



Petroleum Underground Storage Tank Release Compensation Board

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MINUTES OF THE 173rd MEETING OF THE PETROLEUM UNDERGROUND STORAGE TANK RELEASE COMPENSATION BOARD February 14, 2018

BOARD MEMBERS IN ATTENDANCE

Jim Rocco
Ron Falconi
Scott Fleming
Tom Stephenson

EX-OFFICIO MEMBERS IN ATTENDANCE

Bill Hills, representing Director Jacqueline Williams, Ohio Department of Commerce
Chris Geyer, representing Director Craig Butler, Ohio Environmental Protection Agency
J.D. Pisula, representing Josh Mandel, State Treasurer of Ohio

OTHERS IN ATTENDANCE

Starr Richmond	Executive Director, PUSTRCB
Madelin Esquivel	Assistant Director, PUSTRCB
Don Leasor	Chief Fiscal Officer, PUSTRCB
Cindy Duann	Claims Supervisor, PUSTRCB
Jonathan Maneval	Administrative Coordinator, PUSTRCB
Lora Kruse	Claims Administrative Assistant, PUSTRCB
Jennifer Croskey	Assistant Attorney General
Jim Patterson	Assistant Attorney General
Keith O'Korn	Assistant Attorney General
Howard Silver	Hearing Officer
Doug Darrah	ATC Group Services LLC
Claire Linkhart	API Ohio
Sean Hetrick	BJAAM Environmental, Inc.
Samantha Kramer	Speedway LLC
Matthew and Alicia Miller	Former UST Owners
Jacqueline Caldwell	Krugliak, Wilkins, Griffiths & Dougherty, Co. L.P.A.

Minutes submitted by:


Jonathan Maneval
Executive Assistant

Call to Order:

Immediately following the 10:00 a.m. public hearing regarding the Board's proposed rule amendment, Chairman Rocco convened the one hundred seventy-third meeting of the Petroleum Underground Storage Tank Release Compensation Board on Wednesday, February 14, 2018.

The following members were in attendance: Jim Rocco; Ron Falconi; Scott Fleming; Tom Stephenson; Bill Hills, representing Director Jacqueline Williams, Ohio Department of Commerce; Chris Geyer, representing Director Craig Butler, Ohio Environmental Protection Agency; and J.D. Pisula, representing Josh Mandel, State Treasurer of Ohio.

The following members were not in attendance: John Hull and Don Bryant.

Minutes:

Chairman Rocco asked if there were any comments or questions regarding the minutes from the January 10, 2018 Board meeting and there were none. Mayor Falconi moved to approve the minutes. Mr. Fleming seconded. A vote was taken and all members voted in the affirmative. The minutes were approved as presented.

BUSTR Report:

Chairman Rocco called upon Bill Hills, Bureau Chief, to present the Bureau of Underground Storage Tank Regulations' (BUSTR) report.

Mr. Hills reported that the use of an intermittent employee as a file room clerk has been approved for a six month period. He stated that 37 grants totaling over \$5.6 million had been awarded through the Abandoned Gas Station Cleanup Grant Program and that a number of grant applications are currently being reviewed. The program is administered by the Ohio Development Services Agency, in partnership with the Ohio Environmental Protection Agency and BUSTR, and has \$20 million available to local government entities to cleanup abandoned gas station sites.

Mr. Hills reported that all BUSTR employees had completed their mandatory sexual harassment training. He said that a certified installer course was held at the State Fire Marshal Academy the week of February 5, 2018, and a certified inspector course will be held February 22-26, 2018. He said that about 20 people enrolled for these courses which is an increase over previous years and noted that individuals that are retiring from fire and police forces are taking the classes in order to become underground storage tank (UST) inspectors.

Mr. Hills stated that the public hearing for the proposed rule amendment to increase the annual registration fee from \$50 per tank to \$100 per tank would be held at the State Fire Marshal's Office later in the day and the Joint Committee on Agency Rule Review hearing concerning the rule is tentatively scheduled for March 5, 2018.

Mr. Hills reported for the week ending February 3, 2018, there were 63 new inspections performed for a total of 4,999 inspections for the three-year inspection cycle. He said that 11 NFAs (no further actions) were generated during the week ending February 3, 2018, for a total of 158 NFAs for the grant cycle ending September 30, 2018.

Mr. Hills stated that as of February 3, 2018, there were 21,251 registered USTs and 3,596 owners of 7,196 registered facilities. He said that the number of NFAs issued throughout the history of the BUSTR program now exceeds 30,000.

Financial Reports:

Chairman Rocco called upon Don Leasor, Chief Fiscal Officer, to present the financial reports.

Audit Update

Mr. Leasor stated that the Auditor of State completed their review of the financial statements for the year ending June 30, 2017, and the report was released to the public on January 30, 2018. He pointed out that a copy of the audited financial statements was provided to each of the Board members.

December Financials

Mr. Leasor said the December financials were emailed to each member. He asked if there were any questions or concerns regarding these reports and there were none.

Mr. Leasor reported as of February 13, 2018, the unobligated account balance is \$26.8 million. He said this amount includes \$10.8 million in STAR Ohio (State Treasury Asset Reserve of Ohio) and the custodial account, and \$16 million invested in U.S. treasuries and U.S. agency callable bonds.

Mr. Leasor said at the June 2017 Board meeting, \$9 million was obligated for the payment of claims and the obligated account balance as of February 13, 2018, is \$4.8 million.

Mr. Leasor said that as of December 31, 2017, expenses should be around 50% of the amount budgeted for the fiscal year. He said, the claims expense for the month of December was about \$593,000, and to date, approximately \$4.2 million had been paid for claims for fiscal year 2018.

Mr. Leasor reported that as of December 31, 2017, approximately 98.9% of the budgeted revenues, net of refunds, had been collected. He said information on refunds and fee collections would be presented with the compliance and fee assessment report.

Mr. Leasor stated that as of December 31, 2017, the expenses for temporary services were 99.1% of the amount budgeted and explained that this was due to the use of two employees to fill the Office Assistant and Collections Specialist positions. He noted that these positions were recently filled with permanent employees. He said that a position in the compliance department that has been vacant since March of 2015 has also been filled. He explained that there will be an increase in the salary line item throughout the remainder of the fiscal year as a result of all positions being filled. He pointed out that employee expenses were 125.4% of the amount budgeted. He explained that these expenses were for staff parking passes at the LeVeque Tower office location and the overage resulted from the move to the Executive Parkway location being delayed.

Mr. Leasor stated that telephone expenses are at 126.8% of the budgeted amount and explained that cost for the installation and setup of the internet connection and VoIP services for the new office location were higher than anticipated.

Mr. Leasor said postage expenses were 68.5% of the amount budgeted. He said this was due to postage fees for the final quarter of fiscal year 2017 being paid in August of fiscal year 2018. He said these charges include fees for the annual fee statement mailing, which is sent by certified mail.

Mr. Leasor said overall expenses are at or below where they should be at this time in the fiscal year.

Compliance and Fee Assessment Report:

Chairman Rocco called on Madelin Esquivel, Assistant Director, to present the compliance and fee assessment report.

Ms. Esquivel reported that since July 1, 2017, refunds totaling \$22,368 have been paid out to 21 owners for the 2017 program year. She said as of January 31, 2018, there are 2,866 pending refunds totaling \$1,438,434. She said that \$9,445 in refunds has been used to offset prior years' outstanding fees.

Ms. Esquivel reported as of January 31, 2018, the fees collected by the Attorney General's Office and Special Counsel less collection costs totaled \$70,068. She pointed out that no accounts have been certified to the Attorney General's Office for collection since July 1, 2017.

Ms. Esquivel said that no Orders Pursuant to Law are under appeal and one Determination to Deny a Certificate of Coverage is currently under appeal for which a hearing was held on August 3, 2017.

Ms. Esquivel stated that two Ability to Pay Applications are pending review. The Ability to Pay program allows former UST owners experiencing financial difficulty to apply for and receive a determination of their ability to pay delinquent fees.

Ms. Esquivel reported that as of February 6, 2018, a total of 2,919 Certificates of Coverage have been issued thus far for program year 2017. She said there are 199 Applications for Certificates of Coverage currently in process. She said that as of February 6, 2018, a total of 26 notifications of Pending Denial and 26 Determinations to Deny a Certificate of Coverage have been issued.

Ms. Esquivel stated that there are 50 uncashed refund checks, totaling \$38,747. She said there are 10 owners with pending refunds totaling \$32,610 to whom letters have been sent notifying them that more information is needed before their refunds may be issued. She said there are 30 owners with pending refunds totaling \$57,320 for which information had been requested, but no responses have been received.

Claims Reports:

Chairman Rocco called on Lora Kruse, Claims Administrative Assistant, to present the claims reports.

Ms. Kruse reported that as of February 1, 2018, the total maximum liability of in-house open claims is \$30.5 million. She said using the historical average claim payout ratio of 75%, the anticipated claim liability of unpaid in-house claims is about \$22.8 million. She said currently, a total of 1,501 claims with a total face value above the deductible amount were pending review. She noted that claims received in the month of October 2017 are being reviewed by the staff. She noted that as of February 1, 2018, a total of 17 claim settlement determinations were under appeal. She said that since the last

Board meeting in January, one new claim appeal was received and five appeals have been resolved or closed.

Ms. Kruse reported that in the month of January a total of 73 claims were received and the staff settled 69 claims. She stated that the total claim settlement offer for the seven-month period of the 2017 program year was \$4.1 million and the average per-claim payout was about \$11,723. She pointed out that this was slightly higher than the previous year's average. She said that the average claim payout ratio of about 78.3% is also higher than previous years' averages.

Ms. Kruse said that in the month of January, four eligibility applications were received and two eligibility determinations were issued. She said of the two determinations, one was approved and one was denied for no corrective action work being required by BUSTR. She said for program year 2017, 39 eligibility applications were received and 43 eligibility determinations were issued. She noted that of the 43 determinations, 20 were approved and 23 were denied. She said currently, 29 eligibility applications are pending review and seven determinations are under appeal.

Ms. Kruse reported that during the month of January, 10 cost pre-approval requests were received and seven cost pre-approval notifications were issued. She said currently, there are 28 cost pre-approval requests pending review.

Certificates of Coverage – Ratifications:

Chairman Rocco called upon Starr Richmond, Executive Director, to present the lists of owners who have either been issued or denied a Certificate of Coverage for ratification by the Board.

Ms. Richmond said the lists behind Tabs 7 and 8 are listings of facilities that, since the January Board meeting, had been issued or denied a program year 2016 or 2017 Certificate of Coverage.

Ms. Richmond said the process used to review the fee applications and issue or deny a Certificate of Coverage includes a review for completeness to determine full payment was received; financial responsibility for the deductible has been demonstrated; and the owner has certified with his signature that he is in compliance with the State Fire Marshal's rules for the operation and maintenance of petroleum underground storage tanks. She said, if these requirements are met and if the tanks existed in previous years, a Certificate for the subject tanks has been issued to the owner in at least one of the prior two years, then a Certificate of Coverage is issued.

Ms. Richmond explained that if deficiencies or compliance issues are identified, notice is provided to the owner in accordance with the Board's rules. The owner is provided 30 days to respond to the notice with information to correct the deficiency or compliance issue. If correcting information is not received within this time, a determination denying the Certificate of Coverage is issued to the owner.

She said the Board's rules and the Revised Code make provisions for an appeal of the determination. Ms. Richmond said that, throughout this process, the Board's staff works with the owner to correct the fee statement record and, if necessary, refers the owner to BUSTR to correct the registration record.

Ms. Richmond requested the Board ratify her actions with respect to the issuance of the 2016 program year Certificate of Coverage for the two tanks included on the list behind Tab 7.

Mr. Geyer moved to ratify the issuance of the 2016 Certificate of Coverage for the facility listed. Mayor Falconi seconded. A vote was taken and all members were in favor. The motion passed.

Ms. Richmond commented that no 2016 program year Certificates of Coverage had been denied since the January Board meeting.

Ms. Richmond requested the Board ratify her actions with respect to the issuance of the 2017 program year Certificates of Coverage for the 186 facilities owned by 97 owners included on the list behind Tab 8.

Mr. Hills moved to ratify the issuance of the 2017 Certificates of Coverage for the facilities listed. Mr. Fleming seconded. A vote was taken and all members were in favor. The motion passed.

Ms. Richmond requested the Board ratify her actions with respect to the denial of the 2017 program year Certificates of Coverage for the 61 tanks owned by the 20 owners included on the list behind the Tab 8 green divider page.

Mr. Geyer moved to ratify the denial of the 2017 Certificates of Coverage that were listed. Mayor Falconi seconded. A vote was taken and all members were in favor. The motion passed.

Unfinished Business:

Matthew and Alicia Miller Administrative Appeal

Facility Number: 23812-0001, 522 Dover Road, Sugarcreek

Chairman Rocco reminded members that the Board had a lengthy discussion at the January meeting concerning the Millers' appeals and called upon the Board's Assistant Attorney General, Jennifer Croskey, to briefly summarize the cases.

Ms. Croskey explained that as the Assistant Attorney General assigned to the Board, she defended two determinations issued by the Board's Executive Director, Ms. Richmond, which had been appealed by the Millers. She said the first appeal concerned a Determination to Deny a Certificate of Coverage and the second appeal was of a determination to deny eligibility under the Fund. She explained that the Millers had purchased a gas station in Sugarcreek, Ohio and after they purchased it, the Millers submitted a transfer of ownership form and paid the transfer fee. She stated that after the transfer of ownership form and fee payment were received, the Board's Executive Director sent a notification to the Millers stating that an Application for Certificate of Coverage needed to be completed and returned before a Certificate of Coverage could be issued. She said when the Millers did not complete and return the Application, Ms. Richmond subsequently issued a Determination to Deny a Certificate of Coverage.

Ms. Croskey said the Millers later submitted an application for eligibility because a petroleum release was confirmed at the property after the tanks were removed. She said that based on the information provided on the eligibility application, Ms. Richmond denied the eligibility application for two reasons. She stated that the first reason for the denial was because there was no Certificate of Coverage, and the second reason was for a lack of compliance with the State Fire Marshal's rules because the application

and materials provided with it indicated that the tanks had been out of service for more than 90 days without the required out-of-service permit.

Ms. Croskey stated that at the hearing it was shown that because no application for the Certificate of Coverage was submitted, the Millers did not demonstrate to the Board that they had financial responsibility for the Fund deductible and they did not certify to the Board compliance with the Fire Marshal's rules. She said, in response, the Millers provided a number of different exhibits and testimony by Mr. Miller trying to establish that a letter from their bank, which had been sent to BUSTR, should be accepted as demonstration of financial responsibility. She said they also provided an application for insurance, which had been sent to a private insurance company, and that application included statements regarding compliance with the State Fire Marshal's rules. She noted that neither the letter sent to BUSTR nor the insurance application had been provided to the Board within the timeframe set forth in the notification concerning the pending denial of the Certificate of Coverage. She said the Millers also tried to establish that the tanks were not necessarily out of service for more than 90 days prior to their removal and therefore, were in compliance with the State Fire Marshal's rules. She said they did this by providing a fuel delivery invoice dated August 4, 2015.

Ms. Croskey said that after the hearing, the Board's hearing officer, Howard Silver, issued his report and recommendation in which he set out the findings of facts that were proven in the hearing, and concluded that Executive Director Richmond was correct in denying the Certificate of Coverage because no application for the certificate was submitted, and as a result the Millers did not demonstrate to the Board financial responsibility for the deductible or certify compliance with the State Fire Marshal's rules. She said that Mr. Silver also concluded that Ms. Richmond had proved that her denial of eligibility was correct, and this decision was based on the lack of a Certificate of Coverage. She pointed out that in his report Mr. Silver wrote, "There is insufficient evidence in the hearing record to determine with any confidence or precision the last date upon which the underground storage tanks at the site were used." She pointed out that the invoice for the fuel delivery provided at the hearing changed the equation a little.

Ms. Croskey said the Millers' attorney, Jackie Caldwell, filed objections to the report and recommendation, and those objections referenced a 2016 Ohio Supreme Court case that concerned a certification that was required to be submitted to county commissioners by a board of elections. She said that case was different because the board of elections sent a letter to the county commissioners and the Ohio Supreme Court found that the letter was sufficient to meet the notification requirements because there was substantial compliance with the requirement. She stated that the Millers are arguing that they substantially complied with the requirements to demonstrate financial responsibility and compliance with the State Fire Marshal's rules. She pointed out that the letter they argue demonstrated their financial responsibility for the deductible was sent to BUSTR and a certification of compliance was sent to an insurance company.

Ms. Croskey asked, on behalf of Executive Director Richmond, for the Board members to approve Mr. Silver's report and recommendation to uphold the Director's determinations and to adopt it as their decision.

Chairman Rocco called on Ms. Caldwell to offer her response on behalf of the Millers. Ms. Caldwell reminded the Board of the circumstances under which the Millers acquired the property. She discussed certain communication logs maintained in the Board's files that show the Millers had contacted the Board before and after the purchase of the property to discuss the process of transferring the Fund coverage, and stated that by submitting the transfer of ownership form and \$500 transfer fee to the Board, obtaining the letter from their bank, and also trying to acquire an insurance policy from a private insurer collectively demonstrate the Millers' plain intent to comply with both the Board's and BUSTR's requirements, and supports the Millers' belief that every step necessary to obtain the Certificate of Coverage had been taken. She said, at the hearing, Mr. Miller testified that when he received the notification of the pending denial of the certificate, he thought that he had already sent in the requested information. She said they believe the Ohio Supreme Court decision is directly relevant and sufficient grounds for the Board to reverse the Executive Director's decisions because the court determined that plain intent to certify and to comply with the regulations is sufficient, and she believes the actions the Millers took before and after the purchase of the property show their plain intent to comply with the Board's requirements to obtain the Certificate of Coverage. She then distributed a proposed order to reverse the Determination to Deny a Certificate of Coverage and to reverse the determination to deny eligibility to receive Fund reimbursement and requested that the Chairman sign it.

Chairman Rocco asked Mr. Silver to describe the contents of the letter the Millers had obtained from their bank, and Mr. Silver explained that the letter simply stated the amount of funds the Millers had available to them in their account. He pointed out that the letter was never sent to the Board and it had been addressed to BUSTR. He highlighted that the Millers' argument throughout the case was that they had every intention of complying with the requirements, and that the actions they took should be equivalent to the statutory requirements and the rules adopted by the Board. He said the requirements to obtain the Certificate of Coverage were directly communicated to the Millers in the notice they received, but instead of submitting the information requested by the Director, they decided to take different steps that they now argue should be satisfactory for coverage under the Fund. Mr. Silver expressed that, in his opinion, it would be disastrous for the Board to accept the Millers' argument that having an intention to comply with the requirements and holding a personal belief that they complied with the law should be the acceptable standard to demonstrate compliance with matters of law. He said, if accepted, this would become the level of argument for every future case that comes before the Board.

Chairman Rocco stated that the Board would deliberate privately to discuss the appeals, and noted that Jim Patterson, an attorney from the Attorney General's Office, was present for the purpose of answering legal questions the Board members may have concerning the cases.

Following the Board's deliberations, the public meeting resumed and Chairman Rocco explained that the Board had a lengthy discussion considering the facts in the case. He said the circumstances of the case are somewhat unique and it has raised a question of when an existing Certificate of Coverage becomes void or is no longer valid for a particular site. He said the Board is requesting for the Attorney General's Office to provide a legal opinion on when a Certificate is no longer valid before moving forward and making any decisions concerning the Millers' appeals. Mr. Patterson explained that the Attorney General's Office will often provide informal written legal advice on legal questions based

upon assumed facts that are presented for the purpose of giving an opinion on the enforceability of a rule or a statute. He said it would be a matter for his Section Chief to consider the circumstances, and decide whether an opinion can be issued. He added that the Attorney General's Office cannot provide advice as to how an agency should dispose of a pending administrative case. Chairman Rocco said he would submit a request for an opinion to the Attorney General's Office, and he anticipates that the Attorney General's Office would make a decision of whether they will issue an informal opinion before the March Board meeting.

Confirm Next Meeting and Adjourn:

Chairman Rocco said the next Board meeting will be held on Wednesday, March 21, 2018, at 10:00 a.m.

Mayor Falconi made a motion to adjourn the meeting and Mr. Geyer seconded. All were in favor.