

VIRGINIA ACTS OF ASSEMBLY -- 1994 SESSION

CHAPTER 196

An Act to amend and reenact §§ 62.1-44.34:11 and 62.1-44.34:16 of the Code of Virginia, relating to financial responsibility for facilities.

[H 349]

Approved April 2, 1994

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.34:11 and 62.1-44.34:16 of the Code of Virginia are 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.), 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. Per occurrence costs incurred on or 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 the per occurrence financial responsibility requirement imposed in § 62.1-44.34:12, up to one million dollars.

b. Per occurrence costs incurred in compensating third parties, including payment of judgments, for bodily injury and property damage caused by release of petroleum into the environment from an underground storage tank, up to one million dollars.

c. Per occurrence costs incurred by an operator whose net annual profits from all facilities do not exceed \$10,000,000 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 with financial responsibility imposed pursuant to subsection D of § 62.1-44.34:16 in an amount less than \$200,000, per occurrence costs in excess of the required financial responsibility up to \$1,000,000; (ii) for an operator with financial responsibility imposed in subsection D of § 62.1-44.34:16 in an amount equal to or greater than \$200,000, per occurrence costs in excess of \$200,000 up to \$1,000,000 and (iii) for an operator exempt from financial responsibility requirements under § 62.1-44.34:17, per occurrence costs in excess of \$2,500 up to \$1,000,000. ~~Until regulations promulgated under subsection D of § 62.1-44.34:16 are effective, the maximum amount of financial responsibility authorized under that subsection shall be deemed the amount of financial responsibility imposed for purposes of this subsection.~~ *For purposes of this subdivision 2 c, the per occurrence financial responsibility requirement for an operator shall be based on the total storage capacity for the facility from which the discharge occurs.*

d. Per occurrence costs incurred by an operator whose net annual profits from all facilities exceed \$10,000,000 which are in excess of the greater of \$200,000 or the per occurrence financial responsibility requirement imposed in subsection D of § 62.1-44.34:16, up to \$1,000,000 for containment and cleanup of a release from a facility of a product subject to § 62.1-44.34:13. Until regulations promulgated under subsection D of § 62.1-44.34:16 are effective, the maximum amount of financial responsibility authorized under that subsection shall be deemed the amount of financial responsibility imposed for purposes of this subsection.

e. Costs incurred 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 clauses 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 million dollars for any release of petroleum into the environment from underground storage tanks or from underground storage tanks exempted in clauses 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 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. Costs of corrective action incurred on or after December 22, 1989, by the owner or operator in excess of \$2,500 up to one million dollars for any release of petroleum into the environment from an underground storage tank exempted in clauses 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, 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.

3. No funds shall be paid for reimbursement of moneys expended 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 clauses 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 moneys expended 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 prior to the effective date of regulations required pursuant to § 62.1-44.34:15.

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.

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.

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 § 62.1-44.34:12, 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 § 62.1-44.34:12, 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 \$2,500 from the owner or operator of an underground tank exempted in clauses 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; provided that 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.

§ 62.1-44.34:16. Financial responsibility for vessels and facilities.

A. The operator of any tank vessel entering upon state waters shall deposit with the Board cash or its equivalent in the amount of \$500 per gross ton of such vessel. Any such cash deposits received by the Board shall be held in escrow in the Virginia Petroleum Storage Tank Fund.

B. If the Board determines that oil has been discharged in violation of this article or that there has been a substantial threat of such discharge from a vessel for which a cash deposit has been made, any amount held in escrow may be used to pay any fines, penalties or damages imposed under this chapter.

C. The Board shall exempt an operator of a tank vessel from the cash deposit requirements specified in this section if the operator of the tank vessel provides evidence of financial responsibility pursuant to the terms and conditions of this subsection. The Board shall adopt requirements for operators of tank vessels for maintaining evidence of financial responsibility in an amount equivalent to the cash deposit which would be required for such tank vessel pursuant to this section.

D. The Board is authorized to promulgate regulations requiring operators of facilities to demonstrate financial responsibility sufficient to comply with the requirements of this article as a condition of operation. *Operators of facilities shall demonstrate financial responsibility based on the total storage capacity of all facilities operated within the Commonwealth.* Regulations governing the amount of any financial responsibility required shall take into consideration the type, oil storage or handling capacity and location of a facility, the risk of a discharge of oil at that type of facility in the Commonwealth, the potential damage or injury to state waters or the impairment of their beneficial use that may result from a discharge at that type of facility, the potential cost of containment and cleanup at that type of facility, and 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. In no instance shall the financial responsibility requirements for facilities exceed five cents per gallon of aboveground storage capacity or five million dollars for a pipeline. In no instance shall any financial test of self-insurance require the operator of a facility to demonstrate more than one dollar of net worth for each dollar of required financial responsibility. If such net worth does not equal the required financial responsibility, then the operator shall demonstrate the minimum required amount by a combination of financial responsibility mechanisms in accordance with subsection E of this section. No governmental agency shall be required to comply with any such regulations.

E. Financial responsibility may be demonstrated by self-insurance, insurance, guaranty or surety, or any other method approved by the Board, or any combination thereof, under the terms the Board may prescribe. To obtain an exemption from the cash deposit requirements under this section: the operator of a tank vessel and insurer, guarantor or surety shall appoint an agent for service of process in the Commonwealth; any insurer must be authorized by the Commonwealth to engage in the insurance business; and any instrument of insurance, guaranty or surety must provide that actions may be brought on such instrument of insurance, guaranty or surety directly against the insurer, guarantor or surety for any violation of this chapter by the operator up to, but not exceeding, the amount insured, guaranteed or otherwise pledged. An operator of a tank vessel or facility whose financial responsibility is accepted by the Board under this subsection shall notify the Board at least thirty days before the effective date of a change, expiration or cancellation of any instrument of insurance, guaranty or surety. Operators of facilities who are unable to demonstrate financial responsibility in the amounts established pursuant to subsection D may establish an insurance pool pursuant to the requirements of § 62.1-44.34:12 in order to demonstrate such financial responsibility.

F. Acceptance of proof of financial responsibility for tank vessels shall expire:

1. One year from the date on which the Board exempts an operator from the cash deposit requirement based on evidence of self-insurance, except that the Board may establish by regulation a different expiration date for acceptance of evidence of self-insurance submitted by public agencies;

2. On the effective date of any change in the operator's instrument of insurance, guaranty or surety;
or
 3. Upon the expiration or cancellation of any instrument of insurance, guaranty or surety.
- Application for renewal of acceptance of proof of financial responsibility shall be filed thirty days before the date of expiration.

G. Acceptance of proof of financial responsibility for facilities shall expire:

1. Upon expiration of registration under § 62.1-44.34:19.1.
2. Upon application for renewal of registration under § 62.1-44:19.1.
3. At any time a change in circumstances occurs which causes the operator to be unable to demonstrate or obtain evidence of financial responsibility under this section or under the requirements established by the Board pursuant to this section.

Evidence of financial responsibility shall be maintained in accordance with regulations adopted by the Board. Application for renewal of acceptance of proof of financial responsibility shall be filed thirty days before the date of expiration.

H. The Board, after notice and opportunity for hearing, may revoke its acceptance of evidence of financial responsibility if it determines that:

1. Acceptance has been procured by fraud or misrepresentation; or
2. A change in circumstances has occurred that would warrant denial of acceptance of evidence of financial responsibility under this section or the requirements established by the Board pursuant to this section.

I. It is not a defense to any action brought for failure to comply with the cash deposit requirement or to provide acceptable evidence of financial responsibility that the person charged believed in good faith that the tank vessel or facility or the operator of the tank vessel or facility had made the required cash deposit or possessed evidence of financial responsibility accepted by the Board.