting upon which a particular claim will be considered by the board.

17.58.340 THIRD-PARTY DAMAGES: REIMBURSEMENT DOCUMENTATION (1) For cases in which the board received notice as required in ARM 17.58.337, an owner or operator's claim for reimbursement of payments for third-party damages pursuant to a judgment entered in a court shall include copies of the notice of entry of judgment, abstract of costs, and a declaration:

(a) that the case has been concluded, including appeal, if any; and

(b) of the fees paid by the owner or operator to each attorney who appeared in the proceeding.

(2) For cases in which the board received notice as required in ARM 17.58.337, an owner or operator's claim for reimbursement of payments for third-party damages made by agreement in settlement of litigation or a claim shall include copies of the fully executed settlement agreement and such supporting documents as may be required under ARM 17.58.337.

(3) The board shall require a listing of amounts attributed to compensation for property damage, bodily injury, fees, costs, and any other aspect of damage paid to a third party pursuant to a settlement or judgment described in (1) or (2).

AUTH: 75-11-318, MCA

IMP: 75-11-309, MCA

REASON: The proposed amendment is needed to correct a typographical error.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., June 9, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. Paul Johnson, attorney, has been designated to preside over and conduct the hearing.

6. The board maintains electronic mail list-service system lists of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the electronic mail list-service system list may subscribe to one or more of the board interested parties lists using the link [PETROstep1.mcp](#)x and following the instructions. If electronic mail is unavailable, persons who wish to receive notices by U.S. Postal Service mail shall make a written request that includes the name and mailing address of the person to receive rulemaking notices. Such written request may be mailed or delivered to Terry Wadsworth, Executive Director, Petroleum Tank Release Compensation Board, P.O. Box 200902, Helena, Montana 59620-0902; faxed to (406) 841-5091; or e-mailed to Terry Wadsworth at twadsworth@mt.gov or may be made by completing a request form at any rules hearing held by the board. Further information concerning the electronic mail list-service system can be found at [http://deq.mt.gov/pet/OldNews/February 2008News.mcp](http://deq.mt.gov/pet/OldNews/February%202008News.mcp)x.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Reviewed by:

PETROLEUM TANK RELEASE
COMPENSATION BOARD

/s/ James M. Madden
JAMES M. MADDEN

BY: /s/ Roger Noble
ROGER NOBLE, Presiding Officer

Certified to the Secretary of State, May 2, 2011.