



**The State of New Hampshire  
Insurance Department**

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Concord, NH 03301

Roger A. Sevigny  
Commissioner

Alexander K. Feldvebel  
Deputy Commissioner

BULLETIN

Docket Number INS NO. 11-009-AB

TO: All Property Casualty Insurers, including Surplus Lines Insurers

FROM: Roger A. Sevigny, Insurance Commissioner

DATE: July 1, 2011

RE: Claim Settlement Procedures Involving State Fuel Oil Discharge Cleanup Funds

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The purpose of this Bulletin is to clarify the insurance claim determination process where an insured property owner who is strictly liable to the State of New Hampshire for damage to state waters from a fuel oil discharge seeks to establish eligibility for excess insurance coverage from the Fuel Oil Discharge Cleanup Fund established by RSA Chapter 146-E<sup>1</sup> (“FOD Fund” or “Fund”). The Insurance Department (“Department”) recognizes that coverage determinations associated with oil discharges are complex in that the state acts both as an excess insurer through the FOD Fund and as the holder, in public trust, of a property interest in state surface water and groundwater. This Bulletin addresses the obligations of insurers when an insured property owner presents a claim related to an oil discharge to state waters.

In order to secure FOD Fund coverage, the Oil Fund Disbursement Board (“ODD Board”) requires that a property owner first obtain a determination as to whether there is coverage under any private insurance policy. RSA 146-E:6, III; N.H. Admin. Rules, Odb 405.03(b). In the past, some property owners’ applications for FOD Fund coverage have been delayed due to uncertainty as to whether the oil discharge has impacted the property interest of a third party, and confusion about the appropriate timing for issuing a determination regarding coverage for liability for damages caused by the discharge.

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<sup>1</sup> This process also applies to coverage sought under the Oil Discharge and Disposal Cleanup Fund, RSA 146-D and the Motor Oil Discharge Cleanup Fund, RSA 146-F. All three funds are jointly administered by the Oil Fund Disbursement Board, which is administratively attached to the Department of Environmental Services. RSA 146-D:9.

To facilitate the settlement of claims resulting from oil discharges, the Department of Environmental Services (“DES”) has instituted a new procedure whereby it will issue a Notice of Strict Liability under RSA 146-A:3-a (“SL Notice”) to an oil storage facility owner or property owner seeking Fund coverage. A copy of the SL Notice form is attached to this Bulletin. DES will direct owners to submit SL Notices to their insurance companies. See SL Notice, page 2. The SL Notice is a factual determination by DES that there has been a discharge of oil to surface water or groundwater at a particular location that causes damage to the property interest of the state. The legal significance of the SL Notice to any notice of claim filed by the insured is discussed in Section I below.

When making eligibility determinations of liability coverage for oil discharges impacting state surface or groundwater, insurers must comply with the claim settlement procedures of N.H. Admin. Rules, Ins Part 1002 (“Ins 1002”). The specific application of Ins 1002 to claims relating to oil discharges is discussed in Section II below.

#### I. State’s Right to Recover Damages to Surface Water and Groundwater

The State of New Hampshire holds a property interest in the state’s surface water and groundwater. The New Hampshire Supreme Court has ruled that “[t]he General Court has declared that the State is the trustee over all of the State’s water,” including groundwater. State v. Hess Corp., 161 N.H. 426, 432 (2011), citing RSA 481:1. The state’s rights as trustee of surface water and groundwater extend to asserting a claim for damages when there is a release of contaminants to those waters. Hess Corp., 161 N.H. at 434; see also Coakley v. Maine Bonding & Cas. Co., 136 N.H. 402, 412-413 (1992) (groundwater is a “unique and irreplaceable government resource” in which the state has a property interest sufficient to assert an insurance claim). Damages include cleanup costs and reimbursement for related investigatory costs. Coakley, 136 N.H. at 416; see also EnergyNorth v. Century Indemnity Co., 452 F. 3d 44, 57 (1<sup>st</sup> Cir. 2006) (“[C]leanup measures that serve preventative ends while remediating the taint of prior environmental contamination have been held to be covered by general liability policies.”).

The state’s claims under RSA chapter 146-A for damages to public waters are unique in being governed by the strict liability standard; damage claims of other third parties under the same chapter must meet the traditional tort standard of negligent or intentional causation. RSA 146-A:3-a; RSA 146-A:10; Mesiti v. Microdot, Inc., 739 F. Supp. 57, 63 (D.N.H. 1990) (reiterating that there is no private cause of action in strict liability under RSA 146-A:3-a). The state’s property interest as trustee is distinct from any ownership interest the insured may hold in his property, including the right to drill a well and use the groundwater. Appeal of Town of Nottingham, 153 N.H. 539, 548 (2006) (citing Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 577 (1862)). Because the state and the property owner each have a separate property interest, damage to groundwater is not solely damage to property of the insured, but is also damage to the state’s interest. Therefore, the issuance of an SL Notice establishes a claim for damage to the property of a third party that must be addressed by the insurer in accordance with insurance law.

## II. Application of Ins Part 1002 Claim Settlement Procedures to Oil Discharges

It is in the best interest of all parties to address oil discharges quickly and efficiently. Therefore, the following procedures shall apply<sup>2</sup> when an insured has applied for assistance from the Fund, and seeks a determination of coverage from an insurer:

### A. Scope of Coverage

If an oil discharge has reached groundwater or surface water, as evidenced by the issuance of an SL Notice by DES, there is a claim against the property owner for physical damage to the property of a third party, *i.e.*, the State of New Hampshire. The insurer must address any notice of claim filed by an insured in a written determination to the insured, advising whether there is coverage under the policy for the damage caused by the discharge. The insurer must provide notice to the insured and act in issuing this determination in accordance with the procedure outlined in Ins 1002. Insurers are encouraged to issue written determinations consistent with the DES guidelines on page two of the SL Notice.<sup>3</sup>

### B. Claim Settlement Time Limitations After Receipt of SL Notice

The insurer shall commence investigation of the state's claim within five working days of receipt of an SL Notice and any other claim material from the insured, and shall acknowledge receipt of the notice within ten days. Ins 1002.05(a)(1); Ins 1002.05(b). The insurer shall issue a determination letter advising of acceptance or rejection of the state's claim within 30 days of receiving the SL Notice. Ins 1002.05(c). Because the SL Notice is not a notice of claim that appraises the insurer of facts pertinent to the claim(s) of third parties other than the state, the insurance company has no obligation to issue a determination with respect to other third-party claims based on receipt of the SL Notice.

### C. Justified Delays in Claim Settlement

Implicit in the claim settlement procedure of Ins 1002 is the importance of a timely determination by the insurer. Because any delay in corrective action of an oil discharge may result in additional contamination, including potential bodily harm, the Department will strictly construe and enforce the claim settlement time limitations in Ins 1002. Insurers are encouraged to expedite the processing of oil discharge claims, and are reminded that pursuant to RSA 417:4, XV(a)(11), failing to affirm or deny coverage within the limitations set forth in Ins 1002 is an unfair insurance trade practice.

Please contact Jennifer J. Patterson at the New Hampshire Insurance Department, [Jennifer.patterson@ins.nh.gov](mailto:Jennifer.patterson@ins.nh.gov) or (603) 271-2261, with any questions about this Bulletin.

Attachment: Copy of DES SL Notice form

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<sup>2</sup> While surplus lines insurers are not strictly bound by Ins 1002, the Department expects that they will act promptly and in general accordance with the spirit of these guidelines in processing oil discharge claims.

<sup>3</sup> Insurers should also be mindful of RSA 146-A:4, which as described by DES on the SL Notice gives the agency "primary jurisdiction" over oil spill cleanups and requires responsible parties to coordinate their cleanup efforts with those of DES.

**NOTICE OF STRICT LIABILITY FOR OIL DISCHARGE – RSA 146-A  
REQUEST FOR INSURANCE COVERAGE DETERMINATION**

**A. OIL STORAGE FACILITY/PROPERTY, ON-SITE SPILL, OR UNKNOWN SOURCE**



Type (check one): Motor Fuel AST ("LAST")  Motor Fuel UST ("LUST")  Fuel Oil AST ("FUEL")   
 On-Premise-Use Fuel Oil ("OPUF")  Motor Oil ("MOST")  On-Site Spill  Unknown Source

**B. FACILITY AND/OR PROPERTY, OR LOCATION INFORMATION**

(1) Facility and/or property, or location name	(1) _____
(2) Address	(2) _____
(3) Town	(3) _____
(4) NHDES facility registration/permit number, if applicable	(4) _____
(5) NHDES site number and project number (TBD)	(5) _____
(6) Date of discovery	(6) _____

**C. OWNER/RESPONSIBLE PARTY INFORMATION**

(1) Owner/Responsible Party name	(1) _____
(2) Mailing address	(2) _____ _____ _____
(3) Day/Evening phone	(3) _____

**D. NOTICE OF STRICT LIABILITY & STATEMENT OF INSURANCE REQUIREMENTS**

*The New Hampshire Department of Environmental Services (NHDES) has determined that as of the date listed in B(6), the person(s) or entity listed in C(1) is strictly liable under New Hampshire RSA 146-A:3-a for cleanup of the oil discharge discovered at the location listed in B(1), which has impacted the waters of the State. NHDES has or will issue specific instructions for performing cleanup, and requires that insurance coverage information be provided. A state fund, which is designed to be excess coverage to any private insurance, may be available for cleanup cost reimbursement if private insurance is unavailable or insufficient. Pursuant to Insurance Department Bulletin INS No. 11-009-AB, upon receipt of this Notice, the private insurer must make a coverage determination as to whether or not the State's claim in strict liability for damages to waters of the State is covered by the policy. Coverage determination notification to the insured must comply with the guidelines outlined in New Hampshire Code of Administrative Rules, Part Ins 1002.*

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NHDES Representative & Date Signed

**SEE INFORMATION AND GENERAL INSTRUCTIONS ON PAGE 2**

## E. INFORMATION AND GENERAL INSTRUCTIONS

- New Hampshire's Oil Pollution Control statute (RSA 146-A) gives NHDES primary jurisdiction over oil spill cleanup operations. Responsible parties must perform the cleanup to the Department's satisfaction and be consistent with the Department's directives. RSA 146-A:4, I; see also RSA 146-A:7. The law also authorizes NHDES to perform cleanup, but the liable parties will be billed for those services, which must be paid in order to obtain a release from the State that cleanup work is complete.
- Under New Hampshire law (RSA 146-A:3-a), any person who causes or suffers a discharge of oil into or onto any surface water or groundwater, or in a land area where oil will ultimately impact water, is **strictly liable** for cleanup. Petroleum storage tank facility owners, and owners of land where such facilities are or were located, need to understand that they are legally liable even if they were not negligent in the operation of a facility.
- NHDES expects private insurance companies to pay cleanup costs that are covered under the insurance policy. Once NHDES has issued a Notice of Strict Liability, the party determined to be strictly liable is responsible for seeking a **coverage determination** from each private insurance company that has issued a policy on the property or oil storage facility. Coverage determinations from insurance agents interpreting policies are not acceptable. The coverage determination must be from the insurance company or an authorized adjuster, based on a claim filed by the insured. If there is no private insurance, the owner or company officer must supply NHDES with a notarized letter stating this fact.
- The New Hampshire Petroleum Reimbursement Fund Program oil spill cleanup funds, available under RSA 146-D, RSA 146-E and RSA 146-F, provide excess insurance coverage. Private insurance for cleanup costs and/or third-party damages must be exhausted before the State funds are available. The initial request for reimbursement authorization under the State funds must include documents to demonstrate there is no private insurance coverage.
- When water contamination becomes known during a cleanup initially financed by State funds, but it is later determined that there is coverage under a private insurance policy, NHDES expects the insurance company to assume the cost of any water quality assessment that is necessary. Costs excluded from coverage under private insurance may be covered by the State excess insurance funds, provided all eligibility requirements are met.
- The N.H. Department of Insurance (DOI) has issued Bulletin INS No. 11-009-AB to insurance companies regarding the process for handling insurance claims relating to oil discharges, where NHDES has issued a Notice of Strict Liability. The Bulletin directs insurers to issue coverage decisions (i.e., denial or payment of a claim) in accordance with DOI rules, Ins 1002 ([http://www.gencourt.state.nh.us/rules/state\\_agencies/ins1000.html](http://www.gencourt.state.nh.us/rules/state_agencies/ins1000.html)). The Bulletin advises insurers they must give the insured written notice of the reason for denial in whole or in part of any claim; under Ins 1002.06(a), this includes notice of the applicable policy provision upon which denial is based. The Bulletin also encourages insurers to make their oil discharge coverage decisions consistent with the approach outlined in this notice.
- If a private insurer (1) is non-responsive to a request for a coverage determination, (2) states that the policy does not cover the State's strict liability claim, or (3) will not certify that such coverage is not available under its policy, State fund coverage may still be provided. However, the State reserves its right to take legal action against the insurer to recover costs.
- NHDES personnel will complete the Notice of Strict Liability form as soon as possible after an oil discharge is reported and initially investigated, and water impacts are found. The owner/responsible party should provide a copy of both sides of the completed form to their insurance company to request a coverage determination. The owner/responsible party should report the results of the coverage determination to NHDES immediately. The findings of the coverage determination must be included with the owner's request for State excess insurance fund coverage.

If you have questions, email [Timothy.Denison@des.nh.gov](mailto:Timothy.Denison@des.nh.gov) or call (603) 271-2570.