



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Department of Environmental Quality
VAC Chapter Number:	640
Regulation Title:	Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements
Action Title:	Proposed Regulatory Amendment
Date:	December 14, 2006

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary*

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The regulation requires operators of regulated petroleum aboveground storage tanks (ASTs) and pipeline facilities to demonstrate they have the financial resources available to pay for the costs of containment and cleanup in the event of a release from their tanks. The Department proposes to eliminate the standby trust requirement for third party mechanisms such as letters of credit and surety bonds, which would have the effect of reducing operators' cost of compliance without affecting the stringency of the current financial responsibility requirements. The Department also proposes several administrative changes to the regulation that do not affect the regulatory requirements.

Basis*

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The legal basis for the Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements Regulation, 9 VAC 25-640., is the State Water Control Law (Chapter 3.1, Title 62.1, Section 44.34, Articles 10 and 11 of the Code of Virginia). Specifically, § 62.1-44.34:16D authorizes the State Water Control Board to promulgate regulations requiring operators of facilities to demonstrate financial responsibility based on the total storage capacity of all facilities operated within the Commonwealth and operators of pipelines to demonstrate financial responsibility for any pipelines operated within the Commonwealth.

Purpose*

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

According to the Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements Regulation (9 VAC 25-640), operators of regulated petroleum ASTs and pipeline facilities must demonstrate they have the financial resources available to pay for the costs of containment and cleanup necessitated by accidental releases arising from the operation of petroleum ASTs and pipeline facilities. As part of the proposed regulatory action, the Department is exploring alternative methods for achieving compliance with the AST financial responsibility requirements while continuing to meet the goals of the financial responsibility regulations. Specifically, the Department is investigating ways to reduce the cost of compliance with the regulation by proposing modified compliance requirements that are no less stringent than the existing requirements, but may be more cost effective to secure. The Department will also propose administrative changes to the regulation that do not affect the regulatory requirements. In addition to the changes proposed by the Department of Environmental Quality, the Department will also solicit public input during the review and consider alternatives presented by the regulated community which also meet the goals of the regulation.

Substance*

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The Department is exploring alternative methods for achieving compliance with the AST financial responsibility regulations while continuing to meet the goals of the financial responsibility regulation. Specifically, the Department is investigating ways to reduce the cost of compliance with the regulation by proposing modified compliance requirements. The Department will also propose administrative changes to the regulation that do not affect the regulatory requirements. In addition to the proposed changes, the Department will also solicit public input during the review and consider alternatives presented by the regulated community which also meet the goals of the regulation.

Issues*

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantage to the public from the proposed amendments is an increased level of protection associated with third party financial mechanisms. By deleting the standby trust fund requirement for letters of credit and surety bonds, the Department will reduce the cost of obtaining these mechanisms and thus encourage operators to demonstrate using these mechanisms rather than self insurance. Financial mechanisms backed by a third party such as a bank or surety company are more likely to ensure that the money will be available for clean up or compensating third parties than relying on the operator's net worth. There are no potential disadvantages to the public or the Commonwealth from adopting the proposed amendments.

Locality Particularly Affected*

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

The impact of this regulation is statewide; therefore, the Department anticipates that all localities will be equally affected.

Public Participation*

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal.

In addition to any other comments, the Board is seeking comments on the costs and benefits of the proposal and the impacts of the regulation on farm or forest lands.

Anyone wishing to submit written comments for the public comment file may do so at the public hearing or by mail to Josiah Bennet, Department of Environmental Quality, P. O. Box 10009, Richmond, Virginia 2324-0009, (804) 698-4205, jqbennett@deq.virginia.gov. Written comments should be signed by the commenter and include the name and address of the commenter. In order to be considered the comments must be received by the close of the comment period. Oral comments may be submitted at the public hearing.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency’s best estimate of the number of such entities that will be affected; e) the projected cost of the regulation for affected individuals, businesses, or other entities; and f) an estimate of the impact of the proposed regulation upon small businesses as defined in § 9-199 of the Code of Virginia or organizations in Virginia.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>The proposed amendments will not increase the existing cost to the Commonwealth with implementing and enforcing the regulation.</p>
<p>Projected cost of the regulation on localities</p>	<p>The cost of compliance for localities should not change as a result of the proposed amendments.</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the regulation</p>	<p>Business likely to be affected by the regulation include operators of ASTs and pipeline and banks.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There are approximately 750 AST facilities that may incur economic benefits.</p>
<p>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other</p>	<p>Costs associated with this regulation are likely to decrease or remain the same. Operators are still required to report and maintain records demonstrating compliance with this regulation.</p>

administrative costs required for compliance by small businesses.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
10		Owner	Deleted reference to AST owner throughout document. AST or pipeline operators are required to demonstrate financial responsibility.
10		Rural Utilities Office	Replaced Rural Electrification Administration with Rural Utilities Office throughout document; replaced due to agency name change
10		Definition "Group self-insurance pool" or "pool"	Added to define the group self-insurance pool mechanism
10		Definition "Member"	Added to define the group self-insurance pool mechanism
10		Definition "Member Agreement"	Added to define the group self-insurance pool mechanism
10		Definition "Pool Plan"	Added to define the group self-insurance pool mechanism
10		9 VAC 25-91	Deleted -10 et seq. from 9 VAC 25-91 throughout document due to style change.
10		Definition "Tank"	Clarified for purposes of 9 VAC 25-640-220
70	70.B 1. new a. and b.	70.B 1. new a. and b.	Added requirement that AST or pipeline operators include the amount of UST financial responsibility coverage that they self insure using a financial test when calculating the amount of tangible net worth they must have to self insure their AST financial responsibility obligation. Extended the Dun & Bradstreet ratings table to an annual aggregate amount of \$1,000,000.
80		80.D	Standby trust requirement language deleted to decrease the cost of compliance.
90		90.A-E	Added language to clarify how operators can use a group self-insurance pool to demonstrate financial responsibility.
90		90.A.3.	Replaced Virginia Code with Code of Virginia

			for style change
90		90.A.3.	Replaced Bureau of Insurance with State Corporation Commission to clarify governing agency
100		100.D	Removed the requirement that an operator establish a standby trust fund when using a surety bond to demonstrate financial responsibility.
110		110.C	Removed the requirement that an operator establish a standby trust fund when using a letter of credit to demonstrate financial responsibility.
110		110.C	Added a requirement that the issuing institution also provide notice to the Board when canceling the mechanism.
120		120.B	Deleted reference to Appendix VIII because Appendix VIII has been deleted from the regulation
130		130	Removed the requirement that an operator establish a standby trust fund when using a surety bond or letter of credit to demonstrate financial responsibility.
150		150.A	Added language to require any provider of financial assurance to provide notice to the Board in the event that it cancels or terminates a financial responsibility mechanism.
160		160.A, B	Deleted due to redundancy and conflict with section 40.
170		170.B	Removed requirement that operators who demonstrate with a surety bond or letter of credit maintain a copy of their standby trust at their facility and modified the recordkeeping language relating to group self-insurance pools.
180		180.A,B	Added language to require a surety or financial institution to pay over the funds to the Board when directed rather than pay into a standby trust fund. Also modified language to require a local government guarantor to pay funds over to the Board when requested rather than the director.
200	200.D	200.D	Added a requirement that operators and financial assurance providers notify the Board in the event of a bankruptcy.
210	210.A	210.A	Added language to clarify how a letter of credit or surety bond will be replenished by the operator once it has been cashed by the Board.
220	220.A,B,C,D,E ,F,G,H,I,J,K	220.A,B,C,D,E,F,G,H,I,J,K	Added language to clarify how the Virginia Petroleum Storage Tank Fund (VPSTF) is used to reimburse tank operators for the cost of containment and cleanup of a petroleum release from an AST.
250		250.A	Replaced three years with four years for

			consistency with Executive Order 36.
Appendix I			Added language to account for underground storage tank financial responsibility coverage when determining whether an operator's tangible net worth is sufficient to qualify to use this mechanism to demonstrate financial responsibility.
Appendix II			Added language to require the guarantor to give the Board notice in the event of cancellation. Deleted reference to standby trust fund.
Appendix III			Removed reference to group insurance pools and added requirement to give Board notice in the event of cancellation.
Appendix IV			Removed reference to group insurance pools and added requirement to give Board notice in the event of cancellation.
Appendix V			Deleted reference to the standby trust and added language to clarify the surety's responsibilities in the event of a demand for payment or legal action. Added requirement to give Board notice in the event of cancellation. Removed Period of coverage and added Effective date to clarify that surety bond is not self-terminating.
Appendix VI			Deleted reference to the standby trust and added requirement to give Board notice in the event of cancellation.
Appendix VII			Deleted reference to standby trust; Appendix VII no longer exists.
Appendix VIII			Deleted Appendix VIII, Certificate of Acknowledgment; certificate no longer required.
Appendix VIII			Added new certificate of insurance form for group self-insurance pools.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The Department will solicit public input during the review process and consider alternatives presented by the regulated community which also meet the goals of the regulation. To date, the only alternative the Department has considered fully has been elimination of the entire regulation. The Department has determined, however, that the AST financial responsibility regulations have been developed under the specific statutory direction of the Virginia Code and, therefore, must remain intact.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

Event	Summary of Comments	Department's Response to Comments
No comments were received in response to the Department's May 24, 2006, letter to individuals and organizations who asked to be notified about legislation involving petroleum issues.		
No comments were received at the public meeting on June 29, 2006.		
The Department received a comment from Dan Mowyers, an Environmental Specialist with Dominion Virginia Power.	Mr. Mowyers asked if the Department would consider exempting large corporations worth billions of dollars from demonstrating financial assurance using the financial test of self insurance.	The Department filed Mr. Mowyers' comment for future consideration since Mr. Mowyers' comment did not apply to the current proposed amendment.
On September 21, 2006, the Department received a comment from Janis Bunce at the State Corporation Commission in response to a July 27, 2006, letter the Department sent to solicit comments on the proposed amendments.	The comment included several minor suggested changes to the proposed amendments to 9 VAC 25-640.	The Department incorporated the suggested changes into the proposed amendment to the regulation.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The language of the regulation is consistent with that used in other regulations issued by the Board and other existing statutes and state regulations. The Board, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

The Department will review the amended regulation in four years to evaluate the effectiveness of the regulation.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The Department does not anticipate that the proposed changes to the AST financial responsibility regulations will erode the authority and rights of parents in the education, nurturing and supervision of their children; encourage or discourage economic self-sufficiency, self pride and the assumption of responsibility for oneself, one's spouse and one's children and or elderly parents; strengthen or erode the marital commitment; or increase/decrease disposable family income.