



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

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| Agency Name: | State Water Control Board |
| VAC Chapter Number: | 9 VAC 25-590 |
| Regulation Title: | Petroleum Underground Storage Tank Financial Responsibility Requirements |
| Action Title: | Proposed Regulatory Amendment |
| Date: | May 19, 2003 |

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summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed.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 owners/operators of regulated petroleum underground storage tanks to demonstrate that they have the financial resources available to pay for the costs of cleanups and third party lawsuits in the event of a release from their tanks. Please see attached fact sheet for more detailed information regarding program 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 Virginia Petroleum Underground Storage Tank (UST) Financial Responsibility Requirements Regulation, 9 VAC 25-590-10 *et seq.*, is the State Water Control Law (Title 62.1, Chapter 3.1, Articles 9 and 10 of the Code of Virginia). Specifically, § 62.1-44.34:9(8) authorizes the State Water Control Board to promulgate such regulations as may be necessary to carry out its powers and duties with regard to USTs in accordance with federal laws and regulations. Further, § 62.1-44.34:12(A) of the State Water Control Law provides the direct authority to the State Water Control Board to promulgate regulations that conform to the federal UST financial responsibility requirements of 42 U.S.C § 6991b (d) and any regulations adopted thereunder.

The Virginia Petroleum UST Financial Responsibility Requirements Regulation substantially duplicates the federal UST financial responsibility requirements. As provided by federal law, the Virginia regulation (9 VAC 25-590-210) allows tank owners/operators to use the Virginia Petroleum Storage Tank Fund (VPSTF) as a means for meeting the financial responsibility demonstration amount that is in excess of the financial responsibility amount required under VPSTF's sliding scale financial responsibility requirement (see attached fact sheet for more information on sliding scale). Owners/operators may use VPSTF in combination with one of six allowable demonstration mechanisms in order to satisfy the financial responsibility demonstration requirements.

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 Virginia Petroleum UST Financial Responsibility Requirements (9 VAC 25-590-10 *et al*), owners/operators of regulated petroleum USTs must demonstrate they have the financial resources available to pay for the costs of cleanups and third party lawsuits in the event of a release from a regulated tank. As part of the proposed regulatory action, the Department has explored alternative methods for achieving compliance with the UST financial responsibility requirements while continuing to meet the goals of the financial responsibility regulations.

Specifically, the Department has investigated 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 hopes to make third party mechanisms more affordable to encourage owners/operators to use them to demonstrate. This will increase the level of protection provided to the public by this regulation. The Department is also clarifying for owners/operators the appropriate way to use group self-insurance pools and individual self-insurance tests to demonstrate financial responsibility. The Department is proposing changes that bring the regulation into conformance with the State Water Control Law. Finally, the Department also is proposing administrative changes to the regulation which do not affect the regulatory requirements.

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 has explored alternative methods for achieving compliance with the UST financial responsibility regulations while continuing to meet the goals of the financial responsibility regulation. Specifically, the Department has investigated ways to reduce the cost of compliance with the regulation by proposing modified compliance requirements. The Department is proposing clarification changes to the regulation that bring it into conformance with statutory requirements. Also, the Department proposing changes that clarify the method to demonstrate using group self-insurance pools, including a new certificate of insurance form. The Department is proposing changes to the financial assurance mechanism language that ensure the Board receives notice of any cancellations and simplify the cashing process. The Department is proposing changes that require an owner/operator to account for other types of self-insured liabilities when using a self-insurance mechanism. Finally, the Department is proposing administrative changes to the regulation which do not affect the regulatory requirements.

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 owners and 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 owner or operator's net worth. Other proposed changes to the regulation increase the reliability of all the financial assurance mechanisms and, thus, increase the level of protection provided to the public. 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 Renee Hooper, Department of Environmental Quality, P. O. Box 10009, Richmond, Virginia 2324-0009, (804) 698-4018, rthooper@deq.state.va.us. 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.

The proposed amendments will not increase the existing cost to the Commonwealth of implementing the regulation. The cost of compliance for localities should not change as a result

of the proposed amendments. Removal of the standby trust requirement will decrease the cost of complying for many individual and corporate owners and operators which will particularly benefit small business UST owners/operators. Requiring owners/operators to account for aboveground storage tank demonstration obligations when self insuring for USTs, may disqualify some owners/operators who attempt to use the self-insurance mechanism to comply; however, the decreased costs associated with obtaining a letter of credit or surety bond should offset the cost increase.

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.

The following is a description of the proposed changes:

25-590-10 - Definitions: Addition of definitions relating to the group self-insurance pool mechanism.

25-590-40 - Amount and scope of financial responsibility requirement: Addition of a section clarifying that the Virginia Petroleum Storage Tank Fund may be used together with one of the six mechanisms allowed by the regulation to demonstrate financial responsibility.

25-590-60 - Financial test of self-insurance: Addition of a requirement that UST owners/operators include the amount of AST 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 UST financial responsibility obligation. Extended the Dun & Bradstreet ratings table to an annual aggregate amount of \$1,000,000.

25-590-80 - Insurance and group self-insurance pool coverage: Added language to clarify how owners/operators can use a group self-insurance pool to demonstrate financial responsibility.

25-590-90 - Surety bond: Removed the requirement that an owner/operator establish a standby trust fund when using a surety bond to demonstrate financial responsibility.

25-590-100 - Letter of credit: Removed the requirement that an owner/operator establish a standby trust fund when using a letter of credit to demonstrate financial responsibility. Also added a requirement that the issuing institution provide notice to the Board when canceling the mechanism.

25-590-120 - Standby trust fund: Removed the requirement that an owner/operator establish a standby trust fund when using a surety bond or letter of credit to demonstrate financial responsibility.

25-590-140 - Cancellation or nonrenewal by a provider of financial assurance: 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.

25-590-160 - Recordkeeping: Removed requirement that owners/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.

25-590-170 - Drawing on a financial assurance mechanism: 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.

25-590-190 - Bankruptcy or other incapacity of owner, operator or provider of financial assurance: Added a requirement that owners/operators and financial assurance providers notify the Board in the event of a bankruptcy.

25-590-200 - Replenishment of guarantees, letters of credit or surety bonds: Added language to clarify how a letter of credit or surety bond will be replenished by the owner/operator once it has been cashed by the Board.

25-590-210 - Virginia Petroleum Storage Tank Fund: Added language to clarify when and how the Board can pay third party claims from the Virginia Petroleum Storage Tank Fund. Also clarified how the Fund is used to pay cleanup costs for each occurrence.

Appendix I - Letter from chief financial officer: Added language to account for aboveground storage tank financial responsibility coverage when determining whether an owner's/operator's tangible net worth is sufficient to qualify to use this mechanism to demonstrate financial responsibility.

Appendix II - Guarantee: Added language to require the guarantor to give the Board notice in the event of cancellation.

Appendix III - Endorsement: Removed reference to group insurance pools and added requirement to give Board notice in the event of cancellation.

Appendix IV - Certificate of Insurance: Removed reference to group insurance pools and added requirement to give Board notice in the event of cancellation.

Appendix V - Performance bond: 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.

Appendix VI - Letter of credit: Deleted reference to the standby trust and added requirement to give Board notice in the event of cancellation.

Appendix IX - Certification of financial responsibility: Added language to clarify how the Virginia Petroleum Storage Tank Fund is to be used as a demonstration mechanism and to clarify how to calculate the coverage period.

Appendix XI - Letter from chief financial officer(short form): Added language to account for aboveground storage tank financial responsibility coverage when determining whether an owner's/operator's tangible net worth is sufficient to qualify to use this mechanism to demonstrate financial responsibility.

Appendix XII - Certificate of group self-insurance: Added a 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.

One of the alternatives the Department has considered is the elimination of the regulation; however, the UST financial responsibility regulations have been developed under the specific statutory direction of the Virginia Code and must, therefore, remain intact. Another alternative considered by the Department is to make no revisions at this time; however, the Department feels that the proposed revisions are necessary to clarify existing owner/operator obligations and increase the level of protection afforded to the public by this regulation.

Public Comment

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

The following is a summary list of comments from the public comment period on the proposed amendments:

- The State Corporation Commission suggested the addition of definitions and changes to the sections and appendices relating to the insurance mechanism, specifically to UST group self-insurance pools.

Response: The Department incorporated these suggested changes into the regulation and created a new appendix specifically for the group self-insurance pool financial mechanism.

- One commenter requested that the Board streamline the format of the self-insurance forms to reduce paperwork, relax the documentation requirements establishing petroleum flow-through, and extend the time limit for submitting the documents to the Board.

Response: When evaluating self insurance mechanisms, the Department is evaluating the owner or operator's financial ability to pay cleanup costs or third party liability claims. The effectiveness of this evaluation depends on the quality of the information provided by the owner or operator. The existing regulation has two forms available for use by an owner/operator when self insuring financial responsibility obligations. One of the forms is a streamlined version of the other. The Department cannot streamline the form any further without omitting information necessary to judge an owner's/operator's true ability to self insure his UST financial responsibility obligations. This is true as well for the documentation required to establish petroleum flow-through, which sets the amount of financial responsibility to be demonstrated by each owner/operator. Finally, the Department believes that 120 days from the close of the owner/operator's fiscal year is sufficient time to compile the information required by the regulation. In fact, other financial responsibility regulations administered by the Department require compliance within 90 days.

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 three 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 UST 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.