



Courtesy of the Virginia Department of Environmental Quality

The Impact of Heating Oil Tanks on Residential Real Estate Transactions

by Mary-Ellen Alexander Kendall

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Owning a home has always been a major part of the American dream. For many people, investing in residential real estate by purchasing a home represents the single largest monetary transaction made in their lifetime. While the average buyer may understand that “Caveat Emptor” is the rule in Virginia for real estate transactions, most buyers do not understand how a leaking heating oil tank can turn the American dream into a nightmare.

Some recent statistics are useful in highlighting the magnitude of the problem with heating oil and the likelihood that one of your clients will purchase a home with a heating oil tank. According to a recent report from the American Petroleum Institute, there are ten million homes with underground or above ground storage tanks in the United States that used more than eight billion gallons of heating oil in 1999.¹ The Virginia Department of Environmental Quality (DEQ) estimates that approximately 400,000 of these tanks are located in Virginia.² Because heating oil tanks are not regulated by either the federal or state government, the exact number of tanks is unknown. It is also impossible to detect how many of these tanks are leaking because there are no statutes or regulations requiring that heating oil be tanks be tested periodically for leaks.

Historical Background

In 1984, Congress passed Subtitle I of the Resource Conservation and Recovery Act (RCRA).³ Subtitle I governs

the installation, operation, cleanup, and closure of underground storage tanks (USTs). The Environmental Protection Agency (EPA) promulgated regulations that covered USTs from birth to death (installation to closure). The goal of the UST regulations was to reduce the number of releases of petroleum into the environment. The regulations applied to tank owners who pumped a significant amount of petroleum through USTs. Heating oil USTs were not included in the universe of tanks covered by these regulations⁴ due to the small amount of product that flowed through the tanks, the cost to upgrade these tanks to the new regulatory standards, and the tremendous number of these tanks in use in the United States.

In 1988, the Commonwealth of Virginia passed Articles 9 and 10 of the State Water Control Law (SWCL).⁵ These articles authorized the creation of a regulatory program for USTs. Article 11, which governs above ground storage tank (AST) facilities and pipelines, was added to the SWCL in 1992.⁶

The DEQ administers the UST and AST regulatory programs and the Virginia Petroleum Storage Tank Fund. Heating Oil USTs are exempt from both the UST Regulations (UST Financial Responsibility Requirements Regulation⁷ and the UST Technical Standards and Corrective Action Requirements Regulation)⁸, and the AST and Facility Regulation.⁹ Although, heating oil USTs and ASTs are unregulated, there are certain requirements imposed under the SWCL of which heating oil tank owners should be aware.

Types of Tanks

To understand where heating oil tanks fit into the federal and state statutory and regulatory structure, it is necessary to review the definitions of the different types of tanks covered by the UST and AST Programs:

A. USTs

1. **Regulated USTs**—any one or a combination of tanks, including connecting pipes, used to contain an accumulation of regulated substances, the volume of which, including the volume of the underground connecting pipes, is 10% or more beneath the surface of the ground.¹⁰ The UST Technical and Financial Responsibility Requirements Regulations govern owners and operators of these USTs.
2. **Exempt USTs**—USTs, which are exempt from the statutory and regulatory definitions of a UST:¹¹
 - a. 1,100 gallon or less, noncommercial farm or residential gasoline UST;
 - b. any UST containing heating oil that is consumed on the premises where stored;
 - c. septic tanks;
 - d. pipeline facilities;
 - e. surface impoundments, pits, ponds and lagoons;
 - f. storm water or waste water collection systems;
 - g. flow-through process tanks;
 - h. liquid traps or associated gathering lines for oil/gas production facilities; and
 - i. storage tanks situated in a basement upon or above the surface of the floor.
3. **Excluded USTs**—USTs that are not regulated under either the Technical Regulation¹² or the Financial Responsibility Regulation:¹³
 - a. any UST system containing hazardous waste or a mixture of regulated substances and hazardous waste;
 - b. a waste water treatment facility regulated under the Clean Water Act;
 - c. equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks;
 - d. 110 gallon or less UST system;
 - e. UST system with a de minimis concentration of regulated substances; and
 - f. emergency spill or overfill containment unit, which is regularly emptied.
4. **Deferred USTs**—USTs that are not regulated under Parts II, III, IV, V, and VII of The UST Technical Regulation (installation/notification, operating requirements, release detection, release reporting/confirmation, and closure)¹⁴ or the Financial Responsibility Regulation:¹⁵
 - a. waste water treatment tanks systems;
 - b. USTs with radioactive materials;
 - c. emergency generator UST at nuclear power facility;

- d. airport hydrant fuel distribution systems; and
- e. UST systems with field constructed tanks.

5. **Partially Deferred USTs**—USTs that store fuel for emergency power generator use. These USTs are not regulated under Part IV of the UST Technical Regulation.¹⁶

B. ASTs

1. **Regulated AST Facility**—AST facilities having a maximum storage capacity of 25,000 gallons or more of oil. Storage capacity is defined to include the total storage capacity of all ASTs in Virginia owned by a single operator,¹⁷ regardless of whether or not the ASTs actually contain any product, except for those ASTs, which have been properly closed in accordance with the Uniform Statewide Building Code (SWBC).¹⁸
2. **Exempt AST Facility**—AST facilities having a maximum storage capacity of less than 25,000 gallons of oil.
3. **Heating oil AST**—any AST with a storage capacity of 5,000 gallons or less used to store heating oil which is consumed on the premises where stored.¹⁹

Heating Oil Tanks

Heating oil tanks that are exempt from DEQ regulations can be any size, installed either above ground or underground, and used for heating both residential and commercial buildings. This term also includes tanks that contain oil that is used for other types of heating activities, such as supplying boilers to steam turkeys or providing fuel to fire a crematorium oven. To qualify as an exempt heating oil tank, the fuel in the tank must be consumed on the premises where the UST/AST is located. If the tank is used to store heating oil for sale to the public, it does not receive the benefit of the regulatory exemption and it is subject to UST or AST regulatory requirements.

Regulated USTs are subject to the SWBC in that it incorporates the UST Technical Regulation by reference.²⁰ It should also be noted that heating oil USTs and ASTs are subject to regulation under the SWBC.²¹ Tanks are considered to be structures that may only be installed or removed pursuant to a building permit issued by the local building official.

Liability for Heating Oil Tanks

Owners and/or operators may be subject to liability for the cleanup of UST/AST releases under two different sections of the State Water Control Law (SWCL). Regulated UST owners and operators are governed by Virginia Code Section 62.1-44.34:9.8 that permits DEQ (acting for the State Water Control Board) to require cleanups of petroleum releases from regulated USTs. Under Article 9 of the SWCL, the responsible person for a release from a regulated UST/AST is defined as the tank owner

or operator on the date the release is reported to DEQ.²² Operators of regulated ASTs are liable for discharges of oil from ASTs and pipelines under Virginia Code Section 62.1-44.34:18. Because releases of heating oil into the environment are illegal discharges of oil under Article 11, liability for heating oil tanks is also governed under Section 62.1-44.32:18.

There are no statutory or regulatory registration requirements for heating oil tanks.

Regulated UST and AST owners must file signed registration forms with DEQ within 30 days of installation of a tank.²³ DEQ uses these forms to determine the name of the tank owner or operator who will be named the responsible person for a tank, and who is required to cleanup any release of petroleum or discharge of oil. Registered tanks are often transferred to a new owner by a bill of sale independent from the sale of the real estate on which the tanks are located. Because registered, regulated UST and AST owners and operators are often petroleum companies with no interest in the real estate, a landowner is not automatically liable for a release from a regulated tank.

Responsible person determinations for heating oil tanks require a different analysis. There are no statutory or regulatory registration requirements for heating oil tanks. Ownership of these tanks is governed by common law rules applicable to fixtures that transfer with the real estate. By policy, DEQ considers the owner of the land on which the heating oil UST/AST is located on the date the release is reported to be the responsible person for cleanup of a release. This means that a landowner could be named by DEQ as the responsible person for a release from a heating oil tank, even if he or she had never used the tank. Under the DEQ policy, when a person buys property with a leaking tank on it, that buyer buys any environmental problems associated with that tank that are reported to DEQ after title to the property transfers from the seller. If a release is reported to DEQ prior to closing, the seller remains the responsible person for the cleanup of that release, even if the title to the property transfers before a cleanup is finished.

Avoiding Liability for Heating Oil Tanks

Under the Virginia Residential Property Disclosure Act,²⁴ the seller must disclose the existence of a UST/AST, unless the property is sold "AS IS." Whether or not the tanks are disclosed at the time of the sale, there are two methods for protecting your clients from liability for releases from leaking heating oil USTs/ASTs. First, the buyer can have soil tests performed prior to closing. If these tests indicate that a release occurred, and if the release is reported while the seller still owns the tank, the seller would be liable for any cleanup required by DEQ. If the release was not reported to DEQ until after the closing, the buyer would be the

responsible person who is liable for the cleanup. Whenever the heating oil tank is still in service (i.e., it provides fuel to heat the residence), buyers should conduct soil tests to make sure the existing tank is not currently leaking.

The second way a buyer can be protected from liability for heating oil USTs/ASTs is to require the seller to remove the tank prior to closing. Once the source of the release is removed, neither the current buyer nor any subsequent buyer of the property can be liable for any release that occurred from that tank. This method is appropriate for purchases of real estate on which there are old heating oil tanks that are no longer in use. It should not be used in any situation where the tank is still in service because the buyer would incur the cost of replacing the tank and the heating system with an alternate source of heat, such as natural gas.

Even though tank removal is the best solution to the problem of liability for the buyer, by policy, DEQ gives heating oil tank owners the same two options for proper closure that are available to regulated UST owners under the UST Technical Regulation.²⁵ First, the tank may be removed from the ground. It is also permissible to close it in place by pumping the product out of the tank and filling it with an inert substance such as sand, foam, or cement. DEQ receives many requests from buyers asking that DEQ "force" the seller to remove a tank that is no longer in use. However, there is no statutory or regulatory authority to require heating oil UST/AST owners to remove the tank if the tank owner chooses to close it in place.

Cleanup Requirements

Releases from heating oil tanks must be reported immediately to DEQ.²⁶ Pursuant to Section 62.1-44.34:18.A, the tank owner operator must "contain and cleanup" the release. Once DEQ discovers or is notified that a release has occurred, DEQ provides the heating oil tank owner with written instructions concerning the amount of cleanup required. DEQ requires "risk-based cleanups." This means there is an evaluation of the environmental risk from a release on a case-by-case basis. The level of cleanup will be determined by the risk to nearby receptors, such as a drinking water well, a lake or a stream.

A greater level of cleanup is required if there is a possibility that a drinking water well may be contaminated. At any site where the surrounding residences are hooked up to county/city water, DEQ will probably require a less extensive cleanup due to reduced risk to potential receptors. Until a release is reported and an initial site assessment is performed, it is impossible to say what cleanup requirements will be applicable to a given release from a heating oil UST/AST.

Required cleanup activities may include the removal of contaminated soil, the removal of the leaking tank, soil testing, ground water or surface water testing, and the preparation of reports. Although DEQ provides initial guidance to the responsible person about cleanup requirements after a release is reported, it is important to note that cleanup requirements may change at any time throughout the cleanup. If DEQ receives information that

the contamination levels differ from the initial assessment, a more extensive cleanup may be required.

Because most tank owners are not environmental professionals, it is expected that the responsible person will hire an environmental consultant to oversee the cleanup and prepare reports required by DEQ. DEQ has a reference list of contractors for anyone who needs to purchase environmental cleanup or claim processing services. While DEQ neither licenses nor endorses any of the contractors on the list, DEQ makes the list available to the public on the DEQ Petroleum Programs Web page.²⁷ DEQ encourages responsible persons to contact several of the contractors on the list to obtain estimates before hiring a consultant.

Reimbursement

By law, the Virginia Petroleum Storage Tank Fund receives a six-tenths of one-cent fee on every gallon of heating oil, gasoline, and diesel that is sold in Virginia.²⁸ There has not been an increase in the fee since its inception. The fund may be used to assist regulated UST owners and operators with demonstrating their federal financial responsibility requirement, to pay oil spill emergency response and cleanup costs, and to reimburse tank owners and operators for certain cleanup costs.²⁹

There are several factors to be considered before a tank owner can receive reimbursement for cleanup costs. Each owner must pay the financial responsibility requirement specified by law before reimbursement can be paid from the fund. This amount will be deducted from the total approved costs in a reimbursement claim.

The financial responsibility requirement for heating oil USTs/ASTs is \$500 per occurrence.³⁰ The tank owner is allowed to request reimbursement for reasonable, preapproved and eligible costs above \$500 up to \$1 million for each occurrence. For example, if a homeowner spends \$6,800 to conduct a preapproved cleanup of a leaking tank, the homeowner will be eligible to receive reimbursement of up to \$6,300 for that occurrence, assuming that the work was required by DEQ, and that the costs incurred were below DEQ's Usual and Customary Reimbursement Rate Schedule. Practitioners can find the Rate Schedule, reimbursement forms, and other information in the *Reimbursement Guidance Manual* on the DEQ Petroleum Program's Web page.

The cost to clean up a release from a heating oil tank can range from a low of \$2,500 to \$75,000 or more. Paying for a cleanup could bankrupt a homeowner who is not eligible to receive reimbursement from the fund.

Reimbursement Eligibility

One of the benefits that heating oil tank owners have under the SWCL is eligibility to request reimbursement from the Virginia

Petroleum Storage Tank Fund for the majority of costs associated with a preapproved cleanup. Responsible persons are eligible to request reimbursement from the fund for costs incurred due to a release of petroleum from a UST or a discharge of oil from an AST.³¹ They are required to obtain written approval in advance of all cleanup activities to be performed at the site. (Failure to obtain preapproval may cause some or all of the costs incurred to be ineligible for reimbursement.)

There are two other factors that often affect eligibility for reimbursement of heating oil UST/AST releases, which should be noted by real estate lawyers. No reimbursement can be paid if cleanup costs are reimbursed or reimbursable under an insurance policy, or where the release is caused by the negligence of the operator or its employees, agents or contractors. DEQ has determined that the following situations constitute negligence: knocking over an AST; removing a fill pipe that caused water to leak into and out of the tank; and punching a hole in a line or tank when installing a fence or cable. The tank owner will be determined to be ineligible for reimbursement, but may sue the person who caused the release (e.g., the fence installer) to help cover the cost of cleanup.

Finally, not all costs are eligible for reimbursement. Tank owners should be aware that they are expected to pay some costs. For example, the cost to remove and dispose of a tank is ineligible for reimbursement.

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Claim Status

DEQ began processing and paying reimbursement claims in 1991. As of January 26, 2001, DEQ had processed 11,764 claims and reimbursed claimants for more than \$121 million. While it takes approximately 90–120 days to process a claim, there is a long wait to receive a reimbursement check. DEQ has been in delayed payment for more than one year. This means that the check will not be sent until money becomes available to pay the claim. There is a backlog of approved claims waiting to be paid. At this time, DEQ does not have an estimate of when delayed payment will end, but it is likely that it will continue until the fund fee is increased. There are no fee-increase bills being considered by the 2001 General Assembly. Because a fee increase will require a statutory amendment, the earliest that the funding problem can be resolved is 2002. Announcements concerning the length of the delayed payment period can be found on the DEQ Petroleum Program's Web page.

Practice Tips

There are many helpful documents that can be downloaded from the DEQ Web page and sent to clients to alert them to potential problems. The DEQ has seven regional offices: Richmond, Roanoke, Lynchburg, Abingdon, Woodbridge, Virginia Beach and Harrisonburg. Staff are available to assist practitioners in reviewing cleanup liability and reimbursement

options for heating oil tank releases. Working closely with DEQ may reduce or eliminate the potential for having your client's dream purchase turn into a nightmare. 🔄



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Endnotes

- 1 Steven Crookshank, *Heating Oil in the United States* (2000).
- 2 <http://www.deq.state.va.us>.
- 3 42 U.S.C. §§ 6991–6991i.
- 4 42 U.S.C. § 6991(B).
- 5 Va. Code §§ 62.1-44.34:8–13.
- 6 Va. Code §§ 62.1-44.34:14–23.
- 7 9 VAC 25-590-10.
- 8 9 VAC 25-580-10.
- 9 9 VAC 25-91-30(B)(1).
- 10 9 VAC 25-80-10 and 9 VAC 25-590-10.
- 11 Va. Code § 62.1-44.34:8, 9 VAC 25-580-10, and 9 VAC 25-590-10.
- 12 9 VAC 25-580-20(B).
- 13 9 VAC 25-590-20(D).
- 14 9 VAC 25-580-20(C).
- 15 9 VAC 25-590-20(D).
- 16 9 VAC 25-580-20(D).
- 17 Va. Code § 62.1-44.34:14 and 9 VAC 25-91-20 (B).
- 18 Va. Code § 36-98 et seq.
- 19 Va. Code § 62.1-44.34:14 and 9 VAC 25-91-30(B).
- 20 Va. Code § 36-99.6.A.
- 21 Va. Code § 36-98 et seq. and 9 VAC 5-61-10 et seq.
- 22 Va. Code §§ 62.1-44.34:8 and 10.
- 23 Va. Code §§ 62.1-44.34:9(6) and 19.1.
- 24 Va. Code § 55-517 et seq.
- 25 9 VAC 25-580-320.
- 26 Va. Code § 62.1-44.34:19.A.
- 27 <http://www.deq.state.va.us>.
- 28 Va. Code § 62.1-44.34:13.
- 29 Va. Code § 62.1-44.34:11.A.1.
- 30 Va. Code § 62.1-44.34:11(A)(2)(h).
- 31 Va. Code § 62.1-44.34:11.A.1.