COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF WATER QUALITY PROGRAMS
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Subject: Guidance Memo No. 05-2006
Virginia Petroleum Storage Tank Fund Third Party Disbursement Guidelines

To: Fred Cunningham, OSRR Director

From: Ellen Gilinsky, Ph.D., Director

Date: April 15, 2005

Copies: Regional Directors, Regional Ground Water Managers, Renee Hooper, Lisa Dewey, Betty Lamp, John Giese

Summary:

This memorandum summarizes the applicable law, regulations, procedures and interpretations DEQ uses to evaluate third party claims on the Virginia Petroleum Storage Tank Fund.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: http://www.deq.virginia.gov.

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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 particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. 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.

Virginia Petroleum Storage Tank Fund
Third Party Disbursement Guidelines

Under State Water Control Law, disbursements from the Virginia Petroleum Storage Tank Fund (VPSTF or the Fund) may be made for costs incurred by owners and operators of eligible underground storage tanks (USTs) for reasonable and necessary costs of settlements, arbitration awards and judgments to compensate third parties for bodily injury and property damage caused by releases of petroleum from the USTs. The authority to make these disbursements is subject, however, to limitations and restrictions, both in the statute and in the applicable regulations.

The Virginia Department of Environmental Quality (DEQ or the Agency) administers the Fund on behalf of the State Water Control Board (Board). The following guidelines summarize the applicable statutes, regulations, procedures and interpretations of the Board used to evaluate third party claims.

1. Authority

Virginia Code §62.1-44.34:11.A.2.b allows disbursements from the Fund for:

> Reasonable and necessary per occurrence costs incurred for releases reported after December 22, 1989, by the owner or operator who is the responsible person for compensating third parties, including payment of judgments for bodily injury and property damage caused by the release of petroleum into the environment from an underground storage tank, which are in excess of the per occurrence financial responsibility requirement imposed by subsection B of § 62.1-44.34:12, up to $1 million. The reasonableness and necessity of costs shall be determined based upon documented or actual damage, loss in value, and other relevant factors. Disbursements for third party claims shall be subordinate to disbursements for the corrective action costs in subdivision A 2 a of this section. Compensation for bodily injury and property damage shall be paid only in accordance with final court orders in cases which have been tried to final judgment no longer (i) subject to appeal, (ii) in accordance with final arbitration awards not subject to appeal, or (iii) where the Board approved the settlement of claim between the owner or operator and the third-party prior to execution by the parties.

2. Definitions

The definitions contained in Articles 9, 10 and 11 of State Water Control Law and Virginia Petroleum Underground Storage Tank Financial Responsibility Regulation, 9 VAC 25-590-10 *et seq*. apply to this guidance.

3. Tank Type Eligibility

Fund eligibility depends, in part, on the type of tank from which the petroleum release occurred. Table 1 below identifies the various types of storage tanks and the corresponding eligible cost categories (corrective action and third party liability) for that tank type. See Part I

of the VPSTF Reimbursement Guidance Manual for a description of each tank type and the specifics on the eligibility[1] of each tank type. The Manual can be accessed electronically via the following link: http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/PetroleumProgram/GuidanceRegulations.aspx

Table 1- Tank Types and Fund Eligibility for Corrective Action and Third Party Liability Costs

Tank Type	**Eligible Cost Categories**	
	Cleanup costs that exceed the applicable Financial Responsibility Requirement and **third party costs** that exceed the applicable Financial Responsibility Requirement up to a combined maximum of $1 million per occurrence	Cleanup costs (**but NO third party costs**) that exceed the Financial Responsibility Requirement up to a maximum of $1 million per occurrence
Regulated UST	X	
Excluded UST	X	
Deferred UST	X	
Partially Deferred UST	X	
Exempt USTs 1 & 2		X
Regulated AST Facility		X
Unregulated AST Facility		X
Home Heating Oil AST		X

Pursuant to Virginia Code §§62.1-44.34:11.A.2.a through -e, disbursements from the Fund for eligible corrective action and third party claim costs incurred by owners/operators may be made only for those costs incurred which are in excess of the owner/operator financial responsibility (FR) requirement(s) up to a maximum of $1 million per occurrence. Under Virginia Code §62.1-44.34:12, the financial responsibility requirement for regulated, excluded, deferred and partially deferred USTs is determined according to a sliding scale based on annual throughput of petroleum products for **all** regulated tanks owned or operated in Virginia. [2]

[1] Only cleanup costs from certain types of excluded, deferred and partially deferred USTs are eligible for reimbursement.

[2] For example, a corporation owns tanks at multiple gas stations in Virginia. Approximately 2.5 million gallons of petroleum are pumped through the tanks in a year. According to Table 2, the owner would have a FR requirement of $50,000 for corrective action and $150,000 for third party liability costs. One of the tanks has a release and the owner spends $300,000 to clean up the release before the site is deemed closed by the Board. Assuming all of the corrective action costs were eligible, the owner will be reimbursed $250,000 from the Fund ($300,000 - $50,000 [FR requirement]). $550,000 would then be available for reimbursement of reasonable and necessary costs associated with a third party liability suit. This number is calculated first by subtracting the corrective action disbursement and corrective action FR requirement from the total available reimbursement amount ($1,000,000 - $300,000 =

Annual throughput is determined using the year prior to the date of the release report to DEQ. The sliding scale is as follows:

Table 2 – Financial Responsibility Requirements and Petroleum Throughput

Annual Throughput (Gallons)	Corrective Action Financial Responsibility Requirement per Occurrence	Third Party Liability Financial Responsibility Requirement per Occurrence	Annual Aggregate for Demonstration
600,000 or less	$5,000	$15,000	$20,000
600,001 - 1.2M	$10,000	$30,000	$40,000
1,200,001 - 1.8M	$20,000	$60,000	$80,000
1,800,001 - 2.4M	$30,000	$120,000	$150,000
Above 2.4M	$50,000	$150,000	$200,000

The Financial Responsibility per occurrence requirement referred to in Table 2 acts as the owner/operator's deductible to the Fund. For example, an owner/operator in the $20,000 annual aggregate category is responsible for the first $5,000 paid out to perform corrective action at the contaminated site and the first $15,000 owed to an injured third party pursuant to an arbitration award, settlement or final judgment before the Fund will begin to reimburse. The two financial responsibility requirements do not overlap. In the previous example, the owner/operator must pay the full $5,000 before corrective action reimbursement begins and an **additional** $15,000 before reimbursement for third party costs.

4. Persons Eligible for Disbursement

Third party claims disbursement requests can be approved only for the owner/operator who has been determined by the Board to be the responsible person for the release occurrence. Third parties must assert their claims directly against the owner/operator. The Board may refuse to accept (and, in any case, is not bound by) any assignment of the right to disbursement for third party claims from the owner/operator to any other person, including the third party.

5. Time Limitations

Code § 62.1-44.34:11.A.10 requires that a claim for third party damages be filed with the Board within two years of the date the Board issues a site remediation closure letter. Claims filed more than two years after the case closure date are ineligible for reimbursement from the Fund. In the event that DEQ re-opens the case to require additional corrective action, the two year period begins anew and runs from the date of the final site remediation closure letter.

$700,000) then subtracting the third party liability FR requirement from the resulting total ($700,000 - $150,000 = $550,000).

6. Fund Priorities

Pursuant to Virginia Code §§62.1-44.34:11.A.11, the Fund balance shall be maintained at a level sufficient to ensure that the Fund can serve as a financial responsibility demonstration mechanism for owners and operators of underground storage tanks and provide the means for the Board to administer the programs authorized by Articles 9, 10 and 11 of State Water Control Law. The statute also provides that third party payments may be temporarily reduced or delayed, in whole or in part, if such action is necessary, in the judgment of the Board, to maintain the Fund balance. Pursuant to Virginia Code §62.1-44.34:11.A.2.b and Virginia Regulation 9 VAC 25-590-210, third party claims are subordinate to any corrective action claims on an occurrence basis, but may be paid prior to corrective action claims of other occurrences. This means that, for any particular occurrence, third party claims will not be eligible for payment until all corrective action costs for the occurrence have been paid.

Total corrective action costs include, but are not limited to, the amount approved for corrective action reimbursement to the owner/operator (along with the owner/operator's applicable financial responsibility obligation) and corrective action costs incurred by the Board for the occurrence. Corrective action costs incurred by the Board include, without limitation, emergency response and abatement, investigation, and remediation costs and alternate water supply costs.

7. Eligible Costs

To obtain disbursement from the Fund, the owner/operator must demonstrate that the requested costs are reasonable and necessary and actually have been incurred[3]. DEQ will expect the owner/operator to provide documentation to support each requested cost.

Eligible costs include:

Reasonable and necessary costs, otherwise eligible for disbursement, incurred by the owner or operator, on or after December 22, 1989 in compensating third parties for bodily injury or property damage proximately caused by a release from an owner's/operator's eligible tank. See Virginia Code §62.1-44.34:11.A.2.b. DEQ will evaluate the reasonableness and necessity of costs based upon documented or actual damage, loss in value, and other relevant factors. The following**, while not exclusive**, are eligible categories of costs:

A. Bodily injury

- Actual medical expenses,
- Actual future medical expenses (present value),
- Actual costs of future medical monitoring (ordinarily to be reimbursed as expense is incurred),

[3] DEQ will view a contract to pay a cost, such as a settlement agreement, to be proof that the cost actually has been incurred.

- Loss of use or disability,
- Lost earnings caused by bodily injury,
- Lost earnings caused by bodily injury resulting in death, and
- Funeral expenses.

B. Real property damage

- For temporary damage to real property, the decrease in rental value during the continuance of the injury or other appropriate measure, and

- For permanent damage to real property, the lower of (i) the diminution in the value of the real property and fixtures (as determined after completion of corrective action) or (ii) the cost to the property owner, in excess of remediation costs paid by the Fund, to restore the real property to its condition prior to the injury.

Diminution of property value: claims for diminution in property value are not eligible for property on which no contamination was found, or where the third party did not sustain an actual loss. Examples of actual loss include, but are not limited to, the following: (1) the sale or attempted sale of the third party's property where fair market value could not be obtained due to the presence of the petroleum contamination; (2) denial of financing where the third party's property was offered as collateral if the denial was caused by the presence of the petroleum contamination; or (3) incurrence of costs to address remaining petroleum contamination on the third party's property after case closure for property development purposes.

DEQ will look at temporary and permanent damage to be sure that these are not double-counted and are reasonable. For instance, the present value of the temporary damage and permanent damage, taken together, cannot exceed the value of the property in the absence of the petroleum release.

C. Actual relocation costs

- Rent/lodging,

- Utilities at contaminated residence,

- Reconnection fees for utilities whose operation has been discontinued at contaminated residence,

- Connection fees for utilities at relocation residence,

- Actual moving costs incurred by third party,

- Additional food and transportation costs necessitated by the move,
- Pet boarding costs necessitated by move, and
- Renter's insurance on relocation residence.

D. Personal property damage

- For damaged personal property, the lower of (i) the reasonable cost of repair or (ii) the difference in fair market value before and after the injury, and compensation for loss of use, and
- For destroyed personal property, the fair market value of the property at the time of its destruction.

E. Other property damage

- Lost net profits: The amount of profits lost because of diverted sales, price erosion, and/or increased costs, and
- Other business or economic costs: claims for business or economic costs incidental to a petroleum release may include carrying costs, lost investment income, etc. that do not represent a double recovery for the third party.

8. Ineligible Costs

Funds will not be disbursed in those circumstances prohibited by 9 VAC 25-590-210.A.5[4].

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[4] No person shall receive reimbursement from the fund for any costs or damages incurred:

a. Where the person, his employee or agent, or anyone within the privity or knowledge of that person, has violated substantive environmental regulations under 9VAC25-580-10 et seq. or this chapter;

b. Where the release occurrence is caused, in whole or in part, by the willful misconduct or negligence of the person, his employee or agent, or anyone within the privity or knowledge of that person;

c. Where the person, his employee or agent, or anyone within the privity or knowledge of that person, has (i) failed to carry out the instructions of the board, committed willful misconduct or been negligent in carrying out or conducting actions under Part V or VI (9VAC25-580-190 through 9VAC25-580-300) or (ii) has violated applicable federal or state safety, construction or operating laws or regulations in carrying out or conducting actions under Parts V or VI (9VAC25-580-190 through 9VAC25-580-300);

d. Where the claim has been reimbursed or is reimbursable, by an insurance policy;

e. Where the costs or damages were incurred pursuant to Article 4.1 (§10.1-1429.1 et seq.) of Chapter 14 of Title 10.1 of the Code of Virginia and the regulations promulgated thereunder;

f. For corrective action taken prior to December 22, 1989, by an owner or operator of an underground storage tank, or an owner of an underground storage tank exempted in subdivisions 1 and 2 of the definition of an underground

Funds may not be disbursed to reimburse for third party bodily injury or property damage costs if the owner or operator is not liable for these costs as a matter of fact or law. To the extent that recovery by a third party against an owner or operator is limited by law, disbursements from the Fund may not exceed the amount for which the owner/operator is liable under the law.

Ineligible third party liability costs include, but are not limited to, the following:

A. Costs incurred before December 22, 1989 regardless of release report date.

B. Costs covered by insurance of the owner/operator or third party.

C. Damages not proximately caused by a confirmed release from an eligible tank owned/operated by an eligible owner who is the responsible person for the release.

D. Damages resulting from any UST release caused by negligence or willful misconduct of the UST owner/operator or its employee, agency or contractor.

E. Penalties, charges, and fines.

F. Attorney's fees.

G. Damages to the UST owner/operator or its employee, agency or contractor.

H. Owner/operator's liability under Workers Compensation, unemployment compensation, disability benefits or similar law, and liabilities assumed by the owner/operator under contract.

I. Punitive, exemplary, noneconomic and multiple compensatory damages.

J. Costs defined as corrective action.

K. Damages proximately caused by acts that are a civil or criminal violation of Federal or state anti-competition, antitrust, racketeering and corrupt organization, or similar law. DEQ will withhold payment of the third party claim pending disposition of any charges or potential charges of this nature.

L. Costs for subjective or non-physically manifested damage components and indirect damages including, but not limited to, the following:

- Pain and Suffering,

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storage tank in 9VAC25-590-10, or an owner of an aboveground storage tank with a capacity of 5,000 gallons or less used for storing heating oil for consumption on the premises where stored; or

g. Prior to January 1, 1992, by an operator of a facility for containment and cleanup of a release from a facility of a product subject to §62.1-44.34:13 of the Code of Virginia.

- Mental distress,
- Loss of Consortium and/or Services,
- Psychological Injuries,
- Hedonic damages, and
- Inconvenience.

M. Intangible property damage costs including, but not limited to, loss of goodwill.

N. The following relocation costs:

- Deposits on relocation residence and utilities at relocation residence,
- Real property taxes for contaminated residence, and
- Homeowner's or renter's insurance for the contaminated residence.

O. Damages caused by the third party's failure to mitigate, including, but not limited to, failure to provide site access for corrective action.

P. Damages awarded in a final court order or arbitration award or agreed to in a settlement where the owner/operator has failed to vigorously defend.

Q. Interest.

R. Damages that result in a double recovery for the third party.

9. Establishing Liability

The Board will compensate for bodily injury and property damage only:

- In accordance with final court orders in cases which have been tried to final judgment no longer subject to appeal;
- In accordance with final arbitration awards not subject to appeal; or
- Where DEQ has approved the settlement between the owner/operator and the third party prior to execution by the parties.

A. Settlements

State Water Control Law requires an owner/operator seeking reimbursement from the Fund to obtain the Board's approval of a settlement before executing the final settlement document. To obtain the Board's approval, the owner/operator must demonstrate (1) the basis of

the owner/operator's liability to the third party and that the liability, if not clear, is at least fairly disputable and (2) the reasonableness and necessity of the claimed costs, which shall be based on actual damage, as discussed in §§ 7 and 8 above. In order to receive an analysis in advance of final settlement, the owner/operator should, at the earliest possible time, provide DEQ a complete third party claim identifying the basis for liability and the proposed settlement amount and providing comprehensive documentation of each expense for which reimbursement is requested. The third party claim should also include a copy of the motion for judgment and all associated pleadings and any other documents necessary to determine liability and damages. DEQ also may request copies of transcripts, exhibits, expert reports, deposition transcripts, and other appropriate documents (see § 11, below). (DEQ may also hire its own experts if necessary to determine liability and eligible damages.) Upon review of the third party claim the Board will either (1) approve the settlement on the basis that liability is at least fairly disputable and that the damage payment is within a reasonable range, in light of the case for liability or (2) reject it and provide the claimant with the reasons for rejection.

Given sufficient time, the Board will review the proposed settlement to provide the claimant with a precise analysis of reimbursable damages. To ensure that the Board has sufficient review time, any owner/operator receiving notice of a potential or actual third party suit against it should notify the Board as soon as possible and include the Board in the settlement process. However, the Board recognizes that litigation time constraints may limit the amount of time available for a claimant to provide a detailed third party settlement claim and for the Board to review it. In those circumstances, the Board may approve a reasonable range of damages prior to settlement, while reserving the right to review the final settlement to determine the actual reasonableness and necessity of the settlement amount. After the settlement is concluded and the Board completes its final review, and regardless of the actual settlement amount, the Board will disburse only for those actual damages considered eligible pursuant to State Water Control Law and the applicable Regulations, as interpreted in light of this guidance document.

B. Judgments and arbitration awards

Where the third party has obtained a judgment or final arbitration award against the owner/operator for a relevant cause of action, and the questions of liability and damages have actually been litigated, the owner/operator ordinarily will not need to demonstrate its liability to the third party or the amount of damages. However, the Board reserves the right to look behind a final judgment or an arbitration award in special circumstances, for example, where the evidence suggests collusion between the parties, where the defendant has confessed liability but the evidence does not clearly establish liability, or where the award includes damages that are not eligible for reimbursement. The Board will disburse only for those actual damages considered eligible pursuant to State Water Control Law and the applicable Regulations, as interpreted in light of this guidance document.

10. Proving Damages

The owner/operator must demonstrate that the damages for which it is submitting a claim are eligible for disbursement from the Fund consistent with State Water Control Law, 9 VAC 25-590-10 *et seq.* and the principles contained herein. The owner/operator also must demonstrate the amount of the damages and the basis for the damages.

- Physical Examination of Property: DEQ may require, conduct or contract for a physical examination of property that is the subject of the settlement, award or judgment.

- Physical Examination of Person(s): DEQ may request a physical examination of the person(s) who is (are) the subject of the settlement, award or judgment by expert personnel retained by DEQ where bodily injury damages are claimed.

11. Documentation

The Board will discontinue third party claim processing and/or withhold payment if the owner/operator and/or third party refuses or fails to provide reasonably requested documentation. Such documentation includes, but is not limited to: (1) waiver and/or release agreements; (2) subrogation agreements; (3) tax forms; (4) copies of real and personal property appraisals; (5) copies of personal property repair bills; (6) copies of medical bills; (7) financial statements; (8) lease agreements; (9) utility bills; and (10) pleadings and other documents of legal effect.

12. Notice

Claim processing may be delayed or impaired if the owner/operator does not provide DEQ immediate notice of all relevant information, especially copies of all demands, pleadings, motions and other papers. The owner/operator bears the risk of any prejudice to the claim caused by delayed notification to DEQ.

13. Subrogation

Pursuant to Virginia Code § 62.1-44.34:11.F, the Board shall have the right of subrogation for moneys expended from the Fund as compensation for bodily injury or property damage against any person who is liable for such injury or damage.