United States
Environmental Protection
Agency

Underground Storage Tank Technical Compendium References:

Financial Responsibility

U.S. EPA Office of Underground Storage Tanks

The compendium contains interpretations and guidance letters sent out by the Office of Underground Storage Tanks. These references are cited within the underground storage tanks technical compendium at http://www2.epa.gov/ust/underground-storage-tank-technical-compendium.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

October 15, 1990

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Discussion of "Occurrence" and "Property Damage"

FROM: Sammy K. Ng, Chief /s/
Regulatory Analysis Branch

TO: Wayne S. Naylor, Chief
Underground Storage Tank Section, Region III

I am writing in response to your request for clarification of the terms "occurrence" and "property damage" particularly as related to Virginia's interest in these terms. Both John Heffelfinger and I have discussed the issues with Joanne Cassidy, but I wanted to provide you with something in writing for your future discussions with the State.

Occurrence.

Virginia is interested in what situations UST releases would be considered "one" occurrence versus those cases in which releases might be considered two or more occurrences. Insurance industry practice is to consider all contamination discovered during a single site investigation to be "one" occurrence, regardless of the number of tanks/piping that may be leaking. For example, if two tanks are discovered to be leaking during the same site investigation, it doesn't matter whether they are part of the same UST system, i.e., manifolded, or two separate tanks -- the insurance industry considers it to be one occurrence, with one deductible payable by the UST owner, and one cleanup conducted.

One State has chosen to define "occurrence" in their State regulations that directly reflects the insurance industry's approach, as follows:

> "Occurrence" means an incident which results in a release from an underground storage tank system, and any other releases which may be occurring simultaneously at the facility at which the UST system is located.

On the other hand, leaks discovered at different times from the same UST system, as a result of unrelated investigations would be considered "two" occurrences.

Our understanding is that Virginia wants to define leaks discovered at the same time from two separate tanks in the same excavation to be two occurrences. Under their State fund, this would require two deductibles from the tank owner, but also leave the State responsible for paying per occurrence coverage tip to the fund limits for each occurrence (an outcome the State

may not desire). Although Virginia is free to make this interpretation, we believe it makes more sense to follow insurance industry practice in this case. For example, "wrap-around' insurance coverage for the deductible would likely be more available if the State considered all contamination found during a single site investigation to be one occurrence. otherwise, an insurer (or guarantor or tank owner who is self-insuring) would face great uncertainty in providing “per occurrence” coverage for the deductible.

Property Damage.

Virginia has apparently raised a question regarding the definition of “property damage.” The Federal rules define the term as follows:

> "Property damage” shall have the meaning given this term by applicable state law, This term shall not include those liabilities which, consistent with standard insurance industry practices, are excluded from coverage in liabilities insurance policies for property damage. However, such exclusions for property damage shall not include corrective action associated with releases from tanks which are covered by the policy.

The State's concern is over the last sentence, which says that corrective action costs can't be excluded from property damage coverage. The confusion over this sentence lies in the fact that up until our regulations were issued, insurers did not provide any coverage for “on-site” corrective action. Coverage for bodily injury and property damage were considered third party claims. Coverage for “off-site” corrective action was provided under the property damage portion of the policy. when we wrote the FR regulations, we wanted to make sure that “on-site" corrective actions would also be covered. We assumed that such coverage would also be provided under the property damage portion of the policy and, thus, included the last sentence in the above definition.

We also wrote our regulations around the artificial distinctions of “corrective action” and "third party liability" created by Congress in the statute. The insurance industry has, for the most part, responded to these categories and now writes policies covering "corrective action" (both on-site and off-site) and “bodily injury/property damage liability." while we require corrective action coverage be obtained, we recognize that it still may occur under various portions of policy coverage. We recommend that Virginia follow the more recent industry trend of covering both on-site and off-site corrective action under the definition of corrective action.

cc: Ron Brand
Mike Williams

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Christopher E. Mandel, Director
Risk Management Division
National Headquarters
American Red Cross
Washington, DC 20006

Re: American Red Cross compliance with 40 CFR 280 Subpart H

Dear Mr. Mandel:

I apologize for the delay in providing you with written confirmation of our phone discussion on May 10, 1991 regarding your request for a determination of whether the American Red Cross can meet the requirements of 40 CFR 280 Subpart H (Financial Responsibility requirements) through the use of the financial test of self-insurance.

As I had mentioned during our phone conversation, it is our conclusion that, based on a comprehensive review of the regulations as they now stand, the American Red Cross does not quality for the following reasons:

" As recognized in your letter (of October 4, 1990), the American Red Cross does not meet the reporting requirements of 40 CFR 280(b) (4). First, the financial statements of the American Red Cross, although publicly available, are not provided to the securities and Exchange Commission (SEC), the Energy Information Administration (EIA), or the Rural Electrification Administration (REA), as required under 40 CFR 280(b) (4) (i). The regulations require this specific reporting to ensure both that the implementing authority has ready access to current financial statements and that the financial statements are developed in a format that allows verification of compliance with the requirements of the financial test. Because the American Red Cross does not report to these agencies, the requirement that the implementation have ready access to the financial statements, if needed, is not met.

Second, as a non-profit agency, the American Red Cross is not awarded an asset size classification by Dun & Broadstreet. Under 40 CFR 280(b)(4)(ii) an asset size classification of 4A or 5A would be an acceptable substitute for submittal of financial statements to the SEC, the EIA, or the REA.

The American Red Cross's financial statements are not developed according to the Generally Accepted Accounting Principles (GAAP) that were assumed during development of the financial test of self-insurance. First, the "fund" accounting used by non-profit agencies such as the Red Cross recognizes separate funds that are legally restricted to specific purposes (e.g., the donor restricted fund). Such restrictions limit the ability to make parallels between financial statements for private corporation and non-profit agencies. Second, the accounts receivable of approximately $250 million does not appear to have been adjusted for unrecoverable amounts. We would anticipate that accounts receivable of this magnitude would contain some proportion of unrecoverable amounts, particularly if the amounts reflect nonbinding pledges rather than debts for services rendered.

Although we have not undertaken an examination of the accounting practices to identify all discrepancies between corporate financial accounting and accounting for non-profit agencies, these two differences are enough to show that the financial statements prepared by the American Red Cross do not adhere to the practices assumed by EPA when the financial test of self-insurance was developed.

For these reasons, we are unable to approve the use of the financial test of self-insurance for the American Red Cross.

As You may be aware, EPA, on August 14, l991, proposed an additional extension of the deadline for non-marketers to comply with financial responsibility requirements until December 31, 1992 (56 FR 40292). Although EPA had strong reasons for proposing the extension, promulgation is not assured. I have enclosed a copy of the, proposed rule for your information. Your comments on the proposal will be most welcome.

I hope that this letter answer your questions. If I can be of further assistance, please give me a call at (703) 308-8882.

Yours truly,

/s/

Sammy K. Ng, Acting Director
Policy and Standards Division
Office of Underground Tanks

Enclosure

cc: Lee Tyner, Office of General Counsel, EPA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

October 24, 1991

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Ms. Shirley A. DeLibero
Executive Director
NJ TRANSIT
McCarter Highway and Market Street
P.O. Box 10009
Newark, N.J. 07101

Dear Ms. DeLibero:

You have requested that EPA clarify NJ TRANSIT's classification as an underground storage tank ("UST") owner in order to determine which methods for assuring financial responsibility are available to NJ TRANSIT. You ask specifically about classification as a state or local government. In answering this question, I start from the premise that all owners and operators cf petroleum USTs must comply with the Subpart H Financial Responsibility regulations unless they are exempted under one of the express provisions of section 280.90. See 40 CFR § 280.90(a). NJ TRANSIT does not qua1ify at a state agency under 280.90(c) because the debts of NJ TRANSIT are not the debts of the State of New Jersey. You acknowledge this in your letter. Thus NJ TRANSIT must comply with the provisions of 40 CFR § 280.93.

If NJ TRANSIT is not a state agency under the UST regulations, the next question is whether it is a local government. Local government entities are required to meet the financial responsibility provision.. At the time the agency initially promulgated the financial responsibility rules it said that local government includes special purpose local entities which are generally designated as either public authorities. transit authorities, or power authorities. The Agency restated and clarified its view of what constitutes a local government in the June 18, 1990 preamble to the proposed additional mechanisms for local governments to demonstrate financial responsibility. As with the 1988 role, the preamble again mentions transit authorities as an example of special purpose local governments (55 FR 24695) and suggests that the category includes districts created by State enactment (55 FR 24696). Thus it would appear that NJ TRANSIT qualifies as a local government for the purpose of the financial responsibility regulations.

Section 280.91 sets out the schedules by which owners and/or operators of USTs must comply with the financial responsibility provisions. Assuming that NJ TRANSIT is a local government, NJ TRANSIT will be required to comply by a date one year after the promulgation of additional mechanisms for use by local government entities to comply with the financial responsibility requirements for USTs containing petroleum. 55 FR 46025 (October 31, 1990). As

a local government, NJ TRANSIT would be eligible to use any of the mechanisms in the existing rules, or any new mechanisms promulgated specifically for local governments.

I hope that this letter answers your questions. If I can be of further assistance, please give me a call at 703/308-8882.

Sincerely,

/s/

Sammy K. Ng, Acting Director
Policy and Standards Division
Office of Underground Storage Tanks

cc: Lee R. Tyner

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

January 11, 1991

OFFICE OF
GENERAL COUNSEL

Craig F. Stanovich, CPCU
Vice President
BRALEY AND WELLINGTON INSURANCE AGENCY CORP.
44 Park Avenue
Worcester, MA 01609

Dear Mr. Stanovich:

I am responding to your November 27, 1990, letter to Mr. Sammy Ng regarding the financial responsibility requirements for underground storage tanks (USTs).

EPA's financial responsibility requirements for USTs are set forth at 40 CFR Part 280, subpart H (1990). Coverage for corrective action is required by 40 C.F.R. 280.93. If the owner or operator chooses insurance as the means of demonstrating financial responsibility, the policy must comply with 40 C.F.R. 280.97. Note that 40 C.F.R. 280.93(d) allows an owner or operator to use separate mechanisms or separate combinations of mechanisms to demonstrate the different categories for which assurances of financial responsibility are required.

Your letter asked whether coverage for on-site corrective action is required. As explained in the preamble to the final financial regulation, it is. 53 Fed Reg. 43322, 43348 (Oct. 26. 1988). Thus coverage limited to "the existence of imminent and substantial danger to third parties resulting from a pollution condition" would not be sufficient to provide the required corrective action coverage.

You inquired further about the meaning of the phrase "subject to the terms, conditions, limits, and limitations of liability and exclusions of the policy." The phrase quoted above is not exactly the phrase required by the regulations. In a rule published on November 9, 1989, EPA added to the required language of both the endorsement and the certificate of insurance for insurance intended to provide evidence of financial responsibility the phrase "in accordance with and subject to the limits of liability, exclusions, conditions, and other terms of the policy." The preamble explained that this was added "to clarify that these instruments do not narrow or broaden the scope of coverage provided in the policy itself." 54 Fed. Reg. 47081 (November 9, 1989).

If you have further questions, I can be reached at 202/245-3710.

Sincerely,

/s/

Lee R. Tyner
Attorney
Solid Waste & Emergency
Response Division (LE-132S)

cc: Sammy Ng

March 29, 1991

NOTE TO: Wayne Naylor

At the same time that we were considering your request to define "corrective action," we received a request from Region 8 that required us to tackle that issue (in addition to some others). The issue of corrective action, particularly as it relates to coverage that State funds must provide (your issue in West Virginia, I believe) is discussed in the attached response to Region 8. I hope it satisfies your needs. If not, or if you want to discuss it further, please give me a call (FTS 382-7903)

/s/

Sammy Ng

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 29, 1991

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Review of Wyoming Definition of "Release"

FROM: Sammy Ng, chief
Regulatory Analysis Branch

TO: Debbie Ehlert
UST Program Manager, Region 8

Maureen Doughtie of your staff recently sent us a copy of Wyoming's UST statute. she requested our opinion on the definition of "release" as it appears in Wyoming's statute, particularly as it applies to State financial assurance fund coverage and acceptability as a compliance mechanism under the Federal financial responsibility (FR) regulations. We have reviewed the definition in this Context, as well as its implications for State Program Approval stringency.

The Wyoming statue defines the term "release" as:

> "...any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into groundwater, surface water or subsurface soils in amounts exceeding twenty-five (25 gallons" (emphasis added).

The question is whether Wyoming can exclude releases under 25 qallons from its regulatory program and still qualify for State Program Approval or approval of its State fund as a FR compliance mechanism. We believe that their definition may be acceptable in the context of State fund approval, but not for State Program Approval. The rationale for each of these opinions is discussed below.

State Program Approval

The Federal definition of release (Part 280.12) is identical to Wyoming's except for the 25 gallon exclusion in Wyoming's statute. Although we established reporting triggers at the 25 gallon level for aboveground releases, Subpart E of EPA's UST regulations requires that spills or overfills of any size must be

immediately contained and cleaned up, and, if not then it must be reported to the implementing agency. Thus, while reporting is not required for small spills (< 25 gallons), UST owners and operators who experience them are regulated under Subtitle I and must take appropriate action under Subpart E -- Release Reporting, investigation and confirmation.

The State Program Approval regulations and objectives do not appear to provide any relief in this case. Part 281.34 says:

> "In order to be considered no less stringent ... the state must have requirements that ensure all owners and operators conform with following:
> (a) promptly investigate all suspected releases;
> (b) Ensure that all owners and operators contain and clean up unreported spills and overfills ..."

Based on this discussion, we believe that Wyoming's definition of release would be less stringent than the Federal program allows.

State Fund Approval for FR

EPA's financial responsibility rules require UST owners or operators to demonstrate FR for taking corrective action and for third party liability. We allow States to submit their assurance funds to EPA for approval as full or partial coverage mechanisms to satisfy this requirement. The issue we face with Wyoming's definition of release is whether the State fund has to cover releases less than 25 gallons in order to be approved. Specifically, the question to be answered is whether EPA's requirement to respond to releases less than 25 gallons is defined as "corrective action."

In order to provide "corrective action" coverage, a State fund needs to cover, at a minimum, those activities required on the part of owners or operators under Subpart F of EPA'S UST rules. Although EPA has never formally defined the term "corrective action" in our rules, Subpart F -- Release Response and Corrective Action for UST Systems Containing Petroleum or Hazardous Substances -- is generally viewed as the "corrective action" section of the rules. This viewpoint is supported by other parts of the technical standards and preamble, which repeatedly make reference to "... begin corrective action in accordance with Subpart F." Thus, it can be argued that until an owner is forced into the subpart F section of the rules, he is not performing corrective action, per se.

Since the requirement to respond immediately to releases less than 25 gallons is found in Subpart E of the UST rules --Release

Reporting, Investigation, and Confirmation -- it can be reasonably argued that the state fund is not obligated to cover these activities, because they are not required to be performed under Subpart F. Thus, we believe that Wyoming's fund does not have to cover releases less than 25 gallons in order to be approved as an FR compliance mechanism (provided that it meets all other State fund review criteria).

Given the nature of the issue you presented and our belief that other Regions may be interested in the response, as it relates both to State Program Approval and State fund approval, we are sending copies to them for their information. If you have any questions regarding the above, or wish to discuss these issues further, please call John Heffelfinger at FTS 382-2199.

cc: UST Program Managers, Regions 1-7, 9-10
Dave Ziegele
Mike Williams
OUST Desk Officers
Jerry Parker

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

April 6, 1989

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Christopher J. Franki
Insurance Buyers' Council, Inc
22 West Road
Baltimore, Maryland 21204

Dear Mr. Franki:

This is in response to your letter dated March 15, 1989 in which you ask for clarification of a number of issues relating to the financial responsibility requirements for petroleum underground storage tanks.

- EPA defines tangible net worth as the tangible assets that remain after deducting liabilities; such assets do not include intangibles such as goodwill and rights to patents or royalties.

- " The standard definition of working capital is current assets minis current liabilities.

- Unused borrowing capacity is not considered part of the standard definition of working capital.

The non-profit community service corporation that your firm represents is considered a non-marketer. If the corporation has more that $20 million in tangible net worth then it should have complied with the financial responsibility regulation on January 24, 1989; if it has less than $20 million in tangible net worth it must comply by October 26, 1990.

The self-assurance test for local governments that Stephanie Bergman of my staff mentioned may not apply to non-profit organizations; it will be directed more towards general purpose governments (cities, counties, towns) and special purpose governments (school districts, sewer districts, power authorities, transit authorities). If the non-profit organization can meet the criteria in a self-assurance test, then it can use the mechanism to comply with the financial responsibility requirements. otherwise, there are additional mechanisms like insurance and state funds that the organization can use to comply with the requirements by October 26, 1990.

I hope this information has been helpful. If you have any additional questions, please give me a call at 202-382-7903 or Stephanie Bergman 202-382-4614.

Sincerely,

/s/

Sammy Ng , Chief
Regulatory Analysis Branch
Office of Underground Storage Tanks

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

April 6, 1989

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. Dean B. Ziegel
Rivkin, Radler, Dunne & Bayh
EAB Plaza
Uniondale, New York 11556

Dear Mr, Ziegel:

This letter is in response to your letter dated December 28, 1988 in which you ask for confirmation of a number of issues related to the financial responsibility requirements for petroleum underground storage tanks (USTs).

- A firm with more than $20 million in tangible net worth that does not report to the Securities and Exchange Commission, Dun & Bradstreet, Energy Information Administration or the Rural Electrification Administration must comply with the financial responsibility requirements for petroleum USTs on October 26. 1990.

- A firm "reports" to Dun & Bradstreet if:

  S the firm provides to Dun & Bradstreet information about the firms net worth or information that can be used to determine the firm's net worth; or

  S Dun & Bradstreet publishes a rating for the firm.

If you have any additional questions please call me at 202-382-7903.

Sincerely,

/s/

Sammy K. Ng, Chief
Regulatory Analysis Branch
Office of Underground Storage Tanks

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

March 28, 1991

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Release on Monies from Fully Funded Trust that is Funded with Marketable Securities

FROM: Sammy K. Ng, Chief /s/
Regulatory Analysis Branch
Office of Underground Storage Tanks

TO: Chet McLaughlin, Chief
State Program Section
Underground Storage Tank Program
EPA Region VII

This is in response to your question concerning the amount of money that is appropriate to release from a fully funded trust fund that is partially funded with marketable securities. The Federal financial responsibility regulations (Section 280.102) state that, "If the value of the trust fund is greater than the required amount of coverage, the owner or operator may submit a written request to the Director of the implementing agency for release of the excess."

Upon receipt of such a request, we suggest that in the case of a fully funded trust fund that is funded in full or in part by marketable securities, those securities should be valued at the lower of cost or market value until such time as the loss or gain is realized.

We appreciate Alma Moreno's input on this decision. If you have any additional questions or require additional clarification, please phone me at FTS 382-7903. Given the general nature of this question, I am sending a copy of this memorandum to all of the other Regional Program Managers.

cc: Dave Ziegele
Regional Program Managers I - X
Desk Officers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

726 MINNESOTA AVENUE

KANSAS CITY, KANSAS 66101

April 1, 1991

MEMORANDUM

SUBJECT: Fisca Oil Co., Inc.

FROM: Alma Moreno, Environmental Engineer
Underground Storage Tanks (UST) Program, Region VII

TO: UST Regional Program Managers, Regions II - VI

Fisca oil Co., Inc. requested that the Region VII UST Program release monies in excess of $2 million held in a fully funded trust fund. At that time, we contacted each affected Region to verify that a similar request had not been submitted to each, and that Fisca Oil Co., Inc. was in compliance within that Region. Region VII coordinated this request because Fisca Oil Co., Inc. is headquartered in Region VII. Since the trust was partially funded with marketable securities, valuation became an issue.

After discussions with and the approval by the Office of Underground Storage Tanks (OUST) the criteria used to value the marketable securities was "the lower of cost or market value." Based on this criteria and the February 28, 1991 trust accounting, the Regional Administrator authorized the trustee, Commercial National Bank of Kansas City, Kansas, to refund $252,774.45 to the Grantor.

Attached is a copy of the trust agreement and certificate of financial responsibility which were reviewed and found to comply with the financial responsibility regulations. Also included is a copy of relevant correspondence and the letter sent to the trustee by the Regional Administrator and the February 28, 1991 trust accounting.

Attachments

cc: UST Regional Program Managers, Regions I, VIII, IX, X - with attachments
Sammy Ng, OUST - with attachments
Lela Hagen, OUST - with attachments