



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

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| Agency Name: | State Water Control Board |
| VAC Chapter Number: | 9 VAC 25-640 |
| Regulation Title: | Regulation for Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements |
| Action Title: | Regulation for Aboveground Storage Tank and Pipeline Facility Financial Responsibility Requirements |
| Date: | October 26, 2000 |

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

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the action was published.

The regulation provides the criteria by which operators of aboveground storage tank and pipeline facilities can demonstrate that they have adequate financial resources to perform their responsibility to contain and cleanup any oil discharges which may occur at their facilities. The regulation provides six methods of financial responsibility demonstration: (1) financial test of self-insurance; (2) guarantee; (3) insurance; (4) surety bond; (5) letter of credit; and (6) trust fund. Forms for each method are included as appendices to the regulation. The regulation sets the amount of financial responsibility required at (i) five cents per gallon multiplied by the operator's statewide aboveground storage tank facility capacity as the amount of the annual demonstration requirement for aboveground storage tank facility operators and (ii) five million dollars as the amount of the annual demonstration requirement for pipeline facilities operators.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The State Water Control Board adopted the Regulation at its meeting on December 13, 2000.

Basis

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

The legal basis for the regulation is the State Water Control Law (Title 62.1, Chapter 10 of the Code of Virginia). Specifically, Section 62.1-44.34:16 D requires operators to demonstrate financial responsibility as a condition of operation and authorizes the Board to promulgate regulations requiring operators of facilities to demonstrate financial responsibility sufficient to comply with the requirements of Article 11 of the State Water Control Law.

Section 62.1-44.34:16 D states that the financial responsibility for facilities shall not exceed five cents per gallon of aboveground storage capacity or five million dollars for a pipeline. Additionally, that section states that the financial test of self-insurance shall not require the operator to demonstrate more than one dollar of net worth for each dollar of required financial responsibility. Finally, the section states that no governmental agency shall be required to comply with the facility financial assurance regulations. Accordingly, the regulation limits the demonstration amount to five cents per gallon of aboveground storage capacity and five million dollars for pipelines and does not require operators to demonstrate more than one dollar of net worth for each dollar of required financial responsibility. Additionally, the regulation does not apply to government agencies.

Section 62.1-44.34:16 D also requires that regulations governing the amount of financial responsibility take into consideration (1) the type, oil storage or handling capacity and location of a facility, (2) the risk of discharge of oil at that type of facility, (3) the potential damage or injury to state waters or the impairment of their beneficial use that may result from a discharge at this type of facility, (4) the potential cost of containment and cleanup at that type of facility, and (5) the nature and degree of injury or interference with general health, welfare and property that may result from a discharge at that type of facility.

The demonstration amount is set at five cents per gallon of aboveground storage capacity for aboveground storage tanks and five million dollars for pipelines, but caps the aboveground storage tank demonstration at one million dollars (the level which would correspond to 20 million gallons of

storage capacity). Several AST operators have more than 20 million gallons of storage capacity, but DEQ's fifteen years of experience in managing petroleum cleanups indicates that the \$1 million cap is reasonable. There has never been an AST discharge approaching 20 million gallons. The \$1 million cap is also consistent with the financial responsibility demonstration requirement imposed by state and federal law on underground storage tank owners and operators.

Through management of facility cleanups, DEQ has experience with (1) facilities throughout the state, (2) the risk of discharge at facilities throughout the state, (3) actual damage/injury incurred to state waters and their beneficial uses from discharges, (4) actual containment/cleanup costs for more than 250 facility discharges, and (5) the nature and degree of injury or interference with health and welfare caused by these discharges. Based on the Department's experience, consideration of the factors included in Virginia Code Section 62.1-44.34:16 D supports the demonstration requirement recommended in the regulation. For all facilities, regardless of location, some risk of discharge exists. Moreover, because state waters include ground water, and because the threat of ground water impact exists for discharges from facilities regardless of location, any facility release presents the potential to damage state waters. Besides the obvious threat to drinking water supplies posed by contamination from facility discharges, other health and welfare damages have included vapor and fire hazards. Most importantly, the costs to contact and cleanup facility discharges virtually always exceed the financial responsibility requirement of five cents per gallon of storage capacity. Thus, setting the requirement at that level will help to ensure that adequate funding for containment and cleanup is available.

There is no federal requirement to promulgate regulations regarding financial assurance for aboveground storage tank or pipeline facilities.

Purpose

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

The purpose of the regulation is to protect the health, safety and welfare of the citizens of the Commonwealth by ensuring aboveground storage tank and pipeline facility operators maintain adequate financial resources to contain and cleanup discharges of oil which may occur at their facilities.

Substance

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

The regulation requires aboveground storage tank and pipeline facility operators to demonstrate that they have the financial ability to pay for containment and cleanup of oil discharges that may occur at

their facilities. Six methods of financial assurance are provided: (1) financial test of self-insurance; (2) guarantee; (3) insurance; (4) surety bond; (5) letter of credit; and (6) trust fund. The forms for each method are included as appendices to the regulation. The amount of demonstration required for aboveground storage tank facility operators is five cents per gallon multiplied by the total aboveground storage tank capacity at the operator's Virginia facilities, up to \$1 million. The amount of demonstration required for pipeline facility operators is \$5 million.

The regulation requires financial assurance mechanisms to be updated annually.

Issues

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

The primary advantages and disadvantages of implementation and compliance with this regulation by the public and the Department are discussed below.

For the public, the primary advantage of implementation of this regulation is that it helps to ensure that operators will have adequate financial resources to perform containment and cleanup of oil discharges that occur at their facilities. Prompt containment and cleanup should help reduce or prevent impacts to humans and the environment.

The requirement for operators to demonstrate financial responsibility as a condition of operating a facility already exists pursuant to Virginia Code Section 62.1-44.34:16 D. Therefore, the regulation does not add any additional disadvantage. Rather, the regulation provides the regulatory basis for implementing the statutory requirement. Operators will incur some cost to comply with the financial responsibility requirements; however, for most operators, the cost should be negligible.

For the Department the regulation will increase the Department's workload in that it will result in the need to perform compliance reviews; however, the advantages of the regulation should outweigh the additional burden. The regulation will assist the Department by helping to ensure that operators have funds available to perform containment and cleanup. This should help to reduce the need for state lead cleanups (those conducted by the state) and associated cost recovery efforts.

Statement of Changes Made Since the Proposed Stage

Please highlight any changes, other than strictly editorial changes, made to the text of the regulation since its publication.

In conjunction with the Notice of Public Comment Period, the Department requested comments from the public. The Department received comments from two members of the regulated community. Three of these comments have been incorporated into the regulation.

The Department received a request to change the compliance date of existing facilities from 60 days of the effective date of the regulation to 120 days after the end of the fiscal year. This request was rejected. The commenters had confused the timing on the preparation date for initial compliance with the dates for subsequent annual preparation for those operators using the CFO letter. As an alternative, the Department has changed the compliance date for existing facilities to 120 days of the effective date of the regulation. This change will result in an increase from 60 days until 120 day in which an operator has to comply with the Regulation. This change is also consistent with other financial responsibility regulations.

A request was made to amend the reporting requirements of the operator to be consistent with the existing Petroleum Underground Storage Tank Financial Responsibility Requirements Regulation, 9 VAC 25-590-10 *et seq.* This request was incorporated into the Regulation.

In addition, this commenter also requested that the record keeping requirements be amended to make it clear that the operator is not required to keep original demonstration documents at the site. This request was also incorporated into the Regulation.

A request to amend the definitions for “pipeline” and “containment and cleanup” was received and rejected. The request was rejected in order to maintain consistency between the State Water Control Law, Virginia Code Section 62.1-44.34:14, the already existing Facility and Aboveground Storage Tank Regulation, 9 VAC 25-91-10 *et seq.* and this regulation.

It was also requested that the requirement to establish a standby trust when a guarantee is used to demonstrate financial responsibility be eliminated. This request was rejected because the standby trust is needed to deposit funds into in the event the guarantor must pay on the guarantee. In addition, the standby trust only requires a small amount of staff time to prepare and results in negligible expense.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

Public comments were received during the public comment period. These comments were either incorporated into the Regulation or no action was taken on them.

Detail of Changes

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

The following are the requested amendments and the action taken.

Section 10 (Definitions)

The following amendments to Section 10 (Definitions) were requested:

1. "Pipeline" means all new and existing pipe, rights of way, and any equipment, facility, or building used in the transportation of oil, including, but not limited to, line pipe, valves and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping units, metering and delivery stations and fabricated assemblies therein, and breakout tanks.[This term does not include piping associated with an Aboveground Storage Tank (AST).]

Reason for the amendment:

The definition of AST clearly excludes “line pipe and breakout tanks of an interstate pipeline regulated by of an interstate pipeline regulated under the Federal Accountable Pipeline Safety and Partnership Act of 1996 (49 USC § 60101 *et seq.*.” In order to avoid confusion, it was recommended that a similar exclusion be added to the definition of “Pipeline”.

Action taken:

The amendment was not incorporated as requested. The definition for “Pipeline” in the regulation is consistent with the definition for “Pipeline” in the State Water Control Law, Virginia Code Section 62.1-44.34:14 and the existing Facility and Aboveground Storage Tank Regulation, 9 VAC 25-91-10 *et seq.* Incorporating the requested amendment would result in inconsistencies between the State Water Control Law and the AST regulations.

The second amendment to the definitions concerned the definition for “containment and cleanup”.

2. "Containment and cleanup" means abatement, containment, removal and disposal of oil and, to the extent possible, the restoration of the environment to its existing state prior to an oil discharge.[remediation of affected soil and groundwater in accordance with applicable legal, regulatory and or permit requirements.]

Reason for the amendment:

The commenters requested the amendment to eliminate any uncertainty and vagueness.

Action taken:

The amendment was not incorporated as requested. The definition for “containment and cleanup” in the regulation is consistent with the definition for “containment and cleanup”

in the State Water Control Law, Virginia Code Section 62.1-44.34:14 and the existing Facility and Aboveground Storage Tank Regulation, 9 VAC 25-91-10 *et seq.* Incorporating the requested amendment would result in inconsistencies between the State Water Control Law and the AST regulations.

Section 40 (Compliance dates)

The following amendment to Section 40 (compliance dates) was requested:

Operators of existing facilities are required to comply with the requirements of this chapter within ~~sixty (60) days~~ [one hundred-twenty (120) days] of the effective date of this chapter.] Operators of new facilities shall comply with the requirements of this chapter by the date the facility begins operation.

Reason for the amendment:

The initial compliance date was confused with the compliance date for subsequent annual updates by those operators using the Letter from Chief Financial Officer and/or Guarantee. Within 60 days of the effective date of this chapter existing facilities must comply with the Regulation. Annual or subsequent submissions for those operators using the letter from chief financial officer and/or guarantee is **within 120 days of the close of each financial reporting year.**

Action taken:

The amendment was partially incorporated as requested. Section 40 refers only to the effective date of the regulation and the compliance date for those facilities already in existence. However, to clarify the date of compliance and to grant operators adequate time to comply, the Department has changed the initial date of compliance from **sixty (60) days of the effective date of the Regulation** to within **one hundred twenty (120) days of the effective date of the Regulation.**

Section 80 (Guarantee)

The following amendment to Section 80 (Guarantee) was requested:

D. An operator who uses a guarantee to satisfy the requirements of 9 VAC 25-640-50 shall establish a standby trust fund when the guarantee is obtained. Under the terms of the guarantee, all amounts paid by the guarantor under the guarantee will be deposited directly into the standby trust . fund in accordance with instructions from the board under 9 VAC 25-640-180. This standby trust fund shall meet the requirements specified in 9 VAC 25-640-130.

Reason for the amendment:

The requirement of establishing the standby trust would create additional paperwork and administration for the operator and there are several states which do not require a standby trust for those operators using a guarantee.

Action taken:

The amendment was not incorporated as requested. The standby trust is required in the event the guarantor must pay on the guarantee. Funds are deposited in the standby trust to be used for corrective action. The standby trust only requires a small amount of staff time to prepare and results in negligible expense. Because the department provides all forms, it should not be necessary to incur legal fees for document preparation.

Section 160 (Reporting)

The following amendment to Section 160 (Reporting) was requested:

A. Except as specified in 9 VAC 25-640-170 B 7, an operator of a facility existing as of the effective date of this chapter shall ~~submit~~ [comply with the requirements of this chapter within 120 days of the effective date of this chapter.]~~the appropriate original forms listed in 9 VAC 25-640-170 B documenting current evidence of financial responsibility to the board within sixty (60) days after the effective date of this chapter and shall submit new original forms thirty days before the anniversary date for each year thereafter.~~

B. Except as specified in 9 VAC 25-640-170 B 7, an operator of a facility which does not exist as of the effective date of this chapter shall ~~submit~~ [comply with the requirements of this chapter]~~the appropriate original forms listed in 9 VAC 25-640-170 B documenting current evidence of financial responsibility to the board~~ at least thirty (30) days before the facility commences operation or sixty (60) days after the effective date of this chapter, whichever is later; [.]~~and shall submit new original forms thirty days before the anniversary date for each year thereafter.~~

Reason for the amendment:

To ensure consistency between the proposed regulation and the existing Petroleum Underground Storage Tank Financial Responsibility Requirements, 9 VAC 25-590-150.

Action taken:

This amendment was incorporated as requested. In addition, Section 170 (Record keeping) was amended to ensure the consistency between the amendments made to Section 160 and the existing UST Financial Responsibility Regulation. Those sections affected by the amendments to Section 160 are as follows:

- A. Operators shall maintain evidence of all financial assurance mechanisms used to demonstrate financial responsibility under this chapter for an aboveground storage tank and/or pipeline until released from the requirements of this regulation under 9 VAC 25-640-190. An operator shall maintain such evidence by ~~filing original evidence of financial responsibility with the Department.~~ [at the aboveground storage tank site or the operator's place of work in this Commonwealth. Records maintained off-site shall be made available upon request of the board.]

7. For subsequent annual ~~submissions~~ [updates] required under 9 VAC 25-640-160:

- a. The operator may ~~submit~~ [maintain] an endorsement, a rider or a notice of extension from the provider of financial assurance evidencing continuation of coverage in lieu of a new original surety bond or letter of credit or insurance policy, provided the form of the endorsement, rider or notice of extension is approved by the board;
- b. The operator need not ~~submit~~ [obtain] a new original guarantee or trust fund, provided the same mechanism is to continue to act as the operator's demonstration mechanism for the subsequent year or years;
- c. The operator need not ~~submit~~ [obtain] a new standby trust agreement, provided the financial assurance mechanism remains the same;
- d. The operator must ~~submit~~ [maintain] a new original mechanism as specified in subsection 2 of subsection B of this section;

- e. The operator need not ~~submit~~ [obtain] a new original certification of acknowledgment, provided the associated trust agreement has not changed;
- f. The operator must ~~submit~~ maintain a new original certification of financial responsibility.

Family Impact Statement

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

The regulation will not strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; encourage or discourage economic self-sufficiency, self-pride and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; strengthen or erode the marital commitment; nor increase or decrease disposable family income. However, the regulation will ensure that any environmental impacts on the family resulting from an oil discharge will be negligible because facility and pipeline operators will have the financial capability to contain and clean up any oil discharge.