Financial Responsibility

AN INSPECTOR’S RESPONSIBILITY
Regulatory Requirements

FINANCIAL RESPONSIBILITY IN DELAWARE
Del. C. Ch. 74 Part F

✓ Owners and Operators shall certify that they are in compliance with the financial responsibility requirements outlined in Part F of the Delaware Regulations Governing Underground Storage Tank Systems *prior* to any Regulated Substance being placed in the UST System.

✓ Failure to comply with the financial responsibility requirements of these regulations warrant *immediate* delivery and dispensing prohibitions for Owners and Operators.
What does FR cover?

Costs associated with:

- Corrective Action (excluding legal defense and administrative costs)
- Compensating third parties for
  - Bodily injury
  - Property damage
caused by an accidental release arising from the operation of petroleum USTs
Required Financial Minimum Coverages

- Per Occurrence ($500K< 10K gal/month or $1M>10K gal/month): covers costs each time a UST System may leak

- Annual Aggregate (1-100 USTs/$1M;100+ USTs/$2M): maximum amount of coverage annually regardless of number of occurrences
Acceptable Financial Responsibility Mechanisms

In Delaware...
- Guarantee
- Surety Bonds
- Self-Insurance
- Standby Trust Fund
- Letter of Credit
- Trust Fund

Pollution Liability Insurance

Confirmed Release/Suspected Release

- 20%
- 80%
The Players

✓ **Insurance company/Insurance Carrier/Insurer** – The Company that writes the policy, accepts the premium payments, pays the claims.

✓ **Agent/Broker/Producer** – Middleman between the insured and the insurance company. The producer finds you a policy from an insurance company licensed in your state.

✓ **Surplus Lines Producer** – A special license allows this producer to procure insurance from a company not licensed in the state. Surplus lines have more flexibility to accept risk and design policies.

* Tank policies are often Surplus Lines.
During the Inspection

A STEP BY STEP APPROACH
Insurance Verification: The Delaware Way

- The odd relationship of Owner and Operator in Delaware

- If the Owner or Operator of an UST System are separate persons, only one person is required to demonstrate financial responsibility; however, both parties are liable in the event of non-compliance.

- Owners/Operators shall:
  - Maintain evidence of all current and historical financial assurance mechanisms
The Inspector’s Responsibility during Time of Inspection (currently)

The Inspector must review:
- Form D
  Certificate of Insurance (An “Accord” Statement is not acceptable)
- Form R
  Underground Storage Tank Schedule
Insure that Form D...

Form D - Certificate of Insurance

Worded exactly as found in Part F, Del. C. Ch. 74:

✓ Includes Amount and Scope of Coverage
✓ Includes required 1st first dollar language
✓ Includes required Cancellation Notification (60 Days)
✓ Includes required Extended Reporting Period (6 months after non-renewal/cancellation)
Insure that Form R...

Form R – UST Schedule

- Includes DNREC Facility ID Number
- Includes Type of FR Mechanism
- Includes Owner/Operator info (name/address)
- Includes Facility info/location of UST System
- Includes Tanks specifically covered by FR Mechanism
  - Tank ID per registration form submitted
  - Tank Capacity
  - Regulated Substance Stored
During Inspection

• Inspector Requests proof of Financial Responsibility through documentation
  • Response – I don’t have proof here
  • Send Request for Information
• If Owner/Operator indicate they do not have FR
  • Employ an immediate delivery and dispensing prohibition – red tag it! (future regulations)
New UST Regulations on Horizon

- Submit FR documents *annually* (currently reviewed every three years)
  - Insurance Policy
  - Certificate of Insurance (Form D)
  - Tank Schedule (Form R)
- Cause for immediate Delivery and Dispensing prohibition (no FR)
- Termination/Non-renewal notification to Department from insured and insurer
Challenges for Verification

- Educate Owners and Operators to ensure proper paper work at the facility
- Our own Compliance Inspectors
- New Checklists to assist with insurance verification
- An identified staff person to review all policies for compliance annually
Interesting Situations

- owner and operator leave the site
- operator cancelled insurance before tanks removed because of cost of insurance
INSURANCE POLICY – what’s in that sausage?

- **Declarations Page**: Coverage Summary
  (Insured name, Address, Locations, Limits, Deductibles, Term, etc.)

- **Insuring Agreement**: What is intended to be covered

- **Exclusions**: What is not to be covered

- **Limits of Insurance**: How incident limits apply (relative to the aggregate, the deductible, defense costs, etc.)

- **Policy Conditions**: Insured’s duties in event of a claim, cancellation, other insurance, state funds, warranties

- **Extended Reporting Period**: Time period during which the insured can report a release that occurred during the time the policy was in effect, but after the policy end date
The Insurance Checklist

- Verify Carrier/Surplus Lines with state insurance department
- Verify tank schedule with insurance matches tanks registered with the state
- Verify per-occurrence and annual aggregate amounts
- Verify 1st dollar coverage language
- Verify Cancellation language “effective only upon written notice after 60 day expiration”
- Verify policy includes Extended Reporting Period (6 months)
- Ensure that there are no exclusions that do not comply with Del. C. Ch. 74
Unacceptable Exclusions

Voluntary Tank Removal or Voluntary Site Investigation Exclusions

Memorandum from EPA-OUST, dated 8/3/2018

“If a tank removal or tank site investigation reveals contamination from an UST release, the UST insurance policy must not exclude insurance coverage for the cleanup of the release or any third-party damages that may result.”
Examples of Exclusion Language:

✓ “any claim arising out of, caused by, resulting from, contributed to, or in any way related to any pollution incident discovered during any voluntary removal or any UST system”

✓ “This policy does not apply to any claim arising out of or discovered as a result of any removal or replacement of any UST system”

✓ “any claim arising out of release arising from, discovered, or exacerbated as a result of a voluntary investigation of environmental conditions or any storage tank system”
Self Insured Retention

✓ Beware if you see a Self-insured Retention in an insurance policy
✓ A self-insured retention is the dollar amount an owner must pay before the insurance policy starts paying.
✓ Self-insured retentions do not comply with the 1st dollar requirement.
✓ Exception: A self-insured retention is acceptable if it is applied only to claims for releases prior to the inception date of the policy (from the inception date back to the retroactive date).

X <<<<<<<Acceptable >>>>>>>X <<< Not Acceptable>>>>>
X----------------------------------------------------------X---------------------------------------------
Retro Date Inception Date
When is an Owner/Operator no longer required to maintain FR?

When a Tank is removed, closed in place or rendered empty (future regulation)
Emerging Issues

- Aging USTs
  - Higher Premiums
  - Non-Renewals
- With policy review – new issues may result
- Self-Insured Retentions
- Policies for Aging Tanks that have been upgraded with new “tank in a tank” technologies
Resources

EPA’s Reference Manual that reviews all FR Mechanisms

Assoc. of State and Territorial Solid Waste Management Officials Guide to Tank Insurance

LUSTline article focused on how insurance works
Thank you!
Do you have any questions?

David.Gilden@Delaware.gov
Eileen.Butler@Delaware.gov
Financial Responsibility
Contents

• Background
• HO Reimbursement Program
• Documentation Review
• Outreach
• Numbers
• Enforcement Actions
• Policy Review

- **.01 Incorporation by Reference.**

  A. The Department incorporates by reference the provisions contained in 40 CFR §§280.90—280.116, as amended through February 18, 1993, with the exceptions contained in §B of this regulation.
  
  B. Exceptions.

  1. "Director of the Implementing Agency" or "Director of the EPA" means the Secretary of the Environment.

  2. "EPA" or "Environmental Protection Agency" means the State of Maryland.

  3. The requirements for "owner or operator" as contained in 40 CFR §§280.90—280.116, are to be assumed solely by the "owner", as defined in 40 CFR §280.12 and COMAR 26.10.02.04.

Required to have until UST is properly closed by removal or approved abandonment in place.
Financial Responsibility Submittal

• Third Party Inspection Program
  – Submitted with the Inspection
    • Larger multi facility owners submit annually

• Voluntary
  – Some Insurance companies and owner
  – Other than Insurance
    • Local Government
    • Self Insurance
    • Letter of Credit
    • Guarantee
    • Surety Bond
Before

• Our FR expert mostly reviewed FR that was not Insurance for approval.
  – Filed for future reference.
  – Some facilities selected for technical review of insurance documentation.

• Certification Section reviewed the Insurance document.
  – Always confirmed financial responsibility.
  – Did not look for required wording per 40CFR 280.97(b).
  – Would accept pages that contained signature, owner name, facility address, number of tanks, policy number, monetary coverage amount, policy period.
Transition

• FR Expert retires.

• I am the new FR “Expert”.

• Better Understanding of 40CFR 280 including the required wording for all types of financial responsibility.
Now- Documentation Review

- All financial responsibility that is not insurance is reviewed by me for approval.

- Compliance field staff and certification section trained to review endorsements and certificate of insurances worded as required by 40CFR.
  - At times asked to confirm.

- All FR is reviewed to confirm meets all 40CFR 280 requirements including the wording.
Heating Oil Reimbursement Program

• Reimburse owners of heating oil tanks (AST or UST) for eligible spill clean up.

• Max $20K, $500 deductible.

• Owner must apply for reimbursement within 6 months after completion.
  – Invoices/proof of payment.
  – Significant wait time of several years.
• Insurance Company on Maryland Insurance Administration Search.

• Wording required by specific 40 CFR 280 (all FR).

• The owner name registered with us matches the name of the insured or listed on an additional insured endorsement.

• Facility address matches what we have registered.

• Tank system information matches what we have registered.
• EPA Dollars and Sense
Tools

- MDE Financial Responsibility Check List
Example
## Tank Schedule

<table>
<thead>
<tr>
<th>Tank#</th>
<th>Insured Site</th>
<th>City</th>
<th>State</th>
<th>Zip</th>
<th>US For</th>
<th>Install Date</th>
<th>Capacity (gallons)</th>
<th>Tank DW or SW*</th>
<th>Lined Interior Date</th>
<th>Retro Date</th>
<th>Deductible</th>
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<tbody>
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<td>7777</td>
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<td>7777</td>
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<td>Sw</td>
<td>5/03/16</td>
<td>5/03/16</td>
<td>SS</td>
</tr>
</tbody>
</table>

*Single Wall (SW) Double Wall (DW)
Outreach

• Certified Inspectors receive checklist and training on what to look for every 2 years to become/remain certified.

• Example FR and website provided to owners/insurance companies that do not meet the wording or are unsure what to submit.
  – https://www.ecfr.gov/cgi-bin/text-idx?SID=069edc18e4bd5036603f879f55c9dcc1&pitd=20160601&node=se40.27.280_197&rgn=div8

• New Regulations (still pending)
  – Require notification if change in ownership/name of the insured, policy, or cancellation.
  – Required to provide a detailed tank schedule.
Office VS Field

**Office**
- Reviews all forms of acceptable FR in the State of Maryland.

**Field**
- Reviews the financial responsibility documents provided for insurance.
  - Trained on what to look for to approve/“pass” financial responsibility.
  - May submit to me if unsure.
- Submits all other financial responsibility to me for review.
Types of Financial Responsibility

- Self Insured
- Third Party Insurance
- Letter of Credit/Stand By Trust Fund
- Surety Bond/Stand By Trust Fund
- Guarantee/Stand By Trust Fund
- Local Government Bond Rating
- Local Government Financial Test
- Not Listed

Numbers

- 79%
- 9%
- 8%
- 4%
- 0%
- 0%
- 0%
- 0%
Compliance

- Total Federally Regulated Facilities - 2745
- Fail - 198
- Pass - 2522
- Not Listed - 25
Common Issues

• Wording does not match as required.
  – Old version of 40CFR 280.97

• Registered owner name does not match.

• Tank system information in the schedule does not match.

• Does not include all facilities or tanks.

• Tanks installed or added.

• Age of tank.
## Enforcement Action

<table>
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<th>Not SOC</th>
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</thead>
<tbody>
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<td>– Notice of Violation</td>
<td>– Notice of Non-Compliance</td>
</tr>
<tr>
<td>– Red Tag Delivery Ban</td>
<td>– Notice of Violation</td>
</tr>
<tr>
<td>– Referral to Ags</td>
<td>– Red Tag Delivery Ban</td>
</tr>
<tr>
<td></td>
<td>– Referral to Ags</td>
</tr>
</tbody>
</table>
Policy Review

• EPA’s List of Known Insurance Providers for Underground Storage Tank Owners and Operators.

• Insurance Companies, Agents and Brokers

• MD or United States

• Submit complete policy for review.

MEMORANDUM

SUBJECT: Underground Storage Tank Insurance Policies – Voluntary Exclusions and Self-Insured Retentions

FROM: Tony Rain, Director
Release Prevention Division, Office of Underground Storage Tanks

TO: UST Industry Stakeholders
State UST, IUST, and Fund Program Contacts
Tribal UST Contacts

I am writing to provide you with important information about underground storage tank (UST) insurance policies, specifically whether voluntary exclusions and self-insured retentions meet the financial responsibility (FR) requirements of 40 CFR 280. I request that you share this information with UST owners and operators (referred to as owners) in your states, territories, and Indian Country.

As you know, insurance provides a critical role in providing financial responsibility for underground storage tank owners and operators in many states and Indian Country. To ensure owners are buying and retaining appropriate coverage for their UST systems, it is important that they understand and be attentive to the underlying language, terms, and conditions of their UST insurance policies. Several people asked EPA to evaluate certain provisions in UST insurance policies. Below I discuss whether voluntary exclusions and self-insured retentions meet the financial responsibility requirements of 40 CFR 280, talk about certificates of insurance, and provide additional resources about insurance.

Voluntary Tank Removal And Voluntary Tank Site Investigation Exclusions In UST Insurance Policies

Insurance policies may include language that has certain conditions or situations where the insurance company is not required to pay a claim. These circumstances are listed as exclusions. Some exclusions, such as non-payment for claims to pay a state fine for non-compliance meet
April 26, 2019

RE: UNDERGROUND STORAGE TANK INSURANCE POLICIES - VOLUNTARY EXCLUSIONS AND SELF-INSURED RETentions

Dear [Name or Address],

On Aug. 3, 2018, the United States Environmental Protection Agency (EPA) issued the attached memorandum in reference to underground storage tank (UST) insurance policies with voluntary exclusions and self-insured retentions. The Maryland Department of the Environment (MDE) requires that you immediately review the memorandum and your UST insurance policies to determine if they meet all financial responsibility (FR) requirements of Code of Maryland Regulations (COMAR) 26.10.11.01 incorporated by reference 40 CFR 280, Subpart H.

The EPA concluded that exclusions for payments for voluntary tank removals and voluntary tank site investigations do not meet FR requirements of 40 CFR 280. If the insurance policy includes an exclusion of insurance coverage for cleanup of a release or any third-party damages from a tank removal or tank site investigation, it would not meet the federal financial responsibility requirements of 40 CFR 280, Subpart H.

The EPA also determined that an insurance policy with a self-insured retention may be only a partial financial responsibility mechanism if it is applied to claims made after the inception date. The owner would have to use a combination of mechanisms to meet the full financial responsibility requirements.

WORK TO BE PERFORMED

The Maryland Department of the Environment requires that you submit your complete UST policy for review no later than May 31, 2019. If the policy contains an exclusion that does not meet the financial responsibility requirements of 40 CFR 280, Subpart H, the MDE will not accept the policy as a valid policy to provide UST insurance coverage for facilities in the state of Maryland. To continue to provide UST insurance in the state of Maryland, the policy must be revised to ensure it meets all financial responsibility requirements.
Findings

• Most Returned as Undeliverable

• No Business in Maryland

• Agent or Broker
  – Still need to ensure insurance companies are compliant

• Ones returned require reporting and not exemption

• Most meet regulation (8 out of 9 reviewed)
Next Steps

• Create a list of approved insurance companies.

• Send letters to any insurance company that did not already get them.

• Work with the insurance companies that do not meet requirements to revise and review for approval.
Questions?

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Financial Responsibility in Georgia’s Underground Storage Tank Program

July 2019
3rd largest tank population with 29,250 active tanks and roughly 10,000 facilities
The GUST Fund is responsible for approximately 60% of all open releases.
INTERESTING FACTS

- Small Program: Five managers, 40 FT staff
- Solvent, voluntary fund
- In addition to the Fund, the Program accepts all FR mechanisms outlined in 40 CFR, Subpart H
- Fund has $10,000 deductible and provides $1,000,000 coverage for corrective action and 3rd party liability (bodily harm and property damage)
INSTRUMENT DISTRIBUTION (FACILITIES)

GUST Fund, 7367, 74%

Insurance, 1267, 13%

Self-Insured, 797, 8%

Other, 500, 5%
SO, HOW DO WE DO IT?
LET’S JUST SAY WE HAVE WORK TO DO
CHALLENGES

• Limited resources
• The size of our universe
• The $10,000 deductible “headache”
• Insurance policies don’t meet minimum requirements or are non-existent
• Enforcement hurdles
• In short, a high percentage of facilities don’t have adequate financial responsibility*
BUT, WE ARE MOVING IN THE RIGHT DIRECTION
SUCCESES SO FAR

• Dedication of resources and establishment of a “financial responsibility” team
• Standardized, easy to understand forms for all instruments
• Inspector training guide
• Outreach efforts underway
MOVING FORWARD...ADMINISTRATOR’S ROLE

• Development of forms, SOPs, checklists
• Training assistance
• Tracking and storage
• Reviewer of more complex mechanisms
• Coordinates outreach and review of voluntary submissions
• Point of contact for enforcement
MOVING FORWARD...INSPECTOR’S ROLE

- Compliance assistance
- Verifies instrument with annual tank registration
- Reviews critical elements of existing mechanisms
- Refers issues to administrator
- Recommends enforcement
INSPECTOR’S CHECKLIST

- Facility Address and ID
- Owner/operator same on ALL documents
- All tanks listed and match database
- Dates of Coverage
- Amount of Coverage
- Scope of Coverage
- Additional Documents
OUTREACH EFFORTS

1. Inspectors provide compliance assistance
2. Topic in upcoming stakeholder meetings
3. Participation in expos and symposiums
4. Informational pamphlets and letters to owners and financial institutions

In summary: Gentle rollout with eventual deadline and enforcement to follow.
Leverage limited resources

1. Create simple forms to standardize review
2. Consider “borrowing” from other states
3. Consider separating FR enforcement from routine compliance enforcement
4. Make it easy to re-enter Fund

Look for Rule flexibility*
• Deduct $10,000 from first payment
• Get deductible through cost recovery later
• Fund can be used for emergencies...even if RP is not a Fund participant
QUESTIONS?