

Attachment 2

MEMORANDUM

**DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF LAND PROTECTION AND REVITALIZATION
OFFICE OF SPILL RESPONSE AND REMEDIATION**

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SUBJECT: Storage Tank Program Technical Manual, Volume 3: Responsible Persons. January 2021 Edition. LPR-SRR-2020-03

TO: Petroleum Program Managers

FROM: Jeffery Steers 
Director, Division of Land Protection and Revitalization

DATE: January 15, 2020

COPIES: Regional Directors, OSRR Director and Staff, Regional Storage Tank Program Managers

Summary:

The Storage Tank Program Technical outlines and discusses procedures used by DEQ staff following the release of petroleum into the environment. Volume 3 provides guidance related to evaluating what entities/persons have responsibility to take actions following the release of oil or petroleum into the environment. This volume replaces Chapter 3 of the Fourth Edition of the Storage Tank Program Technical Manual issued in 2011. This guidance is based upon the Code of Virginia §62.1-44.34:8 – 23 and Virginia Administrative Code 9 VAC 25-580.

The UST Technical Regulation was amended in January 2018. The amendments resulted in name and requirement changes for certain types of USTs. This volume updates responsible person evaluation processes to reflect changes in the regulation. Also, this document provides a discussion of USTs as fixtures of a property and attempts to provide additional clarification for evaluating oil discharges from unknown sources.

Electronic Copy:

Once effective, an electronic copy of this guidance will be available on:

- The Virginia Regulatory Town Hall under the Department of Environmental Quality(<http://www.townhall.virginia.gov/L/gdocs.cfm?agencynumber=440>);

Contact information:

Please contact James Barnett, 804-698-4289, james.barnett@deq.virginia.gov with any questions regarding the application of this guidance.

Attachment 2

Certification:

As required by Subsection B of § 2.2-4002.1 of the Administrative Process Act (APA,) the agency certifies that this guidance document conforms to the definition of a guidance document in § 2.2-4101 of the Code of Virginia.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any alternative method. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

STORAGE TANK PROGRAM TECHNICAL MANUAL

VOLUME 3: RESPONSIBLE PERSONS

January 2021 Edition

DEQ Guidance Document # LPR-SRR-2020-03

**Commonwealth of Virginia
Department of Environmental Quality**

Storage Tank Program Technical Manual Volume 3: Responsible Persons

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The term “responsible person” (RP) denotes the individual or entity that is responsible for complying with regulatory requirements related to managing storage tanks and taking appropriate actions following a release of petroleum or other regulated substance into the environment. The identity of the person responsible for cleaning up a petroleum release and/or complying with other regulatory and statutory requirements depends on several factors. As a general rule, the RP is the owner or operator of an underground storage tank (UST) on the date the release is reported to DEQ. For an aboveground storage tank (AST) discharge, the RP is the operator of an aboveground storage facility from which a discharge has occurred or the person who discharged, caused, or permitted a discharge to occur. Differences in the statutory provisions defining and governing USTs and ASTs make it necessary for staff to evaluate each type of tank separately when analyzing RP issues.

DEQ Regional petroleum program staff are responsible for identifying the RP who will be required to conduct a cleanup under the State Water Control Law. Where more than one party can be considered an RP, staff should identify which party will be required to conduct a cleanup. The “Responsible Person Identification Worksheet” included in Appendix A can be used to assist staff with identifying the RP. Office of Spill Response and Remediation (OSRR) staff are also available to assist with identifying the appropriate party.

1.0 RPs – Regulated, Partially Excluded, and Excluded USTs

Releases from regulated, partially excluded, and excluded USTs that contain petroleum are governed by Article 9 of State Water Control Law. The RP for the cleanup of a release from these tanks is the owner and/or operator of the UST on the date the release is reported to or discovered by DEQ.

UST owners and operators are equally liable for the cleanup under the State Water Control Law. As a procedural matter, DEQ first pursues the UST owner because the owner can be more easily identified when the owner has filed a UST Notification form with DEQ. However, the UST operator may be required to conduct the cleanup at any time. Pursuing the operator for a cleanup is particularly appropriate in those instances where (1) the operator's conduct is the sole or primary cause of the petroleum release, (2) the operator has contractually agreed to conduct the cleanup, (3) the owner has been determined to be unable to pay, or (4) the UST owner is a person or an entity that no longer exists, cannot be found, or is incapable of conducting the cleanup.

Regional petroleum program staff should first use information on the UST Notification Form to identify and pursue the UST owner. If there is no UST Notification form on file or if there is no viable UST owner or operator, then the Regional Case Manager should contact the current landowner to establish UST ownership. See Section 1.3 for a more in-depth discussion of evaluating a landowner as a tank owner.

1.1 Identifying an UST Owner/RP

RP evaluations should be based on the following presumptions:

1. The release from the UST is presumed to have occurred at the time of discovery by DEQ or the date the release is reported to DEQ, whichever is earlier.
2. The UST owner listed on the Notification Form is presumed to be the person responsible for cleanup and compliance with the UST Technical Regulation. Generally, the owner listed on the Notification Form is the RP regardless of whether the UST was used by this owner.

3. If the registered owner is deceased, defunct or in bankruptcy or otherwise unavailable, staff should pursue the UST operator.
4. If DEQ has not received a Notification Form, and there is no identifiable UST owner or operator, then the current landowner is presumed to be the UST owner.
5. In cases where the registered owner and the operator are deceased, defunct or have clearly manifested intent to abandon the UST (i.e. left the state or country without a forwarding address) staff should pursue the landowner. Regional petroleum program staff should refer to Section 1.3 and contact OSRR before pursuing a landowner.

When a release from an UST is reported to DEQ, the Regional petroleum program staff should check the UST database to verify that the ownership information is consistent with the UST Notification Form (Form 7530-3) for that tank.

1.1.1 RP Identification – UST Notification Form has been Submitted to DEQ

When a Notification Form has been submitted to DEQ, the UST owner listed on the Notification Form is presumed by DEQ to be the UST owner. The UST owner listed on the Notification Form may rebut this presumption by providing acceptable written evidence that:

1. Another person owns the UST (proof of ownership must be dated after the date of the Notification Form and prior to the date of the release);
2. The current UST system is not leaking and the release came from an UST system that was removed by a previous owner or belongs to another entity; or
3. The UST was not used after November 8, 1984, and the UST owner at the time of discontinuation of use was another person.

Acceptable written evidence that someone else owns the UST includes a more recent UST Notification Form (signed by the new owner), a deed, a bill of sale, a court order, a lease agreement, a service contract or similar documentation indicating that someone else owned the UST at the time of the release. An affidavit by the owner listed on the existing Notification Form is not acceptable evidence for establishing ownership of the UST by another person. However, a detailed affidavit may be sufficient to establish when use of the UST was discontinued. The affidavit must be executed by a disinterested government official or other reliable disinterested third party who had personal knowledge of when the UST was taken out of use.

If the owner listed on the Notification Form provides sufficient evidence that someone else owned the UST at the time of the release or that the release was from a different UST, DEQ will require the person who owned the UST at the time of the release to conduct the cleanup. If the evidence is insufficient, the person listed on the Notification Form as the UST owner will be identified as the UST owner, and, therefore, the RP liable for the cleanup of the release. Notification Forms must be signed by the tank owner or an authorized agent of the tank owner.

1.1.2 RP Identification - an UST Notification Form has not been Submitted to DEQ

If DEQ has not received an UST Notification Form for the regulated tanks, the current landowner is presumed to be the UST owner/RP. The current landowner can rebut this presumption by providing a

detailed written history of the site to the Regional Office which includes acceptable written evidence that:

1. Another person owns the UST (proof of UST ownership must be dated prior to the date of the release);
2. The UST was removed by a prior owner or operator;
3. The current UST system is not leaking and the release came from an UST system that was removed by a previous UST owner or located at another facility; or
4. The UST was not used after November 8, 1984, and the UST owner at the time of discontinuation of use was another person.

Acceptable written evidence that another person owns the UST includes the DEQ Notification Form (signed by the UST owner), deed, bill of sale, court order, lease agreement, service contract or similar documentation. An affidavit by the present landowner without additional proof is insufficient to establish ownership by another person. A detailed affidavit may, however, be sufficient to establish when use was discontinued if it is executed by a disinterested government official or other reliable disinterested third party who had personal knowledge of when the UST was taken out of use.

If the evidence is sufficient, the current landowner will not be identified as the UST owner/RP for the cleanup. If the evidence is insufficient, the current landowner will be considered the UST owner, and, therefore, the RP liable for the cleanup of the site.

Example 1. RP Identification - UST Notification Form Submitted for the Site

Example: Person A submitted an UST Notification Form to DEQ in January 1989, following the installation of 4 regulated USTs at a site. Person A sold the property to person B in June 2004. Person B operates the USTs but never submits a Notification Form to DEQ. Person B discovers a release at the site on March 4, 2018. Who is presumed by DEQ to be the RP?

Answer: The only Notification Form submitted to DEQ indicates that Person A is the UST owner. DEQ will, therefore, presume that person A is the RP. Person A can rebut this by providing a bill of sale, deed, court order, UST Notification Form (signed by the new tank owner), lease agreement, service contract or similar documentation indicating that another person owned the UST on March 4, 2018.

NOTES: 1. In order to transfer ownership of the UST from person A to person B, a bill of sale or deed must specifically mention the USTs. Exception: If the deed transfers the real property without a specific reference to the tanks and any other sale documents are silent with respect to the tanks, DEQ will still consider person B to be the owner of the tanks if person B operates the tanks after the sale absent any explicit authority (e.g., lease agreement) to do so.

2. Person B, by virtue of being an UST operator, is also an RP. While DEQ Storage Tank Program will usually require the UST owner (presumed to be person A in this case) to comply with the regulations first, the operator (person B) is equally liable under State Water Control Law and may be required to take the necessary corrective actions. In this example, if Person B owns the land and operates the USTs, it would be appropriate to pursue Person B as the RP .

Example 2. RP Identification - Property Owner Submits an UST Notification Form for Out of Service USTs

Example: Person A bought a property in 1985 containing USTs that were taken out of service prior to November 8, 1984 (these tanks would be regulated USTs under today's standards). Person A never used the USTs but submitted a Notification Form to DEQ, informing DEQ of the presence of these tanks and Person A is listed on the Notification Form as the owner of these USTs. Contamination is found in the area in 2018 and is traced back to these out of service USTs. Who is the RP?

Answer: Person A is the registered UST owner on the date the release was reported. Person A is the RP unless he/she provides:

- (1) a bill of sale dated after the Notification Form date and prior to the release date that specifically states that ownership of the USTs transferred as part of the sale; or
- (2) evidence that the USTs were last used prior to November 8, 1984 by a different person in which case legal ownership ends with that person. Person A in this instance might be able to use photos, an affidavit from a disinterested third party or county tax or real estate appraisal records to demonstrate when land use at the site changed. If the UST was taken out of service prior to November 8, 1984 and last used by someone other than Person A, then under the law Person A cannot be the owner, despite filing a Notification Form.

NOTE: Person A could have crossed through "owner" on the Notification Form and signed it as "current landowner" to clarify that she did not own or operate the USTs.

Example 3. RP Identification - DEQ Never Received an UST Notification Form for the Site and Another Person Removes the USTs

Example: Person A owns and operates a regulated UST on his property until 1982. In 1982, person A stops using the UST and sells the property to person B. Person B never uses the UST and in 2018, Person B removes the UST to make the property more appealing to prospective buyers. Contamination is found around the UST during tank removal. Who is the RP?

Answer: In a situation where the UST was taken out of use before November 8, 1984, the person who last used the UST before discontinuation of use is the RP. Person A, therefore, is the RP with the following caveats:

1. Person B, by virtue of being the present property owner, will be presumed by DEQ to be the RP until he provides written evidence that the UST was last used prior to November 8, 1984, and that he was not the last person to use the UST. Acceptable forms of evidence include a DEQ UST Notification Form (Form 7530-3) showing tank closure, a report or letter from the local building official or fire marshal indicating that the tank was taken out of service, a real estate appraisal showing that the property was used for another purpose prior to November 8, 1984, photos, or an affidavit from a disinterested third party. DEQ will not accept an affidavit from the present landowner as sufficient evidence that another entity is the RP.
2. In cases where a person other than the tank owner removed the tank, the person removing the tank will have an additional requirement of demonstrating that he/she did not cause the release during closure. In this example, Person B will have to provide documentation that he/she did not cause the release during removal of the tank. To meet this requirement, person B may provide a written statement from the building inspector or fire marshal who was present during the tank removal that removal operations did not cause the release.

Example 4. RP Identification - DEQ Never Received a Notification Form for the Site and the USTs have been Removed from the Property

Example: Person A owns a property containing several regulated USTs. In 1986, person A removes the USTs. In 1987, person A sells the property to person B. An environmental audit is performed on the property in 2018 and contamination is found. The audit also indicates that the property formerly contained regulated USTs and that those USTs appear to be the source of the contamination. Who is the RP?

Answer: Whenever USTs have been removed, the liability for the cleanup ends with the person who removed the USTs. Person A is the RP.

Person B, by virtue of being the present property owner will be presumed by DEQ to be the RP until Person B provides written evidence that someone else removed the USTs. Person B will also have to provide written evidence showing: (1) there were USTs on the property; (2) the USTs were removed; (3) the date they were removed; and (4) who was the tank owner at the time of removal. Documents that may be used to provide evidence that USTs were formerly on the property include: (1) DEQ UST Notification forms; (2) letters, reports, or other documents from a local building, fire, or other government official showing tanks were located on the site; (3) real estate appraisal documents indicating the presence of USTs at the property; and (4) a Sanborn Fire Map.

Person B must provide proof that regulated USTs were formerly present at the site and that someone else removed those USTs. If person B is unable to prove that USTs were present at the site, he is not only considered the RP, but he is not eligible to request reimbursement from VPSTF for costs incurred to clean up the release. If person B can demonstrate that someone else removed the USTs and that person is unable to pay for the cleanup, deceased, or unknown, Person B may "step into the shoes" of the RP and be eligible to receive reimbursement from VPSTF after paying a financial responsibility of \$5,000.

Person B may also obtain the written consent of the RP to relinquish its rights to the Fund. At this point, Person B may "step into the shoes" of the RP and be eligible to receive reimbursement from VPSTF after paying the RP's financial responsibility requirement.

Example 5. RP Identification - DEQ Never Received a Notification Form for the Site and the Current Landowner Never Used the USTs.

Example: Person A owns a property that contains several regulated USTs. In 1985, this person ceases to use the USTs. Person B purchases the property from person A in 1988. In 2018, contamination associated with the old tanks is found at the site. Who is the RP?

Answer: Person B is the RP unless he can show DEQ (using the UST Notification Form, bill of sale, etc.) that someone else is the owner of the leaking USTs. Many new owners claim that they never used the USTs, therefore, they should not be responsible for taking corrective action. Use is not an issue unless the USTs were last used prior to November 8, 1984. Since the USTs in this case were in use after November 8, 1984, the new owner (person B) bought the problem.

The new owner may also claim that the release occurred when someone else owned the tanks. Unless person B can provide documentation that a release was reported to DEQ, the Fire Marshall, or a building official before he took title to the property, person B is the RP.

1.2 Identifying an UST Operator

The definition of “operator” in Section 62.1-44.34:8 of the Code of Virginia states:

"Operator means any person in control of, or having responsibility for, the daily operation of the underground storage tank."

An operator is the person or entity having ultimate authority or the right to exercise control over the UST's day-to-day operations. An operator of an UST is a person or entity who has the responsibility for performing any of the requirements of the UST Technical Regulation. For example, an operator is a person or entity who is responsible for inspecting regulated substance deliveries; monitoring any regulated component of the UST system; or controlling surface spills of petroleum from an UST facility.

Station or facility managers who are employees of the person or entity with superior authority over the UST's operations are not operators. In this case, the person with the superior authority over the USTs would be the operator.

A person may be both the operator and the owner of an UST. In addition, operators include, but are not limited to, persons or entities who operate USTs (a) leased or franchised from the UST owner, or (b) used by the operator as part of an exclusive supply contract.

Petroleum suppliers who provide product to a person or entity on a consignment basis may also be operators. A consignment arrangement is defined as follows: (a) the person or entity receiving the product does not purchase/own the product but does, however, receive a predetermined percentage of actual sales, and (b) the petroleum supplier has the responsibility for maintaining and gauging tanks, and performing UST regulatory requirements. A person or entity, which receives a product on a consignment basis and has no responsibility for performing any of the requirements of the UST Regulation, may not be an operator of an UST. Only the current operator is liable as an RP under the statute. The current operator means the operator at the time the suspected or confirmed release triggers the applicability of the UST Regulation. As such, where the leaking UST in question has no operator at the time the release is reported, it will be deemed to have no operator for purposes of determining an RP under the statute. Regional petroleum program staff should contact Central Office staff for assistance or concurrence with operator identification.

1.3 Landowners as Tank Owners

Regional petroleum program staff should first look to the registered UST owner or the UST operator at the time the release is reported to DEQ as the RP for corrective action for a petroleum release. However, over the years, DEQ has encountered releases from a registered UST that was not properly closed and which presented a potentially significant risk to human health and the environment. In these situations, the registered owner and the operator may be deceased, or they may have left the state or country without a forwarding address, or the company owner may no longer exist.

Courts generally consider USTs to be fixtures¹ rather than personal property and apply a three-part test when analyzing whether a tank becomes a fixture of the real property. The test looks at:

1. The nature of the tank's annexation to the realty and the annexation's degree of permanency,
2. The tank's adaptation to the property's use or purpose, and
3. The UST owner's intention to make it a permanent addition to the real property. *Danville Holding Corp. v. Clement*, 178 Va. 223, 232, 15 S.E.2d 245, 250 (1941).

The analysis used by courts to identify whether an item is a fixture emphasizes the UST owner's intent to make the item a permanent addition to the real property. DEQ has relied on the Notification Form to analyze the owner's intent in the past. However, case law (as well as other states' practice) supports treating the UST as a fixture where a breakdown in the relationship between the landowner and the UST owner has occurred. Consequently, DEQ should pursue the landowner for cleanup where the available evidence indicates that the UST is a fixture and (1) the registered UST owner and the UST operator are either defunct or deceased, (2) staff cannot locate the registered owner (3) staff determine that continued enforcement against the owner would be ineffective; or (4) evidence suggests the owner has abandoned the UST. Regional petroleum program staff should consult with OSRR before pursuing a landowner.

Identifying a Landowner

Staff can obtain property owner information by accessing the online real property databases maintained on the website for each Virginia locality. The information may be offered through a real property database or a GIS viewer, depending upon the locality. Staff may contact OSRR legal staff for assistance, if needed.

Landowner Financial Responsibility for Fund Access

Financial responsibility (FR) for a landowner is calculated in the same way as for a registered tank owner of a regulated facility, i.e., the annual petroleum throughput of tanks owned by the RP landowner. However, in the vast majority of these cases, the landowner will only own the tanks at the facility in question so the FR amount should be \$5,000. Once staff verifies with the landowner that they do not own any other facilities in Virginia, staff should assume the FR is \$5,000.

In summary, DEQ will pursue corrective action in the following order based on the timing of the release report and the documents, evidence and facts of the individual case: 1. Registered UST Owners, 2. UST Operators, 3: Landowners. Staff should consult with OSRR before pursuing a landowner as discussed above.

1.4 RP Identification Process

Regional petroleum program staff are responsible for initial identification of the RP for each site. Staff may use the checklist, "Responsible Person Identification Worksheet," in Appendix A to assist in making

¹ USTs may be considered fixtures that are permanently attached to the land (e.g., a fence or wall) which transfer with the land by deed as part of the real estate. In the past, DEQ took this approach because the UST owner was frequently a different entity than the landowner and DEQ considered the UST Notification Form sufficient to identify the UST owner when the UST owner and landowner differed. DEQ considered the Notification Form to reflect the parties' intent to separate the UST from the land such that it became the personal property of the entity registering the UST rather than a fixture of the land. In 2012, DEQ altered this approach to recognize that both previously registered and unregistered USTs may be considered fixtures for which the landowner is responsible.

the RP evaluation. If program staff are unable to identify the RP, the checklist and relevant documentation should be sent to OSRR for review. A written analysis of RP status will be provided to the Regional Office and the RP. If an RP cannot be identified or found, OSRR may direct the site to become a state lead site.

2.0 RPs – ASTs and Exempt USTs

2.1 RPs - ASTs Having a Capacity of Greater than 660 Gallons of Oil

Discharges of oil from facilities with ASTs of any size are governed by Article 11 of Virginia Water Control Law. Under Article 11, the person(s) responsible for cleaning up a discharge of oil is/are the person discharging, causing or permitting the discharge and any operator of the facility from which the discharge occurred. This Article differs from Article 9 in that a person who causes a discharge (sometimes called "the spiller") is also liable to conduct a cleanup, even if the spiller neither owns nor operates the facility where the discharge occurred. Additionally, the definition of operator in Article 11 includes more persons/entities than does the Article 9 definition of operator. The person who caused the discharge (the spiller) and the person who permitted the discharge (the facility operator) are equally responsible under the law. Where the spiller and the AST operator are different persons, DEQ will pursue the person who caused the discharge (the spiller).

In many instances, discharges from ASTs cannot be tied directly to a specific act committed by someone (i.e. the person causing the discharge). If the discharge from an AST of greater than 660 gallons is not a direct result of an action or failure to act by the person who caused the discharge (the spiller), DEQ staff will assign responsibility for the discharge to the person listed in the AST database as the person responsible for day to day operation (operator) of the facility or AST.

NOTE: If the discharge was caused by a spiller and the spiller demonstrates financial incapability to perform the cleanup, DEQ will pursue the operator who is responsible for day to day operation of the tank. The operator may choose to conduct the cleanup instead of the spiller; however, if the discharge was caused by the spiller's negligent actions or willful misconduct, depending upon the relationship between the spiller and operator, the operator may not have access to the Fund for reimbursement of cleanup costs.

The person listed on the AST registration form as the tank operator can demonstrate that someone else is the RP by providing acceptable written documentation that:

1. Another person caused the discharge;
2. Another person is responsible for the day to day operation of the AST;
3. The discharge came from an AST that was removed by a prior operator or at another facility.

If the person listed on the AST registration form as the operator (in this context, the person having day-to-day control over the AST) no longer exists, cannot be found, or is financially incapable of performing the cleanup, DEQ will then consider the AST owner listed on the registration form to be the RP. If neither the operator nor the owner listed on the AST registration form exists or is financially capable of performing the cleanup, staff must contact OSRR for further guidance.

If no registration information has been submitted for the AST, DEQ will presume that the property owner is the AST operator and RP. The property owner may rebut this presumption by providing acceptable written evidence that:

1. Another person caused the discharge;
2. Another person is responsible for the day to day operation of the AST;
3. The discharge came from an AST that was removed by a prior operator.

Table 1. Summary: RP Priority for Discharges from AST having a capacity of greater than 660 gallons of oil.

1. The person causing the discharge (the spiller)
2. The operator who is responsible for the day to day operation of the AST
3. The AST owner
4. The person who owns the land where the AST is located
5. Another person (depending upon information presented to and obtained by DEQ)

Example 6. Discharge from an AST at a facility that has not submitted a registration form to DEQ

Example: A discharge of #2 heating oil occurs from a 100,000 gallon AST at a bulk oil facility. DEQ does not have an AST registration form for the facility. Who is the RP?

Answer: There is no evidence of a spiller in this example since we have no evidence that the discharge was caused directly by an act or failure to act. Since there is no spiller, DEQ would go to the registration form. Since a registration form was never submitted in this case, DEQ will go to the present property owner. The present property owner is the RP unless this person provides acceptable written evidence that another person is responsible for the day-to-day operation of the AST, or that another person caused the discharge.

2.2 RPs - ASTs of 660 Gallons or Less and Exempt USTs

Discharges of oil from ASTs of 660 gallons or less and exempt USTs are governed by Article 11 of State Water Control Law. Under Article 11, the person responsible for cleaning up a discharge of oil is the person discharging, causing or permitting the discharge and any operator of the facility from which the discharge occurred. When DEQ receives a report of a discharge from an AST of 660 gallons or less or from an exempt UST, DEQ will first look to the person who caused the discharge (the spiller) as the RP. Spillers who are not the tank owner or operator do not have access to the Virginia Petroleum Storage Tank Fund for reimbursement of cleanup costs. Also, if the spiller's actions in causing or permitting the discharge are negligent, the spiller's negligent behavior may impact a tank operator's access to the Fund. (See Volume 2, section 2.8 for additional information regarding negligence, willful misconduct and vandalism.)

In many instances, discharges from these tanks cannot be shown to be a direct result of an act or failure to act committed by a spiller. If the discharge from an AST of 660 gallons or less or an exempt UST is not a direct result of an act or failure to act or the spiller is unknown or unable to conduct the cleanup, DEQ will presume that the property owner is the RP. The property owner may rebut this presumption by providing acceptable written evidence that:

1. Another person caused the discharge;
2. Another person is responsible for the day to day operation of the tank (see exception for home heating oil tanks in rental situations below); or
3. The discharge came from a tank that was removed by a prior operator.

Example 7. RP Identification - exempt USTs remaining on a property

Example: Person A purchases a farm which includes a house and several barns. Person B (the seller), who owned the property for the previous 8 years, did not farm the land and stated that he had no knowledge of any USTs on the property. Five years after purchasing the farm, Person A encounters a 500 gallon diesel exempt UST while adding footers to expand one of the existing barns. Soil around the tank had a strong diesel odor indicating that oil had been discharged from the exempt UST. Who is the RP?

Answer: Exempt USTs are considered fixtures of the property (there are no notification requirements for exempt USTs). When the property was transferred from person B to Person A, ownership of the exempt UST transferred with the sale of the property. The fact that neither person used or even knew of the presence of the exempt UST is irrelevant. The present property owner (Person A) is the RP.

NOTE: This scenario would apply to any exempt UST.

Staff may encounter situations where home heating oil USTs or ASTs of 660 gallons or less are present on a rented residential property. Article 11 defines the facility "operator" to include persons who own, operate, charter, rent, or otherwise exercise control over or have responsibility for a facility. Therefore, both the person who rents the property and uses the tank and the tank owner are "operators" of the facility and both are RPs under Article 11.

Under most residential rental agreements, the tank owner (usually the property owner) is responsible for maintaining the tank. Since the tank owner has the ultimate authority to maintain and replace the tank, DEQ will first pursue the tank owner for discharges from home heating oil USTs and home heating oil ASTs of 660 gallons or less unless the actions of another person (spiller) caused the discharge.

- NOTES:**
1. **There may be situations where the renter is the tank owner. In those situations, DEQ will first pursue the renter for cleanup.**
 2. **Home heating oil ASTs > 660 gallons must be registered with DEQ. If there is no spiller, DEQ will assign first responsibility for discharges from these tanks to the person listed on the registration form as the AST operator (see Table 1).**

Table 2. RP Priority for Discharges from Home Heating Oil USTs and Home Heating Oil ASTs of 660 gallons or less

1. Spiller
2. Tank owner
3. Person renting the residence and using the tank
4. Another person (depending upon information presented to and obtained by DEQ)

Example 8. RP Identification - Home Heating Oil AST of 660 gallons or Less

Example: Person A owns a house that has a 275 gallon heating oil AST. The house is rented to person B. During severe weather, the AST falls over and oil is discharged. Who is the RP?

Answer: Both person A and person B are RPs. DEQ will assign first responsibility for this discharge to the tank owner. DEQ will presume that Person A (the property owner) is the tank owner since tanks are considered to be fixtures of the property. If person A is unable to conduct the cleanup, DEQ may look to person B since this person is also an operator of the tank and an RP.

NOTE: Person A may rebut the presumption of tank ownership by providing evidence that someone else owns the tank.

Example 9. RP Identification - Home Heating Oil AST of 660 gallons or Less

Example: Person A owns land on which a trailer park is located. Person B owns a trailer within the trailer park and owns the 275 gallon heating oil AST that supplies fuel for his trailer. During severe weather, the AST falls over and oil is discharged. Who is the RP?

Answer: DEQ will assign first responsibility for this discharge to person B (the tank owner) since this person had the ultimate authority to maintain the AST. If person B is incapable of performing the cleanup, DEQ may look to person A since this person is also an operator of the facility (person A owns the facility on which the oil tank is located).

3.0 Entities other than RPs who may Undertake Corrective Action

3.1 Persons Who Have Assumed Liability for Corrective Action

(Appendix C fact sheet - Assumption of Liability (“Stepping into the Shoes”))

DEQ routinely receives requests for reimbursement from the Virginia Petroleum Storage Tank Fund from people or entities who are not defined as storage tank owners or operators and/or who are not considered to be RPs under the State Water Control Law. Generally, these persons or entities have purchased the property or are in the process of purchasing the property for use or redevelopment and wish to perform the cleanup themselves. DEQ developed a procedure which allows interested persons, such as a current property owner who is neither the tank owner nor operator, to "step into the shoes" of the owner or operator, conduct the cleanup and receive Fund reimbursement for reasonable and necessary cleanup costs.

NOTE: The procedures below are different than those described for the Voluntary Remediation Program (VRP). The VRP allows owners, operators, or those persons interested in a contaminated property to voluntarily remediate releases of contaminants if the site meets certain criteria.

An interested person who is not the RP, but who has a legal interest in the property, may "step into the shoes" of the RP by assuming liability for the cleanup and become eligible for reimbursement from the Fund. An interested person must agree to assume liability for a petroleum cleanup in accordance with DEQ requirements to be eligible to request reimbursement from the Fund. If a person does not assume liability for the cleanup or is not the owner/operator, they are not eligible for reimbursement of cleanup

costs.

The "step into the shoes" procedure requires the interested person to assume all corrective action liability for that occurrence which the law imposes on the owner or operator, and to agree to perform the cleanup as required by DEQ. Please note that, if a lender qualifies for the lender liability exemption, the lender will not be required to assume liability in order to be eligible for reimbursement. See Section 3.2.1 below for additional information pertaining to lenders.

This procedure benefits both DEQ and the interested person, particularly in those situations where the owner or operator is unknown or unable to pay for the cleanup. The interested person can clean up the property in accordance with DEQ requirements and request reimbursement from the Fund for reasonable and necessary cleanup costs. The procedure alleviates delays in completing the cleanup due to limited resources and/or the low priority of the site on the state lead priority list.

DEQ limits the class of entities eligible to assume liability to those who have a legal interest in the property, i.e., those who have a lawful and substantial economic interest in the safety or preservation of property from loss, destruction or damage. However, DEQ may allow other people or entities to assume liability in those cases where that person or entity has a demonstrable incentive to complete the cleanup other than access to the Fund. For example, an adjacent property owner who wishes to increase the value of his own property or keep the value of his property from further declining may be eligible to assume liability. Also, an entity with a legal interest in the RP, such as a parent corporation or a company who has purchased the assets of the RP, may be eligible to assume liability.

NOTE: A person stepping into the shoes of an existing RP must meet the RP's financial responsibility requirement. If the RP is deceased, defunct, or bankrupt then the person stepping into the shoes must meet the lowest financial responsibility for that tank type. Refer to the Virginia Petroleum Storage Tank Fund Guidance Manual for eligible tank types and financial responsibility requirements.

In order to assume liability to undertake corrective action, the interested person must provide DEQ with the following written statement before they begin cleanup or request reimbursement:

(Name of Person Assuming Liability) assumes all liability for the completion of corrective action from the petroleum/oil contamination associated with PC #_____ and agrees to perform the corrective action in accordance with Virginia DEQ requirements.

In cases where an RP is unknown, deceased, no longer in existence, bankrupt or otherwise unable to pay as demonstrated by a DEQ inability to pay evaluation, there is no need to obtain the agreement of the RP to the transfer of reimbursement eligibility for that occurrence.

In cases where there is an existing RP, the interested person assuming liability must provide the statement assuming liability described above and obtain the following signed statement from the RP:

(Responsible Person Name) is the responsible person for the cleanup of the petroleum/oil release from the (insert tank type) located at (insert street address, city/county) and identified as PC #_____. (Responsible Person Name) quitclaims, assigns and releases all of its rights to reimbursement for corrective action costs from the Virginia Petroleum Storage Tank Fund associated with PC #_____ to (Name of Person Assuming Liability) and (Responsible Person Name) represents and warrants that

(Responsible Person Name) has the right to make such quitclaim, assignment and release. (Responsible Person name) acknowledges that if (Name of Person Assuming Liability) fails to complete the cleanup for any reason, DEQ may require (Responsible Person name) to resume cleanup activities. (Responsible Person name) acknowledges that neither this relinquishment nor the assumption of liability for cleanup relieves him/her of any potential liability arising from any third party claims or lawsuits.

This agreement by the person interested in conducting the cleanup does not release the RP under the law from liability for cleanup or payment of third party claims. If the person who assumes liability for the cleanup is determined to be unable to pay for the cleanup at any time or fails to complete the cleanup, the Regional Office may inform the RP that the RP must complete the cleanup. The RP's eligibility to request reimbursement from the Fund will be restored if the RP completes the cleanup according to DEQ requirements. If the RP is unknown or unable to pay for the cleanup, the site may become a state lead site.

Persons assuming liability will not be eligible for reimbursement unless the cleanup is performed in accordance with instructions from the DEQ Regional Office. In addition, persons assuming liability must complete the entire cleanup.

Regional petroleum program staff should forward the signed Assumption and Relinquishment statements to OSRR for review. OSRR staff will review the documents and follow up with the RP and the person assuming liability, if necessary. If the documentation is in order, OSRR will notify the appropriate Regional Office that the cleanup can move forward. OSRR will also notify reimbursement claims processing staff of the change in claimant.

3.2 Persons Who May Conduct Cleanups without Assuming Liability/Fund Eligibility

The State Water Control Law was amended effective July 1, 1996, to allow certain persons or entities to conduct cleanups without assuming owner liability for USTs.

3.2.1 Lenders

The first change to the State Water Control Law in Article 10 provides an exemption from liability to persons or entities who have a security interest in real property on which regulated USTs are located ("lenders"). This exemption mirrors the exemption given in the federal Resource Conservation and Recovery Act. The Environmental Protection Agency promulgated the Lender Liability Regulation (40 CFR §280.200 through 280.230 (1997)) that allows security interest holders to foreclose on property with USTs and perform certain compliance activities (e.g., removing the UST, pumping the product out of the UST, reporting a release) without incurring liability as the UST owner. Lenders who foreclose on loans after July 1, 1996, are eligible to request that DEQ approve an exemption from UST owner liability. Lenders should notify DEQ Regional petroleum program staff that the lender intends to request the exemption. Regional petroleum program staff should refer the lender to OSRR staff who will review the request and approve exemptions. OSRR staff will send copies of approval letters to the Regional Office. Once the lender liability exemption has been approved, the lender may choose to conduct a cleanup of the site. The lender is required to obtain Regional Office preapproval for all activities and conduct the cleanup in accordance with DEQ requirements in order to be eligible for reimbursement.

Whether or not the lender agrees to conduct a cleanup, the lender would not be deemed to be an owner/RP under the State Water Control Law. Please note that the lender liability exemption is limited to loans made on property with regulated USTs. It does not apply to property with any other type of tank. In addition, **lenders may become RPs for regulated UST cleanups if they operate the USTs after the foreclosure.** Operator liability is not covered by the exemption. Any questions concerning this exemption should be addressed to the OSRR Legal Coordinator. [Click here for additional information about the Lender Liability Exemption Guidelines.](#)

3.2.2 Virginia Department of Transportation (VDOT)

The second change to the State Water Control Law affects VDOT. VA Code 62.1-44.34:11.A.2.p. At any site where VDOT chooses to conduct or take over corrective action activities at a known petroleum release site on property acquired for transportation purposes, VDOT will not be required to assume liability or to be deemed to be the RP for that release. However, if VDOT acquires property for transportation purposes and subsequently discovers and reports a release, it will be considered the RP if it meets the definition of "Owner of an underground storage tank" and "Responsible person" under 62.1-44.34:10. VDOT should notify the Regional petroleum program staff if it intends to conduct a cleanup. By law, there is no financial responsibility requirement imposed for these cleanups. However, VDOT is required to obtain preapproval on an AAF for all activities and conduct the cleanup in accordance with DEQ requirements.

Sometimes VDOT only acquires a portion of a petroleum impacted site needed for transportation purposes. (For example, VDOT may only acquire the property it needs to expand a road or install a storm sewer or utility installation.) In these situations, VDOT may choose to complete the corrective action activities associated with the acquired property while the RP completes corrective actions on the rest of the site. In cases where the RP and VDOT are both performing the corrective action, VDOT's eligible reimbursement costs should be submitted in a claim by the RP and not by VDOT. The reimbursement program is not designed to accept claims from multiple claimants for the same PC Number.

In situations where a viable RP no longer exists and the only remaining corrective actions needed for site closure are those actions completed by VDOT, the PC should remain open until the work is completed. After completion, VDOT may submit the reimbursement claim package.

In instances where property acquired by VDOT expands across the sites of multiple PC Numbers, staff should contact OSRR for information on how to proceed. These situations can pose challenges and will need to be handled on a case-by-case basis.

Please note that the VDOT financial responsibility exemption is limited to property acquired for transportation purposes. It does not apply to any facility where VDOT is the owner or operator of an UST or AST or deemed the spiller of a release. Regional petroleum program staff having questions regarding issues related to the VDOT exemption may contact the Central Office Financial Programs Manager for further guidance.

NOTE: In situations where VDOT acquires an entire property for transportation purposes and they elect to conduct the corrective action activities, VDOT must address and clean up the entire site impacted by petroleum contamination, not just the portion of the site involved with VDOT's transportation project.

4.0 The RP is Deceased

4.1 Article 9

If a tank owner or operator who is the RP dies after the release has been reported, Regional petroleum program staff should work with the estate executor to accomplish the cleanup. (An estate will have an “administrator” in situations where the deceased had no will. However, in this section the term “executor” will be used to include both.) In such situations, the estate executor has a duty to preserve the assets of the estate from loss or waste while the estate is administered, and this includes the contaminated property. If the executor of the estate is unknown, staff should contact the person who reported the release or the consultant (if one has been retained) for the identity of the executor. Staff can also contact the circuit court in the locality where the decedent lived to obtain the name and address of the executor for the deceased’s estate. If an executor has not been appointed (for estates worth less than \$50,000) staff will generally be working with an heir to the estate.

Working with the estate executor is an option only while the estate is open and being administered. If the estate of the RP is settled and closed, DEQ has no recourse against the estate executor. Liability for the cleanup in this circumstance does not transfer to the heirs. It does not matter that someone else has inherited the tanks because that someone was not the owner at the time of the release report. Consequently, unless another potential RP exists (e.g. a tank operator exists) the site may need to be enrolled in the State Lead Program.

If a tank owner or operator who is the RP dies before the release has been reported and the deceased UST owner also owned the land where the tank is located, the heir(s) to the real property where the tank is located can be presumed to be the RP(s). However, as noted, the estate executor generally has control over the estate assets during the estate administration and program staff should send the release letter to the estate executor and work with them to accomplish the cleanup. If the estate has settled and closed by the time DEQ becomes aware of the release or if the estate closes before the cleanup is complete, the Case Manager should look to the heir(s) of the real property to perform the necessary corrective action.

NOTE: In the case of a deceased tank owner who is not the owner of the land where the tank is located, unless there is a tank operator to pursue, the liability for the cleanup ends with the tank owner’s death and the site should be enrolled in the State Lead Program.

Not all transfer of property upon death goes through probate courts. In these circumstances, information on heirs may not be easily available. Staff should attempt to establish who the heir(s) is by speaking with the executor, if there is one, or the person who reported the release and/or the person who hired the consultant. Staff should attempt to obtain a letter from the executor identifying the heir(s) to the contaminated property in order to document the RP. Staff should confer with OSRR on all sites where the RP is deceased.

Example 10. RP Identification – Deceased RP- Article 9

Example: Person A reports a release and begins corrective action. During corrective action, Person A dies. Person B, the estate executor, refuses to continue the cleanup stating that Person A's heir should be responsible because he now owns the property. Who is the P?

Answer: Under Article 9, the RP is the owner or operator at the time the release is reported to the Board. Therefore, Person A is the RP and remains the RP even though the property may have passed to his heir. However, Person B, as the estate executor, has a duty under law to preserve the property from loss and waste. Furthermore, if the RP has not yet met his financial responsibility requirement for the cleanup, the cleanup can be considered a debt of the estate which must be addressed by the executor. The case manager should look to the estate executor to continue the cleanup.

NOTE: For reimbursement purposes, the estate is treated as the claimant. Because the executor has the authority to administer the assets and debts of the estate, the executor can sign and submit reimbursement claims on behalf of the estate. The executor of the estate must submit the order issued by the circuit court qualifying him/her as executor along with his first reimbursement claim.

In the event that the property is held by a trust, the trust becomes the claimant and the trustee can sign and submit reimbursement claims upon providing documentation that he is the trustee.

DEQ often encounters situations in which the estate is settled and the heir(s) wish to sell the property, but are unable to do so due to the existing petroleum contamination. In these cases, the heir(s) often elect to step into the shoes and become eligible to receive reimbursement from the Fund. An interested person must either assume liability for the cleanup or be the owner/operator in order to be eligible for cleanup costs. See Section 3.1 for additional information on persons assuming liability.

Example 11. RP Identification – Deceased RP- Article 9

Example: Person A was the owner and operator of a gas station until the mid-1990s. Person A stopped using the tanks at that time but did not close or remove them. Person A dies and his estate is inherited equally by his children, Person B and Person C. During probate, the tanks are removed from the ground and a release is discovered and reported. Who is the RP?

Answer: The RP is the owner or operator at the time the release is reported to the Board. By law, Person B and Person C become the legal owners of the property at the point of Person A's death, and would be the RPs for this release. However, the estate executor has a duty to manage and preserve the estate assets, so the case manager should work with the estate executor to accomplish the cleanup, rather than attempt to deal with multiple RPs.

Caveat: If the estate closes before the cleanup is finished, DEQ has the option of pursuing the heir(s) to the property. If the case manager discovers that the estate has closed (i.e. probate has ended) during the course of the cleanup, the Case Manager should contact OSRR for assistance in identifying the appropriate party to pursue.

4.2 Article 11

In a situation where the deceased RP is a facility operator under Article 11, Regional petroleum program staff should apply the same analysis as described above for Article 9 RPs. However, if a person is liable under Article 11 as a spiller (for discharging or causing a discharge) and dies during the cleanup, the Case Manager should contact OSRR for assistance. Under Article 11, a spiller is liable to the Commonwealth for any costs associated with cleanup and containment of the discharge. In these cases, DEQ will consider the cleanup to be a debt owed to the Commonwealth and will look to the estate administrator/executor to

complete the cleanup as part of estate administration.

Information and boilerplate release letters for estate cleanups can be found in the Appendices to the Storage Tank Program Technical Manual.

5.0 Oil Discharges from Unknown Sources (Article 11)

Case Managers may encounter oil discharges to the environment that come from unknown or multiple sources. In situations where a regulated UST is not or does not appear to be a potential source, then the Case Manager must proceed pursuant to Article 11 of State Water Control Law. Under Article 11, the person responsible for cleaning up a discharge of oil is the person discharging, causing or permitting the discharge and any operator of the facility from which the discharge occurred.

When DEQ receives a report of oil contamination from an unknown source, Case Managers should attempt to establish whether there are any probable sources. This may involve reviewing historical records of the site, and, perhaps neighboring properties for evidence of a previous discharge or evidence that a property in the area stored or managed oil (i.e. a facility). Staff should contact OSRR on a case by case basis to establish what forms of evidence would be sufficient for making an RP decision. If there is not sufficient evidence to link the discharge to someone or the discharge is impacting human health or the environment, then DEQ may pursue the current landowner as the person “permitting” the discharge. See examples 12 and 13 below for additional information.

NOTE: A person with a continual discharge on their property may be continuing to permit a discharge under Article 11 and be deemed responsible for cleaning it up regardless of whether they caused the discharge.

Example 12. Miscellaneous Oil Discharge

Example: Person A purchased a piece of property and later discovered petroleum contamination on the property. There is no past evidence that a UST or AST existed on the property nor is there evidence to confirm that the oil discharge was caused by a previous owner. The contamination is impacting a neighbor’s supply well. Who is the RP?

Answer: There is no evidence of a spiller in this example because we have no evidence that the discharge was caused directly by an act or failure to act. The petroleum contamination is currently impacting a supply well; therefore, there is a continuing discharge to state waters (groundwater in this case). Staff should consider the present property owner to be the RP unless this person provides acceptable evidence that another person is responsible for causing the discharge or the contamination came from a tank previously located on the property. Under Article 11, a person permitting a discharge is liable for cleaning it up, regardless of whether the person caused the discharge.

Example 13. Miscellaneous Oil Discharge

Example: A person purchased several acres of land which has a 275 gallon AST that stored heating oil in the past and is no longer in use. The previous owner operated a vehicle repair garage on the property several years before the property was sold to the present owner. The current property owner excavated a portion of the land to build a house and petroleum stained soils were identified between the locations of the old garage and the AST. Who is the RP?

Answer: There are two possible sources: oil that may have originated from the previous garage activities that took place and the 275 gallon AST that is no longer in use. Because one of the potential sources was an AST, DEQ can infer that the oil originated from the AST (unless evidence clearly indicates otherwise). Staff should consider the present property owner to be the RP unless this person provides acceptable evidence that another person is responsible. If the AST was greater than 660 gallons, staff should assign responsibility for the discharge to the person listed in the AST database as the person responsible for day-to-day operation of the facility or AST. If no registration information has been submitted, see Section 2.0 of this manual for information on how to proceed.

6.0 Identifying Controlling Persons of Businesses

Case Managers may encounter situations where it is difficult to establish a contact person and address for a corporation or a limited liability company (LLC). The Clerk's Office of the State Corporation Commission (SCC) serves as the filing office for corporations, LLCs, partnerships, and business trusts conducting business in Virginia. The Clerk's Office staff and website can assist Regional petroleum program staff attempting to locate contact information for the person(s) controlling these businesses. Staff may access the [SCC's electronic database](#) to obtain the principal mailing and street address, the officers, directors and the registered agent of a corporation. Staff may also download a corporation's annual reports, which contain the same information, from the website. Finally, staff can obtain information by contacting the Clerk's Office Call Center at (804) 371-9733 or toll-free (in Virginia only) 1-866-SCC-CLK1 (1-866-722-2551).

NOTE: The SCC's electronic database (The Clerk's Information System) also provides information on the status of corporation or LLC, e.g., whether the entity is active, voluntarily terminated or involuntarily terminated.

The principal office and the registered agent of an LLC can be obtained from the Clerk's Office website as well. However, the controlling officers of an LLC (referred to as "members") are not listed in the SCC database. Case Managers may contact an LLC's registered agent to obtain this information; however, the registered agent may choose to protect the identity of the LLC's members and refuse to disclose their contact information. In these situations, Regional Office staff may send correspondence to the principal office for the LLC and to the registered agent regarding cleanup matters. If assistance is needed on developing the proper letter, staff should contact OSRR for assistance.

NOTE: The State Corporation Commission will maintain records for a business entity in their database for 5 years following dissolution or termination of that business. All business entity filings since 1980 have been imaged onto microfilm and are maintained by the Clerk's Office.

7.0 Defunct or Dissolved Businesses or Sole Proprietorships

Case Managers may confront situations where a business is identified as the tank owner in CEDS but the business is no longer active or was never incorporated. If the business is neither a partnership, corporation, nor a limited liability company (LLC), then it is considered a sole proprietorship and the

individual who owned the business is the person who is liable for cleanup and compliance.

Case Managers can perform a ["Name Search" in the SCC database](#) to determine if an entity is a corporation or LLC. If the case manager cannot find the entity in the database, but the owner claims it is incorporated or an LLC, then the case manager can call the SCC directly for assistance.

Generally, a corporation or LLC that has terminated or dissolved will not be pursued for corrective action. If there is a question whether a business is still operating, staff can check the SCC database (discussed above in Section 6.0) for the entity's status. If the SCC identifies the status of the entity as "terminated," "cancelled," "dissolved," or "purged," the business is no longer a legal entity. In many cases, however, the entity's operating authority has been terminated automatically by the SCC due to its failure to pay annual filing fees. The database will indicate if the termination was an automatic one due to nonpayment of fees. In this event, the Case Manager should begin by pursuing the entity and note in the correspondence that the SCC database indicates that the business has been terminated for non-payment of fees. Often the business, upon learning this information, will make the payment and become reinstated as an active entity. Also, if staff learn during the course of cleanup that an entity has terminated or if the termination date is recent relative to the release report date, staff should contact OSRR to evaluate whether to pursue the company's directors or members for the cleanup.

When in doubt about whether an entity is defunct, staff should contact OSRR. In situations where the entity no longer exists (other than the situation described in the preceding paragraph) and no tank operator exists for the cleanup, then the site should be enrolled in the State Lead Program.

NOTE: If the entity is identified as "fictitious" in the SCC database status field, then the business is operating under a fictitious name. In this event, the SCC database will identify the true name of the entity and the entity's principal address. If the entity is identified as "merged" then it has merged with another company and staff may call OSRR or the SCC Clerk's Office for assistance in identifying the surviving company's name.

8.0 Ability to Pay Program

If an RP claims to be financially incapable of proceeding with all or a portion of corrective action, Regional petroleum program staff should inform the director of the Office of Financial Responsibility and Waste Programs (OFRWP) so that an inability to pay application and additional guidance may be provided to the RP. Information that program staff must provide to OFRWP include:

1. RP name;
2. RP address;
3. RP telephone number(s);
4. Pollution complaint number;
5. Site name;
6. Number and type of occurrences;
7. Release report date;
8. Identification of RP's type of business entity:
 - A. Individual/sole proprietorship;
 - B. Bankrupt;
 - C. Corporation;
 - D. Partnership;
 - E. Estate;

- F. Non-profit organization; or
 - G. Other (limited liability company, government entity, etc.).
9. Filing deadline for the next report required for the case.
 10. Whether an RP filed a tax return the previous year (this only applies to individuals).

Upon receiving this information, OFRWP will contact the RP and send the necessary forms and instructions to that person. OFRWP will also copy the Regional Office on correspondence with the RP.

After receipt of the completed claim form and relevant financial information, OFRWP will perform the Ability to Pay analysis. Upon completion, OFRWP staff will provide regional program staff with a memo providing the results of the analysis, including a brief explanation of the results. If the RP is unable to pay, the site should be enrolled in the State Lead Program. If the RP is able to pay, regional program staff should require the RP to perform the requested corrective action. If the RP fails to meet the corrective action deadlines, the case should be referred to the regional enforcement program.

9.0 Occurrence Evaluation

One of the functions that must be performed by Regional petroleum program staff prior to the submittal of the first reimbursement claim is occurrence evaluation. Release occurrence evaluations are necessary in order to establish the level of access that the tank owner or operator has to the Virginia Petroleum Storage Tank Fund (VPSTF) under Article 10 of State Water Control Law. For each occurrence, the owner or operator is eligible to request reimbursement from VPSTF between his/her financial responsibility requirement and one million dollars.

Based upon the requirements of Article 10 and the practical aspects of managing release response and corrective action, there are five factors that must be evaluated to identify the number of occurrences at a site. These factors are: fund eligibility, ownership, tank type, time, and location. When a release is reported, staff must first evaluate whether the oil or petroleum released is a Fund-eligible product. In general, Fund-eligible products are petroleum motor fuels released from USTs, heating oil from heating oil USTs or ASTs, and oil for which a Fund fee is paid that is discharged from ASTs.

Once staff have established the release is Fund-eligible, the next consideration is tank ownership. Each tank owner (or operator if an AST or exempt UST) is required by law to pay the financial responsibility requirement for his/her/its releases and/or discharges. Releases from tanks owned by different persons must, therefore, be considered separate occurrences.

The next consideration is the tank types from which releases/discharges occurred. Separate occurrences must be assigned for each different tank type that had a release or a discharge at the site. Releases from different types of tanks (i.e. a regulated UST and an AST of greater than 660 gallons) are separate occurrences even if they are discovered at the same time.

Next, the time that the release(s)/discharge(s) occurred must be evaluated. Releases or discharges from either the same type of tank or releases/discharges from different types of tanks that are discovered during different SCR Phases must be considered separate occurrences. For example, if releases from a gasoline UST and a diesel UST (regulated USTs) at a site are found during the Site Characterization Phase, the tanks are owned by the same person, and the Case Manager decides that a single SCR can address both releases, the release from these USTs is considered to be one occurrence. If, however, the SCR addressed only the gasoline release and the diesel release was found during the Site Characterization Addendum

Phase, this would constitute two occurrences since the releases were found during different corrective action phases.

Finally, staff must consider the location of the tanks. Releases from tanks of the same type (e.g. heating oil UST) that are owned or operated by the same person, and discovered during the same SCR Phase may be considered one occurrence if their spatial proximity allows these releases/discharges to be addressed as part of the same SCR. If their spatial proximity does not allow these releases/discharges to be addressed as part of the same SCR (e.g., a very large parcel or military base), the releases should be considered separate occurrences. A worksheet containing a procedure that staff may use to identify the number of occurrences at a site is included as Appendix B.

Example 14. Occurrence Evaluation - releases from multiple tanks with one owner

Example: ACME Widgets reports a gasoline release from an UST system at its vehicle fueling and maintenance facility to DEQ. During the process of collecting environmental data for the SCR, ACME Widgets finds evidence that the used oil UST at the facility has also had a release and ACME reports this to DEQ. The used oil UST is located near the gasoline UST and the Regional Case Manager determines that one SCR should be completed to address releases from both tanks.

ACME Widgets completes the SCR and the Case Manager determines that Corrective Action is needed at the site. While the CAP is being developed, a release occurs from the diesel UST at the fueling and maintenance facility. How many occurrences are there at this site?

Answer: There are two occurrences.

ACME Widgets is the only tank owner at this site. A release from a gasoline UST (regulated UST) was reported to DEQ and triggered the investigation at the site. Before the SCR was submitted to DEQ, ACME found (and reported) a release from a used oil UST (regulated UST) to DEQ. Since the same entity owns both tanks, the tanks are both regulated USTs, the releases were discovered prior to submission of the SCR, and the Case Manager believed that one SCR could address release from both tanks, the release from the used oil UST and release from the gasoline UST can be handled as one occurrence.

The diesel UST at the site is also a regulated UST. The release from this tank occurred after the SCR was submitted, therefore, this release must be considered a separate occurrence.

Example 15. Occurrence Evaluation - Multiple owners and tank types

Example: Person A owns a property containing a gasoline station and is the registered owner of three gasoline USTs and one diesel UST at that site. During the process of upgrading the 3 gasoline USTs and 1 diesel UST at the station, evidence of a release is found around two of the gasoline USTs. The release is reported and Person A begins the Site Characterization Process. During the Site Characterization process, evidence of a diesel release is found in the vicinity of a diesel UST removed by the former property owner (Person B) and contamination is found around the heating oil UST for the gas station. How many occurrences are there at this site?

Answer: There are three occurrences.

Person A is the owner of the gasoline USTs and the operator of the heating oil UST. The releases from the two gasoline USTs may be considered one occurrence because the same person owns those tanks, they are the same type of tank (i.e. regulated USTs), the releases were discovered at the same time, and they can be addressed as part of the same SCR. Person A is also the operator of the heating oil UST. This must be considered a different occurrence because the heating oil UST is a different type of tank.

Person B is the RP for the diesel UST that had a release (the person who owned the UST when it was removed). The release from the diesel UST must be considered a separate occurrence because the owner of this tank is different than the owner of the gasoline USTs. If the two RPs agree and the Case Manager approves, a single cleanup of the tanks belonging to both owners may be undertaken. Even if a single cleanup is undertaken at this site, there are still three occurrences and each tank owner must pay his/her financial responsibility requirement.

NOTE: The number of occurrences at a site must be identified in order for a reimbursement claim to be processed for the site. Staff must, out of necessity base occurrence determinations upon the known facts at the time a reimbursement claim is submitted. Staff may modify occurrence determinations for later claims upon receipt of new information that invalidates or changes the original or latest occurrence determination.

Once the number of occurrences has been assessed for a cleanup, the RP and the Case Manager should monitor both the cleanup costs and the remaining dollar amount available for reimbursement. When a Case Manager projects that a site will reach its fund access limit before all required corrective actions are completed, the Case Manager should notify the RP by letter of the approximate dollar amount of remaining fund access. Since projected cleanup costs and the progression of cleanup activities varies for each case, Case Managers, at their discretion, may decide when it is appropriate to send a letter to the RP. An example letter can be located in Appendix D.

10.0 Third Party Claims

Owners/operators of regulated USTs, partially excluded USTs, and excluded USTs (types 3 and 4) may be eligible to receive reimbursement for costs associated with compensating third parties for certain injuries and/or damages caused by petroleum releases. Staff should inform interested parties that third party reimbursement claims are subordinate to corrective action reimbursement claims. Corrective Action has to be completed and the case must be closed by the Regional Office before third party claims for that occurrence may be approved. **Regional petroleum program staff must refer all third party claims/requests to the Legal Coordinator in OSRR the Central Office.** [Click here for a link to the Third Party Disbursement Guidelines.](#)

APPENDIX A

Responsible Person Identification Worksheet

Responsible Person Identification Worksheet

I. Site Information

Site Name _____

Site Address _____

Primary phone number _____

Alternate phone number _____

E-mail address _____

Facility ID# _____

PC # _____

Date of release report: _____

II. Tank Information: (check one)

UST Type: Regulated, Excluded, Deferred (pre 2018), _____
 Partially Deferred (pre 2018), Partially
 Excluded (starting in 2018) _____
 Exempt (except home heating oil) _____
 Home heating oil _____

AST Type: Greater than 660 gal. oil _____
 Oil tank of 660 gal. or less _____
 (except home heating oil) _____
 home heating oil AST of 660 gal. or less _____

III. Leaking Tank Status

___ Currently in use

___ No longer in use _____ Date last used

___ Removed _____ Date removed

IV Responsible Person

A. Release(s) from Regulated, Previously Deferred, Partially Excluded, and Excluded USTs

1. If a Notification Form been submitted to DEQ, the UST owner listed on the form is presumed to be the Responsible Person. List the tank owner's name, address, and phone number below, and then go to Part V.

2. If a Notification Form has not been submitted for the site or the release was from an excluded UST, the person who owned the property at the time of the release is presumed to be the responsible person. List this person's name, address, and phone number below, and then go to Part V.

B. Discharges from ASTs with a capacity of greater than 660 gallons of oil

1. If the discharge was caused by a person (the spiller) and the spiller is known, the spiller is the RP. List this person's name, address, and phone number below, and then go to Part V.

2. If the discharge was not caused by a spiller go to the AST Registration Form.
 - a. The RP is the person listed on the AST Registration Form as the AST operator (person responsible for the day-to-day operation of the AST). List this person's name, address, and phone number.

 - b. If the AST operator no longer exists or cannot be found, the person listed on the Registration Form as the AST owner is the RP. List this person's name, address, and phone number, and then go to Part V.

3. If there is neither a known spiller nor a Registration Form for the tank, presume that the property owner at the time of the discharge is the AST or facility operator and the responsible person. List this person's name, address, and phone number below, and then go to Part V.

C Discharges from home heating oil ASTs of 660 gallons or less and home heating oil USTs (i.e. small home heating oil tanks)

1. If the discharge was caused by a person (the spiller) and the spiller is known, the spiller is the RP. List this person's name, address, and phone number below, and then go to Part V.

2. If the discharge was not caused by a spiller or if the spiller cannot be found, the tank owner is the RP. The present property (facility) owner is presumed to be the tank owner. List the property owner's name, address, and phone number below, then go to part V.

V. Documentation potentially affecting the responsible person evaluation.

- | | |
|---|--|
| <input type="checkbox"/> Deed | <input type="checkbox"/> DEQ Notification or Registration Form |
| <input type="checkbox"/> Bill of Sale | <input type="checkbox"/> UST or AST removed by a prior owner
(documentation must be provided) |
| <input type="checkbox"/> Lease | <input type="checkbox"/> UST removed or last used prior to 11/8/84 that
was owned by someone other than the person listed
in IV.A.2, above. (documentation must be provided) |
| <input type="checkbox"/> Service Contract | <input type="checkbox"/> Other (explain) |

If the case manager has any of the documentation listed above that potentially impacts the RP analysis, the case manager should contact OSRR for an RP evaluation.

NOTE: Questions regarding Responsible Person evaluations should be directed to the legal coordinator in OSRR.

(Revised 09/09/2020)

APPENDIX B

Worksheet for Occurrence Evaluation

Worksheet For Occurrence Evaluation

(Revised 10/8/2008)

Site Name: _____

Site Location: _____ PC#: _____

1. Does the type of contamination at the site include the following:

petroleum from USTs (regulated, excluded, deferred (pre 2018), partially deferred (pre 2018), partially excluded (starting in 2018), exempt 1 & 2);

gasoline, diesel, kerosene, and/or heating oil from ASTs (regulated facility, unregulated facility) for which the VPSTF-fee was levied; and/or

heating oil from a small heating oil AST. YES NO

If you answered NO to question 1 STOP; the release is not eligible for reimbursement from the VPSTF.

2. Were all releases reported prior to the due date of the first SCR required by the Regional Office? YES NO

3. Is there only one owner/entity for the tanks with the releases? YES NO

If you answered YES to questions 2 and 3 assess the number of occurrences using the table in item 4 below. If you answered NO to question 2 or 3; go to the next page and complete items 5 through 7.

4. Under TANK TYPE circle the tank type(s) with releases. Under OCCURRENCE circle "YES" if there are release(s) within an Group and "NO" if there is not a release within a Group. Each "YES" is one occurrence.

GROUP	TANK TYPES	OCCURRENCE
1	Petroleum Regulated UST, Excluded UST, Deferred UST (pre 2018), Partially Deferred UST (pre 2018), Partially Excluded UST (starting in January 2018)	YES NO
2	Exempt UST 1, Exempt UST 2, Small Heating Oil AST	YES NO
3	Regulated AST Facility, Unregulated AST Facility	YES NO

Total Occurrences _____

If part of the contamination is the result of a release from any of the following:

1. an UST which contained a non-petroleum substance,
2. an AST which contained Non-Fee Products, and/or
3. parking area,

inform the RP that the costs resulting from these releases are ineligible for reimbursement and identify work which is eligible for reimbursement.

5. List the tank type(s) with releases that were addressed in the first SCR by tank group and tank owner(s).

Give one occurrence to tanks within the same group that were owned by the same responsible person.

Tank Owner	Tank Group 1	Tank Group 2	Tank Group 3	Total

Do any of the SCRs prepared for the site address releases that were not addressed in the first SCR? If yes, go to 6. If no, go to 7.

6. For each SCR or SCR Addendum submitted after the first SCR, list the tank type(s) by tank group(s) and tank owner(s) for releases that were addressed in that report and not in previously submitted reports.

Give one occurrence to tanks within the same group that were owned by the same responsible person.

Tank Owner	Tank Group 1	Tank Group 2	Tank Group 3	Total

Repeat step 6 as necessary to assess the total number of occurrences at a site

7. Add the occurrences for each tank owner person identified in 5 and 6.

Tank Owner _____ Total Occurrences _____

Tank Owner _____ Total Occurrences _____

Tank Owner _____ Total Occurrences _____

If part of the contamination is the result of a release from any of the following:

1. an UST which contained a non-petroleum substance,
2. an AST which contained Non-Fee Products,
3. an parking area,

inform the RP that the costs resulting from these releases are ineligible for reimbursement and identify work which is eligible for reimbursement.

(Date Revised 9/9/2020)

APPENDIX C

Fact Sheets for Responsible Person Identification and Assumption of Liability

Virginia Department of Environmental Quality (DEQ) Storage Tank Program

Fact Sheet: Responsible Person Identification (USTs)

A Responsible Person is any person who is an owner or operator of an underground storage tank or an aboveground storage tank at the time the release is reported to the Board.

DEQ may require any owner or operator who is the Responsible Person for a petroleum release to take corrective action for the release.

Owners and Operators are both considered to be Responsible Persons. Both are equally liable for investigative and/or cleanup costs.

An UST **owner** is:

- ▶ anyone who owned an underground storage tank (UST) system that was in use or brought into use on or after November 8, 1984.
- ▶ the person or entity who owned the system when the UST system was last used IF the UST system was in use before November 8, 1984 but not on or after that date.

The term "owner" does not include any person who, without participating in the management of an UST or being otherwise engaged in petroleum production, refining, and marketing, holds indicia of ownership primarily to protect the holder's security interest in the tank.

An **operator** is:

- ▶ any person or entity in control of, or having responsibility for, the daily operation of an UST system.

In identifying the Responsible Person, DEQ makes the following presumptions:

- 1) The release occurred at the time of discovery.
- 2) The UST owner listed on the UST Notification Form is the UST owner.
- 3) If DEQ has not received a Notification Form, the current property owner is the UST owner and is the Responsible Person for the necessary investigations and/or cleanup.

The current landowner may provide acceptable written evidence that another person is the Responsible Person or that the release came from an UST system removed by a previous owner.

Examples of documents that are acceptable to prove UST ownership:

- UST Notification Form filed with DEQ.
- Bill of Sale or other document indicating someone else owns the UST.
- Document such as a tax record or real estate appraisal showing discontinuation of use of the UST system prior to November 8, 1984.
- A Building Permit showing UST removal by prior owner and proof that no other UST has been in the same basin since the removal.
- A Building Permit showing UST removal by prior owner, documents indicating that a release occurred prior to removal (e.g. records from local fire or building officials, DEQ records), and a replaced UST exists on site (not in the same excavation), but has had no release.

USTs are normally considered a fixture, transferred with land, unless an UST Notification Form, contract, bill of sale, or other written agreement exists that specifically states otherwise. Documents that are accepted as evidence of such a transfer:

- lease agreement
- deed that identifies the USTs as part of the transfer.
- bill of sale
- service contract
- court orders
- bankruptcy proceedings
- Deed that transfers real property and fixtures but does not specifically mention USTs may be sufficient when the purchaser continues to operate the facility as a going concern.

As a general rule, affidavits alone are not acceptable in proving UST ownership

(Revised 7/10/09)

Virginia Department of Environmental Quality Storage Tank Program

Fact Sheet: Assumption of Liability

("Stepping into the Shoes")

An interested person who is not the responsible person, but who has a legal interest in the property, may "step into the shoes" of the responsible person and become eligible for reimbursement from the Fund. An interested person must agree to assume liability for a petroleum clean-up in accordance with DEQ requirements to be eligible to request reimbursement from the Fund. If a person does not assume liability for the clean-up or is not the owner/operator, they are not eligible for reimbursement of clean-up costs. This procedure has no impact on any potential third party claims that may arise against the responsible person. **The responsible person retains third party liability after someone steps into the shoes for corrective action liability.**

- In some circumstances (usually, real property transfers), a party may wish to complete a petroleum cleanup that is the responsibility of another entity. Typically, the party wishing to complete the cleanup requests access to the Fund for reimbursement of cleanup costs. Two methods may be used to gain Fund access: (1) assignment of payment or (2) assumption of liability.
- Assignment of payment requires that assignment forms be submitted with each progress claim for the cleanup. Please see the VPSTF Reimbursement Guidance Manual for reimbursement procedures. **Assignments transfer only the right to payment and do not transfer cleanup liability.**
- Assumption of liability allows the party to "step into the shoes" of the responsible person (RP). A party that "steps into the shoes" of the RP assumes the RP's cleanup liability and obtains the RP's eligibility to request reimbursement from the Fund for eligible, pre-approved, verified, reasonable and necessary costs of cleanup, in excess of the RP's financial responsibility for the occurrence. Parties that assume liability must provide DEQ with the following signed statement before they begin the cleanup or request reimbursement.

[Name of person assuming liability] assumes all liability for the completion of corrective action from the petroleum/oil contamination associated with PC# _____ and agrees to perform the corrective action in accordance with Virginia DEQ requirements.

- In cases where there is an existing responsible person, the person assuming liability must provide the statement assuming liability described above and obtain the following signed statement from the responsible person:

[Responsible Person Name] is the responsible person for the cleanup of the petroleum/oil release from the [insert tank type] located at [insert street address, city/county] and identified as PC #_____. [Responsible Person Name] quitclaims, assigns and releases all of its rights to reimbursement for corrective action costs from the Virginia Petroleum Storage Tank Fund associated with PC # _____ to [Name of Person Assuming Liability] and [Responsible Person Name] represents and warrants that [Responsible Person Name] has the right to make such quitclaim, assignment and release. [Responsible Person name] acknowledges that if [Name of Person Assuming Liability] fails to complete the cleanup for any reason, DEQ may require [Responsible Person name] to resume cleanup activities. [Responsible Person name] acknowledges that neither this relinquishment nor the assumption of liability for cleanup relieves him/her of any potential liability arising from any third party claims or lawsuits.

- Persons assuming liability will be eligible for reimbursement as long as the cleanup is performed in accordance with instructions from DEQ Regional Office and the Reimbursement Program's reimbursement procedures. Persons assuming liability are expected to complete the entire cleanup. However, if the person assuming liability fails to complete the cleanup for any reason, DEQ may require the Responsible Person to resume cleanup activities. If the RP is required to re-commence cleanup, they will be eligible for reinstatement of Fund access.
- DEQ limits the class of entities eligible to assume liability to those who have a legal interest in the property, i.e., those who have a lawful and substantial economic interest in the safety or preservation of property from loss, destruction or damage. DEQ may allow other people or entities to assume liability in those cases where there is a demonstrable incentive to complete the cleanup other than access to the Fund. For example, an adjacent

property owner who wishes to increase the value of his own property or keep the value of his property from further declining may be eligible to assume liability. Also, an entity with a legal interest in the responsible person, such as a parent corporation or a company who has purchased the assets of the responsible person, may be eligible to assume liability.

Created on 8/30/07

APPENDIX D

Example Letter: Site Approaching \$1 Million Cap on Reimbursement

Example Letter: Site Approaching \$1 Million Cap on Reimbursement

Date

Addressee

RE: Site Name/Location:
Facility and Tank Identification:
DEQ Tracking Number: PC#

Dear _____:

The following letter is to inform you that this site is approaching the \$1 million limit for eligible reimbursements from the Virginia Petroleum Storage Tank Fund (the "Fund"). Virginia Code §62.1-44.34:11.2 limits disbursements from the Fund to remediate a petroleum release to reasonable and necessary per occurrence costs which are in excess of the per occurrence financial responsibility requirement **up to \$1,000,000.**

At present, we calculate that [\$] remains available for reimbursement.

[Optional language: The following is a breakdown of the current reimbursement status:

Reimbursement claims paid or approved for payment:	\$
State Lead invoices paid or approved for payment:	\$
Financial responsibility requirement:	\$
Total	\$

Please note that the remaining amount available for reimbursement may be less than \$[] because this figure does not include any unprocessed reimbursement claims that you may have filed or pre-approved work for which you have not yet filed a claim. [Case manager may need to add a sentence regarding additional state lead work that needs to be done such as maintenance on CFUs].

Regardless of the eligibility of costs incurred for this cleanup, you are responsible for completing the corrective action required to address the petroleum contamination at this site.

Please contact me at XXXX if you have any questions or would like to discuss.

Sincerely,

Case Manager

Enc: Case manager can include a cost breakdown as an attachment rather than in the letter.

(Created on 10/7/08)