VOLUME NO. 44 **OPINION NO. 46**

ADMINISTRATIVE LAW AND PROCEDURE - Statutory authority of Petroleum Tank Release Compensation Board to promulgate rule for review and approval of corrective action plan for release from underground storage tank;
HEALTH AND ENVIRONMENTAL SCIENCES, DEPARTMENT OF - Statutory authority of Petroleum Tank Release Compensation Board to promulgate rule for review and approval of corrective action plan for release from underground storage tank;
WATER AND WATERWAYS - Review of reimbursable expenses in cleanup of release from underground storage tank;
ADMINISTRATIVE RULES OF MONTANA - Section 16.47.342;
MONTANA CODE ANNOTATED - Title 75, chapter 10, parts 4, 7; sections 75-11-301 to 75-11-321, 75-11-302, 75-11-307, 75-11-309, 75-11-313, 75-11-314, 75-11-318;
MONTANA LAWS OF 1989 - Chapter 528;
OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 4 (1991), 44 Op. Att'y Gen. No. 3 (1991), 42 Op. Att'y Gen. No. 1 (1987), 41 Op. Att'y Gen. No. 23 (1985), 40 Op. Att'y Gen. No. 50 (1984).

HELD: 1. The Petroleum Tank Release Compensation Board does not have statutory authority to modify the technical methodologies or requirements of corrective action plans approved by the Department of Health and Environmental Sciences. The Board's rule, which purports to grant the Board corrective action plan review and approval authority, is invalid as it conflicts with the provisions of section 75-11-309(1), MCA.

2. The Board does not have discretion to deny a claim for reimbursement from the petroleum tank release cleanup fund for expenses "actually, necessarily, and reasonably incurred" in preparation or implementation of a Department-approved corrective action plan, assuming the reimbursement criteria of section 75-11-309(2), MCA, are satisfied.

December 31, 1992

Dennis D. Iverson, Director
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and Environmental Sciences
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Dear Mr. Iverson:

You have requested my opinion upon the following questions:

1. Does the Petroleum Tank Release Compensation Board have authority to modify the technical methodologies or requirements of corrective action plans approved by the Department of Health and Environmental Sciences?

2. May the Board refuse to pay a claimant's actual, necessary and reasonable expenses incurred in performing the Department's approved corrective action plan?

These questions involve the interpretation of House Bill 603, enacted in 1989 by the Fifty-first Montana Legislature and codified at sections 75-11-301 to 321, MCA, and administrative regulations promulgated under the authority of the bill.

A corrective action plan is a method of physically remediating a release of petroleum products from a leaking underground storage tank. In the vernacular of tank owners, regulators and private contractors, a "corrective action plan" is known as a "work plan" or a "cleanup plan." The phrase is defined by Montana statute as the "investigation, monitoring, cleanup, restoration, abatement, removal, and other actions necessary to respond to a release." § 75-11-302(5), MCA. A "release" is defined as "any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum or petroleum products from a petroleum storage tank into ground water, surface water, surface soils, or subsurface soils." § 75-11-302(18), MCA.

In January 1989 federal regulations became effective which imposed financial responsibility requirements on owners or operators of underground storage tanks (hereinafter owners). Insurance coverage of $1 million per occurrence was required and various mechanisms by which owners could comply with the financial responsibility requirements were provided. One such mechanism was reliance upon a state fund.

House Bill 603 established a regulatory framework through which the owners in Montana could comply with the new financial responsibility requirements. A state fund (the petroleum tank release cleanup fund, hereinafter "fund") was created from use fees collected from distributors of petroleum products. See

§§ 75-11-313, 75-11-314, MCA. The fund was designed to pay for the costs of corrective action and compensation paid to third parties for damages caused by releases from storage tanks. § 75-11-307(1), MCA. House Bill 603 established a board (the Petroleum Tank Release Compensation Board, hereinafter Board) to administer the fund and pay owners for claims submitted for the eligible costs of corrective action. §§ 75-11-309(2), 75-11-318, MCA. The law allows the Board to reimburse owners for 50 percent of the first $35,000 of eligible costs and 100 percent of subsequent eligible costs, up to a maximum total reimbursement of $982,500. § 75-11-307(4)(a), MCA. The Department of Health and Environmental Sciences (hereinafter Department) was given the responsibility for formulating a plan for corrective action to be undertaken by a tank owner in response to a release and overseeing the implementation of the corrective action plan. § 75-11-309(1), MCA.

Your opinion request concerns the proper method by which a tank owner is compensated under House Bill 603 for costs of corrective action. The bill sets out in detail the procedures for reimbursement of eligible costs. Since these procedures are germane to your inquiry I will briefly review them. Section 75-11-309, MCA, establishes the following steps for reimbursement of corrective action costs:

1. Upon discovery of a release from a tank, the owner notifies the Department of the release and conducts an "initial response" to the release. § 75-11-309(1)(a), MCA. An initial response is dictated by federal and state law and would include, for example, the removal of remaining petroleum product from the leaking tank.

2. After notification and initial response, the owner conducts an investigation of the release and submits a proposed corrective action plan, meeting state, tribal and federal law, to the Department. § 75-11-309(1)(b), MCA.

3. The Department reviews the proposed corrective action plan and circulates the plan to other affected governmental agencies, including local government offices and any affected tribal government. § 75-11-309(1)(c)(i), MCA.

4. The Department approves the corrective action plan following its review and consideration of comments received by outside sources. Prior to this approval, the Department may ask the owner to modify the proposed plan originally submitted or the Department may prepare its own plan for compliance by the owner. § 75-11-309(1)(c)(ii), MCA. In any event, the plan approved by the Department after this process becomes "the approved corrective action plan." *Id.*

5. The Department notifies the owner and the Board of its approval of the corrective action plan. § 75-11-309(1)(d), MCA.

6. The owner implements the approved plan. The Department oversees implementation of the plan and exercises its authority pursuant to applicable state and federal law, including the Montana Hazardous Waste and Underground Storage Tank Act and the Comprehensive Environmental Cleanup and Responsibility Act (CECRA), Title 75, chapter 10, parts 4 and 7, respectively. § 75-11-309(1)(e), MCA.

7. The owner documents and submits to the Board all expenses incurred in preparing and implementing the corrective action plan in a manner required by the Board. The Board forwards all such claims to the Department which notifies the Board of any costs not meeting the requirements set forth above. § 75-11-309(1)(f), MCA.

8. The Board reviews the claims received and determines whether the claims meet the following four criteria: (i) the claimed expenses are "eligible costs," as defined by sections 75-11-302(8) and 75-11-307, MCA; (ii) the expenses were "actually, necessarily, and reasonably incurred" for the preparation or implementation of a corrective action plan approved by the Department; (iii) the owner meets eligibility criteria established by section 75-11-308, MCA; and (iv) the owner has complied with all the requirements of section 75-11-309, MCA, set forth above, and rules adopted pursuant to this section. Providing the Board affirmatively determines these four criteria are met, the Board may then approve the claim and reimburse the owner from the fund. § 75-11-309(2), MCA.

As this process indicates, it is essential that, in order to be a reimbursable corrective action expense, the expense be incurred in the implementation of a corrective action plan approved by the Department.

The clarity of the described reimbursement process was clouded by an amendment adopted by the Senate Committee on Taxation to House Bill 603 prior to its enactment. In relevant part, the statutory authority of the Board to adopt rules, presently codified at section 75-11-318(5), MCA, was amended by the addition of rulemaking authority for "procedures for the review and approval of corrective action plans." § 75-11-318(5)(c), MCA. In reliance upon this authority, the Board adopted a rule in 1990 that reads in full as follows:

> 16.47.342 REVIEW OF CORRECTIVE ACTION PLAN; WHEN BOARD APPROVAL REQUIRED (1) The Act authorizes the department and the board to each review and approve a corrective action plan. The department's authority appears at section 75-11-309(1)(c)(ii), MCA, with rulemaking power delegated to establish requirements for approval at section 75-11-319(1), MCA. The board's power to establish procedures for approval is delegated at section 75-11-318(5)(c), MCA, and is

> also reflected in the statement of intent as amended by the senate taxation committee on March 29, 1989.
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> (2) The board may review upon its own motion, or the applicant's request, department decisions on cleanup or corrective action plans. If the responsible party does not request the board to review a corrective action plan, and if all comments submitted by board staff to the department have been accepted by the department, then the department-approved plan will be presumed as approved by the board without further formal action by the board. However, this presumptive approval may be reconsidered by a motion to reconsider adopted by the board.
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> (3) Review or reconsideration of a cleanup or corrective action plan approved by the department, when set in motion by any of the events described in the preceding paragraph, will be conducted by the board at a scheduled meeting, after notice to all interested parties, including the local governments concerned. The board may modify a corrective action plan if the testimony it hears establishes that another cleanup strategy would provide equal or greater improvement of the affected environment at less cost.

The validity of this rule, which arguably grants the Board authority to approve and modify corrective action plans previously approved by the Department pursuant to section 75-11-309(1)(c)(ii), MCA, is the essence of your opinion request.

In recent years, the Attorney General frequently has been requested to determine the validity of administrative rules promulgated under a legislative delegation of authority. See 44 Op. Att'y Gen. No. 4 (1991), 44 Op. Att'y Gen. No. 3 (1991), 42 Op. Att'y Gen. No. 1 at 1 (1987), 41 Op. Att'y Gen. No. 23 at 79 (1985), 40 Op. Att'y Gen. No. 50 at 203 (1984). Within these opinions this Office has consistently relied upon section 2-4-305, MCA, and a handful of applicable Montana Supreme Court decisions which state settled principles of administrative law in this area. Bick v. State Dept. of Justice, 224 Mont. 455, 730 P.2d 418 (1986); Board of Barbers v. Big Sky College, 192 Mont. 159, 626 P.2d 1269 (1981); McPhail v. Montana Board of Psychologists, 196 Mont. 514, 640 P.2d 906 (1982); Bell v. Dept. of Professional and Occupational Licensing, 182 Mont. 21, 594 P.2d 331 (1979).

The precedent of these cases and opinions controls my analysis. No rule adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. § 2-4-305(6), MCA. Administrative rules have been found invalid if they engraft additional and contradictory requirements on the statute or if they engraft additional noncontradictory requirements on the statute which were not

envisioned by the Legislature. See, e.g., Bick, supra; Board of Barbers, supra; 44 Op. Att'y Gen. No. 3.

Section 16.47.342, ARM, is invalid for several reasons. First, the rule engrafts an additional and contradictory requirement on section 75-11-309, MCA. In the absence of the rule, an owner must only secure Department approval of a proposed corrective action plan before implementing the plan and obtaining reimbursement for actual, necessary and reasonable expenses incurred in performing that plan. Pursuant to the rule, owners are required to additionally obtain Board approval of the corrective action plan. The additional requirement conflicts with the statutory provision that an owner, if found otherwise eligible, may be reimbursed for costs which were incurred "for the preparation or implementation of a corrective action plan approved by the department." § 75-11-309(2)(a)(ii), MCA. Second, the notion that the Board may amend or review a Department-approved corrective action plan conflicts with the express thrust of section 75-11-309(1)(c)(ii), MCA: Once a plan is approved by the Department, it becomes "the" approved corrective action plan for purposes of reimbursement. Finally, Board approval of corrective action plans is not necessary to effectuate the purposes of House Bill 603. Financial responsibility for owners of underground storage tanks is provided under the legislation without the oversight of Department-selected cleanup methodologies by the Board.

In the Statement of Intent for House Bill 603, the Board is directed to enact rules that "provide procedures for the review and approval of corrective action plans" and are necessary for the administration of the bill, provided "that the rules do not alter or conflict with the eligibility requirements and procedures provided in [sections 75-11-301 to 314, MCA, and sections 75-11-318 to 321, MCA]." 1989 Mont. Laws, ch. 528. Thus, while the Statement of Intent reinforces the amendment language of section 75-11-318(5)(c), MCA, it does so consistent with the administrative law principles discussed herein.

It has been suggested that the amendment language of section 75-11-318(5)(c), MCA, was intended to expand the Board's rulemaking authority such that proposed corrective action plans would undergo "dual review." The legislative history of the bill supports the proposition that those testifying in support of the amendment intended the language to expand the Board's review authority. Notwithstanding such expectations, the Legislature enacted amendment language that simply provided rulemaking authority for "*procedures* for the review and approval of corrective action plans." § 75-11-318(5)(c), MCA (emphasis supplied). Authority for the adoption of rules governing *procedures* is clearly distinct from authority which would grant the Board a *substantive* power of dual review and approval. See Amerada Hess Pipeline v. Alaska Public Utilities Comm'n, 711 P.2d 1170, 1176 (Alaska 1986) (legislative grant of discretion to agency to adopt "practice and procedure" regulations must be narrowly construed). A substantive power of dual review, upon which

section 16.47.342, ARM, is premised, is not found within the rulemaking authority granted by section 75-11-318(5)(c), MCA. As discussed above, this rule, which purports to establish dual review in conflict with the statute, is invalid.

Summarizing my response to your first question, the Board does not have the authority to modify the technical methodologies or requirements of corrective action plans approved by the Department. House Bill 603 granted corrective action plan review and approval authority solely to the Department. While the Board was granted rulemaking authority for *procedures* governing such review and approval, this authority may only be exercised consistent with the statutory framework by which the Department determines and approves cleanup methods and technologies. For example, the Board could adopt rules formalizing the review procedures currently followed whereby the Board's staff submits written comments to the Department on proposed corrective action plans prior to Department approval. Employing such procedures, the Board's staff may convey information on alternative technologies to accomplish the Department's corrective action plan. Section 16.47.342, ARM, is invalid because it attempts to grant the Board a substantive review and approval power that conflicts with the statutory scheme.

You have also requested my opinion on whether the Board may refuse to reimburse an owner's actual, necessary, and reasonable expenses incurred in performing the Department-approved corrective action plan. The governing statute is section 75-11-309(2), MCA. While this subsection has been paraphrased in my discussion of your first question, it states in full as follows:

> (2) The board shall review each claim received under subsections (1)(f) and (1)(g), make the determination required by this subsection, inform the owner or operator of its determination, and, as appropriate, reimburse the owner or operator from the fund. Before approving a reimbursement, the board shall affirmatively determine that:
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> (a) the expenses for which reimbursement is claimed:
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> (i) are eligible costs; and
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> (ii) were actually, necessarily, and reasonably incurred for the preparation or implementation of a corrective action plan approved by the department or for payments to a third party for bodily injury or property damage; and
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> (b) the owner or operator:
>
> (i) is eligible for reimbursement under 75-11-308; and

(ii) has complied with this section and any rules adopted pursuant to this section.

You have framed your question in a manner which facilitates my response. Assuming, as I have interpreted your question, that a claim has been affirmatively determined by the Board to be "actually, necessarily, and reasonably incurred for the preparation or implementation of a corrective action plan approved by the department" *and* the Board affirmatively determines that the other three reimbursement criteria are satisfied, the claim reimbursement must be approved for payment from the fund. The Board has no discretion to deny such a claim. Section 75-11-307(1), MCA, provides in full:

> **Reimbursement for expenses caused by a release.** (1) Subject to the availability of money from the fund under subsection (5), *an owner or operator who is eligible under 75-11-308 and complies with 75-11-309 and any rules adopted to implement those sections must be reimbursed by the board from the fund* for the following eligible costs caused by a release from a petroleum storage tank:
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> (a) corrective action costs; and
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> (b) compensation paid to third parties for bodily injury or property damage. [Emphasis supplied.]

The concern of the Department and the Board is whether the Board may use the reimbursement review authority within section 75-11-309(2)(a)(ii), MCA (the Board shall affirmatively determine that the expenses were "actually, necessarily, and reasonably incurred"), to determine, as a condition of reimbursement, that a particular cleanup expense was necessary to achieve remediation of the release. In other words, does the Board have the discretion to deny a claim because the cleanup could have been accomplished with a different, less expensive, choice of technology?

The discretion of the Board is statutorily limited. The Board's relevant reimbursement review authority is confined to whether an expense was "actually, necessarily, and reasonably incurred *for the preparation or implementation of a corrective action plan approved by the department.*" § 75-11-309(2)(a)(ii), MCA (emphasis supplied). Significantly, the Board is not granted authority to review whether an expense was necessary or reasonable *for cleanup*. The parameters of a cleanup -- that is, the selection of a choice of technology and method for achieving the remediation of a release -- are established by the Department's review and approval of the corrective action plan. Once a particular cleanup plan is selected, the Board may not preempt or frustrate the Department's technology determinations by denying an owner's claims for reimbursement of expenses incurred in furtherance of the Department plan.

Within the statutory limits discussed above, the Board does have discretion in reviewing the reasonableness of claims submitted for reimbursement. For example, an owner's cleanup contractor might perform work that arguably furthers the Department-approved corrective action plan, but was not expressly ordered by the plan. In these situations, assuming the contractor has not sought and received an amendment to the approved corrective action plan, the Board will exercise discretion in determining whether the work was "actually, necessarily, and reasonably incurred" in performing the approved corrective action plan. Other situations may arise where work is specifically ordered by a Department-approved corrective action plan, but is performed or billed in an exorbitant manner. Here again, the Board will exercise discretion in determining whether the work was reasonably performed in furtherance of the plan.

In summary, the Board has no discretion to deny a claim for reimbursement upon consideration of criteria outside the scope of subsection 309(2), MCA -- for example, the fact that a cleanup could have been accomplished through a less expensive method or technology. As previously discussed, the essential requirement that must be met for a claim reimbursement under the statute is that the work was performed for the preparation or implementation of the Department-approved corrective action plan. Assuming the claim otherwise satisfies section 75-11-309(2), MCA, work "actually, necessarily, and reasonably incurred" in performing the Department cleanup plan must be approved for reimbursement by the Board, regardless of the Board's opinion of the effectiveness or necessity of the particular cleanup response.

THEREFORE, IT IS MY OPINION:

1. The Petroleum Tank Release Compensation Board does not have statutory authority to modify the technical methodologies or requirements of corrective action plans approved by the Department of Health and Environmental Sciences. The Board's rule, which purports to grant the Board corrective action plan review and approval authority, is invalid as it conflicts with the provisions of section 75-11-309(1), MCA.

2. The Board does not have discretion to deny a claim for reimbursement from the petroleum tank release cleanup fund for expenses "actually, necessarily, and reasonably incurred" in preparation or implementation of a Department-approved corrective action plan, assuming the reimbursement criteria of section 75-11-309(2), MCA, are satisfied.

Sincerely,

MARC RACICOT
Attorney General