

VIRGINIA ACTS OF ASSEMBLY -- 2004 SESSION

CHAPTER 485

An Act to amend and reenact § 62.1-44.34:11 of the Code of Virginia, relating to disbursements from the Petroleum Storage Tank Fund.

[H 1450]

Approved April 12, 2004

Be it enacted by the General Assembly of Virginia:

1. That § 62.1-44.34:11 of the Code of Virginia is amended and reenacted as follows:

§ 62.1-44.34:11. Virginia Petroleum Storage Tank Fund.

A. The Virginia Petroleum Storage Tank Fund is hereby established as a nonlapsing revolving fund to be used by the Board for (i) administering the state regulatory programs authorized by Articles 9, 10 and 11 (§ 62.1-44.34:8 et seq.) of this chapter, (ii) demonstrating financial responsibility, and (iii) other purposes as provided for by applicable provisions of state and federal law. All expenses, costs, civil penalties, charges and judgments recovered by or on behalf of the Board pursuant to Articles 9, 10 and 11 of this chapter, and all moneys received as reimbursement in accordance with applicable provisions of federal law and all fees collected pursuant to §§ 62.1-44.34:19.1 and 62.1-44.34:21, shall be deposited into the Fund. Interest earned on the Fund shall be credited to the Fund. No moneys shall be credited to the balance in the Fund until they have been received by the Fund. The Fund shall be established on the books of the Comptroller and any funds remaining in such Fund at the end of the biennium shall not revert to the general fund but shall remain in the Fund.

The Fund shall be administered by the Board consistent with the provisions of Subtitle I of the federal Solid Waste Disposal Act (P.L. 98-616, § 9001 et seq.) and any approved state underground storage tank program and in accordance with the following provisions:

1. The Fund shall be maintained in a separate account. An accounting of moneys received and disbursed shall be kept, and furnished upon request to the Governor or the General Assembly.

2. Disbursements from the Fund may be made only for the following purposes:

a. Reasonable and necessary per occurrence costs incurred for releases reported after December 22, 1989, by the owner or operator who is the responsible person, in taking corrective action for any release of petroleum into the environment from an underground storage tank which are in excess of the per occurrence financial responsibility requirement imposed in subsection B of § 62.1-44.34:12, up to ~~one~~ \$1 million ~~dollars~~.

b. 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 ~~one~~ \$1 million ~~dollars~~. *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.*

c. Reasonable and necessary per occurrence costs incurred by an operator whose net annual profits from all facilities do not exceed ~~ten~~ \$10 million ~~dollars~~ for containment and cleanup of a release from a facility of a product subject to § 62.1-44.34:13 as follows: (i) for an operator of a facility with a storage capacity less than 25,000 gallons, per occurrence costs in excess of \$2,500 up to ~~one~~ \$1 million ~~dollars~~; (ii) for an operator of a facility with a storage capacity from 25,000 gallons to 100,000 gallons, per occurrence costs in excess of \$5,000 up to ~~one~~ \$1 million ~~dollars~~; (iii) for an operator of a facility with a storage capacity from 100,000 gallons to four million gallons, per occurrence costs in excess of ~~five cents~~ \$.05 per gallon of aboveground storage capacity up to ~~one~~ \$1 million ~~dollars~~; and (iv) for an operator of a facility with a storage capacity greater than four million gallons, per occurrence costs in excess of \$200,000 up to ~~one~~ \$1 million ~~dollars~~. For purposes of this subdivision (2 c), the per occurrence financial responsibility requirements for an operator shall be based on the total storage capacity for the facility from which the discharge occurs.

d. Reasonable and necessary per occurrence costs incurred by an operator whose net annual profits from all facilities exceed ~~ten~~ \$10 million ~~dollars~~ for containment and cleanup of a release from a facility of a product subject to § 62.1-44.34:13 as follows: (i) for an operator of a facility with a storage capacity less than four million gallons, per occurrence costs in excess of \$200,000 up to ~~one~~ \$1 million

dollars; (ii) for an operator of a facility with a storage capacity from four million gallons to ~~twenty~~ 20 million gallons, per occurrence costs in excess of ~~five cents~~ \$.05 per gallon of aboveground storage capacity up to ~~one~~ \$1 million dollars; and (iii) an operator of a facility with a storage capacity greater than ~~twenty~~ 20 million gallons shall have no access to the Fund. For purposes of this subdivision, the per occurrence financial responsibility requirements for an operator shall be based on the total storage capacity for all facilities located within the Commonwealth.

e. Costs incurred by the Board in taking immediate corrective action to contain or mitigate the effects of any release of petroleum into the environment from an underground storage tank or from underground storage tanks exempted in subdivisions 1 and 2 of the definition of underground storage tank in § 62.1-44.34:10, if such action is necessary, in the judgment of the Board, to protect human health and the environment.

f. Costs of corrective action up to ~~one~~ \$1 million dollars for any release of petroleum into the environment from underground storage tanks or from underground storage tanks exempted in subdivisions 1 and 2 of the definition of underground storage tank in § 62.1-44.34:10 (i) whose owner or operator cannot be determined by the Board within ~~ninety~~ 90 days; or (ii) whose owner or operator is incapable, in the judgment of the Board, of carrying out such corrective action properly.

g. Costs of corrective action incurred by the Board for any release of petroleum into the environment from underground storage tanks which are otherwise specifically listed in exemptions 1 through 9 of the definition of an underground storage tank in § 62.1-44.34:10.

h. Reasonable and necessary per occurrence costs of corrective action incurred for releases reported after December 22, 1989, by the owner or operator in excess of \$500 up to ~~one~~ \$1 million dollars for any release of petroleum into the environment from an underground storage tank exempted in subdivisions 1 and 2 of the definition of an underground storage tank in § 62.1-44.34:10 and aboveground storage tanks with a capacity of 5,000 gallons or less used for storing heating oil for consumption on the premises where stored.

i. The "cost share" of corrective action with respect to any release of petroleum into the environment from underground storage tanks undertaken under a cooperative agreement with the Administrator of the United States Environmental Protection Agency, as determined by the Administrator of the United States Environmental Protection Agency in accordance with the provisions of § 9003 (h) (7) (B) of the United States Public Law 98-616 (as amended in 1986 by United States Public Law 99-662).

j. Administrative costs incurred by the Board in carrying out the provisions of regulatory programs authorized by Articles 9, 10, and 11 (§ 62.1-44.34:8 et seq.) of this chapter.

k. All costs and expenses, including but not limited to personnel, administrative, and equipment costs and expenses, directly incurred by the Board or by any other state agency acting at the direction of the Board, in and for the abatement, containment, removal and disposal of oil pursuant to Article 11 (§ 62.1-44.34:14 et seq.) of Chapter 3.1 of this title.

l. Procurement, maintenance and replenishment of materials, equipment and supplies, in such quantities and at such locations as the Board may deem necessary, for the abatement, containment, removal and disposal of oil pursuant to Article 11 (§ 62.1-44.34:14 et seq.) of Chapter 3.1 of this title.

m. Costs and expenses, incurred by the Board or by any other state agency, acting at the direction of the Board, for the protection, cleanup and rehabilitation of waterfowl, wildlife, shellfish beds and other natural resources, damaged or threatened by the discharge of oil, owned by the Commonwealth or held in trust by the Commonwealth for the benefit of its citizens.

n. Refund of cash deposits held in escrow pursuant to Article 11 (§ 62.1-44.34:14 et seq.) of Chapter 3.1 of this title and reasonable interest thereon, and refunds of fees collected pursuant to § 62.1-44.34:21 as authorized by this chapter.

o. Administrative costs incurred by the Department of Motor Vehicles in the collection of fees specified in § 62.1-44.34:13.

p. Reasonable and necessary costs incurred by the Virginia Department of Transportation in taking corrective action on property acquired for transportation purposes. If the costs of taking corrective action are recovered, in whole or in part, from any responsible party, the recovery shall be deposited to the Fund.

q. Reasonable and necessary per occurrence costs for releases reported after December 22, 1989, in taking corrective action for any release of petroleum into the environment from an underground storage tank, which are in excess of \$5,000 up to ~~one~~ \$1 million dollars, by any person who, without participating in the management of an underground storage tank 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.

3. No funds shall be paid for reimbursement of costs incurred 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 storage tank in § 62.1-44.34:10, 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.

4. No funds shall be paid for reimbursement of costs incurred 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.

5. No funds shall be paid for reimbursement of moneys expended for payment of interest or other finance charges on loans which were used for corrective action or containment and cleanup of a release by a person in subdivisions A 3 or A 4 of this section, except for an owner or operator which is exempt from taxation under § 501 (c) (3) of the Internal Revenue Code, provided that: (i) the loan moneys have been paid for corrective action that was pre-approved by the Board, (ii) any and all disbursements received from the Fund shall be paid against the loan or for interest and points, and (iii) the payment of interest and points under this subdivision shall be limited to five years from the date the release is reported to the Board. The Board may extend the period for payment of interest and points if, in the judgment of the Board, such action is necessary. The restrictions imposed in clauses (i), (ii) and (iii) shall not apply to loans made prior to June 1, 1992, to an owner or operator exempt from taxation under § 501 (c) (3) of the Internal Revenue Code.

6. No funds shall be paid for penalties, charges or fines imposed pursuant to any applicable local, state or federal law.

7. No funds shall be paid for containment and cleanup costs that are reimbursed or are reimbursable from other applicable state or federal programs.

8. No funds shall be paid if the operator of the facility has not complied with applicable statutes or regulations governing reporting, prevention, containment and cleanup of a discharge of oil.

9. No funds shall be paid if the owner or operator of an underground storage tank or the operator of an aboveground storage tank facility fails to report a release of petroleum or a discharge of oil to the Board as required by applicable statutes, laws or regulations.

10. No funds shall be paid from the Fund unless a reimbursement claim has been filed with the Board within two years from the date the Board issues a site remediation closure letter for that release or July 1, 2000, whichever date is later.

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 the owners and operators of underground storage tanks. Any disbursements made by the Board pursuant to subdivision 2 of this subsection 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.

B. The Board shall seek recovery of moneys expended from the Fund for corrective action under this section where the owner or operator of an underground storage tank has violated substantive environmental protection rules and regulations pertaining to underground storage tanks which have been promulgated by the Board.

C. For costs incurred for corrective action as authorized in subdivision A 2 e of this section, the Board shall seek recovery of moneys from the owner or operator of an underground storage tank up to the minimum financial responsibility requirement imposed on the owner or operator in subsection B of § 62.1-44.34:12 if any, or seek recovery of such costs incurred from any available federal government funds.

D. For costs incurred for corrective action taken resulting from a release from underground storage tanks specified in subdivision A 2 f of this section, the Board shall seek recovery of moneys from the owner or operator up to the minimum financial responsibility requirement imposed on the owner or operator in subsection B of § 62.1-44.34:12 if any, or seek recovery of such costs incurred from any available federal government funds.

E. The Board shall seek recovery of moneys expended from the Fund for costs incurred for corrective action as authorized in subdivision A 2 g of this section or seek recovery of such costs incurred from any available federal government funds. However, the Board shall not seek recovery of moneys expended from the Fund for costs of corrective action in excess of \$500 from the owner or operator of an underground tank exempted in subdivisions 1 and 2 of the definition of underground storage tank in § 62.1-44.34:10 and aboveground storage tanks with a capacity of 5,000 gallons or less used for storing heating oil for consumption on the premises where stored.

F. The Board shall have the right of subrogation for moneys expended from the Fund as compensation for personal injury, death or property damage against any person who is liable for such injury, death or damage.

G. The Board shall promptly initiate an action to recover all costs and expenses incurred by the Commonwealth for investigation, containment and cleanup of a discharge of oil or threat of discharge against any person liable for a discharge of oil as specified in Article 11 (§ 62.1-44.34:14 et seq.) of Chapter 3.1 of this title; however, the Board shall seek recovery from an operator of expenditures from the Fund only in the amount by which such expenditures exceed the amount authorized to be disbursed to the operator under subdivisions A 2 through A 8 of this section.