COMMONWEALTH OF VIRGINIA

Department of Environmental Quality

Subject:	**Division of Land Protection and Revitalization Guidance Memo No. LPR-SRR-02-2012** **Tank Ownership and Responsible Person Identification Changes**
To:	Regional Groundwater Managers
From:	Jeffery A. Steers Division of Land Protection and Revitalization Director
Date:	October 2, 2012
Copies:	Regional Directors, Deputy Regional Directors, OSRR Director, Enforcement Director

Summary:

This document provides guidance to regional office petroleum staff concerning when to pursue a property owner for compliance with pollution prevention requirements of the UST Technical Regulation and corrective action in the event of a petroleum release to the environment.

Electronic Copy:

An electronic copy of this guidance is available on DEQ's website at **http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/PetroleumProgram/GuidanceRegulations.aspx** under the heading *Tank Compliance Guidelines*.

Contact Information:

Please contact Renee Hooper at (804) 698-4018 or Lisa Dewey at (804) 698-4216 with any questions about this guidance.

Disclaimer:

Guidance documents do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts.

DEQ is altering its current practice regarding pursuing a landowner for compliance and corrective action in certain limited cases. If the registered underground storage tank (UST) owner and the UST operator are defunct, deceased, or have clearly abandoned the USTs and the available evidence indicates that the UST is a fixture, DEQ will pursue the landowner as the tank owner.

State Water Control Law (Va. Code §62.1-44.34:8, et. seq.) and its accompanying UST Technical Regulations (9 VAC 25-580-10 *et seq.*) hold both the UST owner (owner) and the operator responsible for compliance with pollution prevention and cleanup requirements. As a program practice, DEQ has pursued the owner first, both for compliance and cleanup. One reason for this is the owner can be more easily identified because it has registered the UST with DEQ and identified itself on the registration form as the UST owner. DEQ has generally considered a landowner to be the UST owner only in those cases where the UST is not registered with DEQ. DEQ took this approach because the UST owner was often a different entity than the landowner and the UST registration form (7530-2) was considered sufficient to identify the UST owner when the UST owner and landowner differed. DEQ considered the registration form a reflection of 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 that existed as part of the land, like a wall or a fence.

Over the years, DEQ has encountered numerous circumstances under which a registered UST has been abandoned without proper closure, resulting in potentially significant risk to human health and the environment. Generally, in these situations, the registered owner is deceased, not authorized by the SCC to do business in the Commonwealth or does not exist, or has left the state or country without a forwarding address. In these cases, unless an operator is present, DEQ has been left with no avenue to pursue compliance with pollution prevention and closure regulations. In the event of a release, DEQ has generally enrolled the site in the State Lead program unless the landowner or another related party has been willing to assume liability for the cleanup.

From a legal standpoint, courts generally consider USTs to be fixtures[1] rather than personal property. 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. Although DEQ has considered the 7530-2 dispositive on the issue of intent in the past, case law, as well as other states' practice, support treating the UST as a fixture in these situations where a breakdown in the relationship between the landowner and the UST owner has occurred. Consequently, where the registered UST owner and the UST operator are defunct, deceased, or

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[1] Generally, courts 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).

have clearly abandoned the USTs and the available evidence indicates that the UST is a fixture, DEQ will pursue the landowner for compliance and cleanup.

Identifying an owner for compliance with the regulations:

DEQ will continue to look first to the registered owner for compliance with the requirements of the UST Technical Regulation. However, the registered owner should not be the only option for achieving compliance. The operator is also liable for compliance. If the registered owner is deceased, defunct or in bankruptcy or if staff cannot locate the owner or determines that continued enforcement against the owner would be ineffective in achieving compliance, staff should pursue the operator. If the owner is deceased, a defunct[2] entity, or has clearly manifested an intent to abandon the USTs (i.e., left the state or country such that staff cannot locate the entity) and there is no operator, staff should considering pursuing the landowner[3].

In summary, DEQ will pursue UST compliance in the following order based on the documents, evidence and facts of the individual case: 1. Registered UST Owners, 2. UST Operators, 3. Landowners.

Staff should request any documents that may aid in analyzing UST ownership, such as bills of sale, lease agreements, or contracts involving use or ownership of the USTs from the landowner or registered owner[4]. For example, lease agreements may contain clauses that deal with the disposition of personal property upon termination of the lease or abandonment. Similarly, contracts may have termination clauses that specify UST ownership. The landowner may provide sale documents that demonstrate that the tanks were specifically excluded from the sale of the property (e.g., VDOT frequently includes such clauses when acquiring property for transportation purposes.) Staff should provide the documents to OSRR staff who will perform an ownership analysis and notify regional staff of the result. The absence of written documentation should not prevent pursuit of the landowner for compliance, however. For example, staff may also consider whether the landowner has taken actions regarding the UST that indicate an ownership interest, such as marketing the property as a gas station.[5] Whenever the situation arises where the registered owner and the operator are not viable, staff should consult with OSRR because the circumstances may warrant pursuit of the landowner for compliance.

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[2] See Section 3.1.9 of the Technical Manual for more information on defunct or dissolved entities.

[3] Staff may use the locality's real property records to identify the property owner. Most localities maintain an online database or staff can contact OSRR for assistance.

[4] In the case of a defunct corporation or limited liability company, officers of the entity may still be available to provide the documents.

[5] For example, in the case of a defunct registered owner, although there is no controlling lease agreement or contract to provide any guidance, the landowner subsequently markets the property for sale as a gas station including the USTs. DEQ generally considers this indicative of the landowner's intent to exercise ownership over the tanks.

Identifying an owner as a responsible person for a cleanup:

DEQ staff should continue to look first to the registered owner at the time the release is reported to DEQ to identify the responsible person for corrective action for a petroleum release. However, as discussed above, if the registered owner is not a viable choice, there are other options. Under state law, the operator, at the time the release is reported to DEQ, is also liable for the cleanup. If the registered owner is deceased or a defunct entity or if staff cannot locate the registered owner or determines that continued enforcement against the owner would be ineffective, staff should pursue the operator. If, at the time the release is reported to DEQ, the registered owner is deceased, a defunct entity, or has clearly manifested an intent to abandon the USTs (i.e., left the state or country such that staff cannot locate the entity) and there is no operator, staff should considering pursuing the landowner. The decision to pursue a landowner will be made at the time of the release report. For example, if DEQ staff identify a registered tank owner as the RP at the time of the release report and that RP later dies or is otherwise incapable of completing the cleanup, staff will not require the landowner to complete the cleanup. Regardless of whether DEQ will require a landowner to perform a cleanup, staff is encouraged to approach the landowner about voluntarily assuming liability for the cleanup. [6]

Financial responsibility (FR) for a landowner is calculated in the same way as for a registered tank owner, 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. Unless staff has information that the landowner owns multiple facilities, staff should assume the FR is $5,000.00.

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[7], 2. UST Operators, 3: Landowners. Staff should request documentation and consult with OSRR before pursuing a landowner as discussed above.

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[6] In reality, program staff often successfully approach landowners about conducting a cleanup. This guidance is simply recognizing that, depending upon the specific facts of the case, we can go one step further and require the landowner to clean up the site.

[7] As discussed in Chapter 3 of the Technical Manual, a viable registered owner can always attempt to establish, at any time, that it is no longer the owner of the UST for purposes of complying with pollution prevention and cleanup requirements. Registered owners can provide DEQ with documentation (such as lease agreements or contracts or bills of sale) establishing a landowner or other entity as the UST owner. Staff should continue to consult with OSRR staff in those circumstances.

Example Letter

[This letter is an example of one used in a previous case. This guidance does not provide a "boilerplate" or "template" letter.]

[date]

Property Owner Name
and Address

RE: USTs at [facility name and address]
UST FAC ID No.

Dear :

In April 2010, a Department of Environmental Quality (DEQ) inspector visited the above-referenced facility to determine the compliance status of the underground storage tanks (USTs). She discovered that the property had been vacated and the two 6,000-gallon gasoline and one 4,000-gallon gasoline USTs registered with DEQ were no longer in use. Though the last registered owner for these tanks was [entity name] and this entity ceased being a viable corporation in June 2009, it appears as if the USTs where still in operation after June 2009. However, DEQ has not received information required by state regulations to be submitted when a UST undergoes ownership transfer and temporary or permanent closure.

Pursuant to 9 VAC 25-580-70 of the Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation[8] (UST Regulation), "...Any change in ownership, tank status...requires the UST owner to submit an amended notification form within 30 days after such change..." Additionally, Part VII of the UST Regulation, Out of Service UST Systems and Closure, outlines specific requirements for the temporary and permanent closure of USTs.

9 VAC 25-580-310 which addresses temporary closure states:

- A permit must be obtained from the local building official prior to the temporary closure;
- Owners and operators must continue operation and maintenance of corrosion protection in accordance with 9 VAC 25-580-90 and any release

[8] The Underground Storage Tanks: Technical Standards and Corrective Action Requirements Regulation can be found at http://www.deq.virginia.gov/export/sites/default/tanks/pdf/usttech.pdf

detection in accordance with Part IV. *(Release detection is deferred if the product level is below one inch);*

- When a UST system is temporarily closed for more than three months, owners and operators must leave vent pipes open and functioning and cap and secure all other lines, pumps manways and ancillary equipment;

- When a UST system is temporarily closed for more than twelve months, owners and operators must permanently close the UST system if it does not meet either performance standards in 9 VAC 25-580-50… or 9 VAC 25-580-60. Owners and operators must permanently close the substandard UST systems at the end of this twelve month period in accordance with 9 VAC 25-580-320 through 9 VAC 25-580-350, unless the building official grants an extension of the twelve months closure period. Owner and operators must complete a site assessment in accordance with 9 VAC 25-580-330 before an extension can be applied for. *(If corrosion protection of the tanks is adequately maintained, the tanks may be placed in temporary closure indefinitely.)*

Pursuant to 9 VAC 25-580-320 of the UST Regulation, the following requirements must be met when a UST is permanently closed:

- A permit must be obtained from the local building official prior to the closure;

- A site assessment must be performed in accordance with 9 VAC 25-580-330;

- The tank must be emptied and cleaned by removing all liquids and accumulated sludges, and either removed from the ground or filled with an inert, solid material (e.g. cement slurry, sand);

- Within 30 days after the completion of the closure, a 7530-2 UST Notification Form must be submitted to DEQ reflecting the closure of the tank.

A site assessment generally consists of soil or water samples being taken around the immediate vicinity of the excavated UST and piping, in the area where a release is most likely to be detected, to determine the level, if any, of total petroleum hydrocarbons in the soil or water. Samples must be analyzed using EPA or DEQ approved methods. Results from vapor or groundwater monitoring performed in accordance with 9 VAC 25-580-160 are acceptable in lieu of soil or ground water samples during UST closure. The results of the site assessment, along with a site map detailing the UST system, buildings and roads, the sample or monitoring locations, and any other important features, must be submitted to DEQ along with the 7530-2

UST Notification Form. Please refer to 9 VAC 25-580-320 and 9 VAC 25-580-330 of the UST Regulation.

In addition, the locality where the tanks are located may have building and/or fire codes that require the tanks to be emptied.

I am requesting that you, as the real property owner, provide DEQ with information about the status of the tanks, including current ownership. Please be aware that if these tanks contain fuel, and the tanks begin to leak, your property and possibly your neighbors' properties could become contaminated. If that occurs, state law requires cleanup measures to be conducted.

Please respond to this letter by contacting [inspector name] at ### or [email address] no later than [date], indicating what actions may already have been taken, or whether you plan to take any actions regarding these tanks.

Sincerely,

[name]
Petroleum Program Manager

Enclosure

cc: Compliance File
Local Fire Marshal