

MINIMIZING POTENTIAL UNDERGROUND
STORAGE TANK LIABILITIES

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I. LIABILITIES ASSOCIATED WITH OWNING AND OPERATING PETROLEUM
UNDERGROUND STORAGE TANKS

Owners and operators of petroleum underground storage tanks face a variety of potential liabilities under federal, state, and common laws in the event of a release of petroleum from its tank or piping, or if there is a spill or tank overfill. An underground storage tank owner or operator's statutory liabilities include: the Environmental Protection Agency's ("EPA") underground storage tank corrective action regulations (40 CFR §280 Subpart E) promulgated under Subtitle I of the Resource Conservation and Recovery Act ("RCRA"); and state Superfund laws such as the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. ch. 21E. These laws impose liability for "response costs" and damage to natural resources without regard to whether the owner or operator is at fault or even had knowledge of the release. In addition, common law actions in nuisance, trespass, and negligence can be brought by government and private parties seeking damages for alleged bodily injuries, diminution of property value, and impairment of use of property on which there has been a release or to which petroleum constituents have migrated.

* The author gratefully acknowledges the assistance of Laura Handley and Don Cordell in preparing this paper.

II. FINANCIAL RESPONSIBILITY REQUIREMENTS

Pursuant to 42 U.S.C. §6991b(d) of RCRA, EPA has promulgated regulations requiring owners and operators of petroleum underground storage tanks ("USTs") to demonstrate that they are financially able to pay for corrective action and compensate third parties who are injured in the event there is a sudden or non-sudden accidental release of petroleum from an operating UST.^{/1/} 53 FR 43332 (10/26/88). The deadline for complying with the regulations is determined by the type of tank owner and number of tanks owned. 40 CFR §§280.91, 280.92(i) and (j). Petroleum marketing firms owning 1,000 or more USTs, or reporting a tangible net worth of \$20 million or more, were required to comply with financial responsibility requirements by January 24, 1989. Petroleum marketing firms owning 100-999 USTs were required to comply by October 26, 1989. Petroleum marketing firms owning 13-99 USTs at more than one facility were initially scheduled for compliance by April 26, 1990, but EPA has extended the compliance date to April 26, 1991. Compliance by all other UST owners was

^{/1/} The statutory definition of "underground storage tank" in RCRA Subtitle I contains a number of exclusions. For example, farm or residential tanks of 1,100 gallons or less storing motor fuel for non-commercial purposes, heating oil tanks for residential use, and septic tanks are exempted. See, RCRA §6991(1). Owners or operators of USTs containing hazardous substances are also exempted from the current financial responsibility requirements. RCRA §6991(2)(A), 40 CFR §280.90(d).

initially scheduled for October 26, 1990, but a proposed rule would extend the date until October 26, 1991. 55 F.R. 27837 (7/6/90). EPA has cited both unforeseen difficulties in obtaining UST insurance and delays in implementing state trust fund programs for the extension.

A. Types and Amount of Financial Assurances Required

[Financial responsibility coverage] must be demonstrated for both corrective action and third-party compensation costs for sudden and non-sudden accidental releases. 53 FR 43338 (10/26/88), and 40 CFR §280.93(d).

1. Per Occurrence Requirements

EPA requires that petroleum marketing firms or facilities handling more than 10,000 gallons per month demonstrate that they can financially bear \$1,000,000 for corrective action and third party liability per occurrence (per leak). All other UST owners must show \$500,000 of financial responsibility per occurrence. RCRA §6991b(d)(5)(A), 40 CFR §280.93(a); see also, 40 CFR §280.92(i) and (j). EPA estimates that these per occurrence levels will be sufficient to cover corrective action and third-party compensation costs arising from 99% of all UST releases. 53 FR 12799 (4/17/87), preamble.

2. Aggregate Requirements

Owners and operators of petroleum USTs are further required to obtain annual aggregate coverage of at least \$1,000,000, if they own or operate 100 or fewer tanks. If the number of tanks

owned or operated exceeds 100, the UST owner or operator must demonstrate at least \$2,000,000 aggregate coverage. 40 CFR §§280.93(b) and (f). These aggregate requirements are based upon EPA's assumption that owners or operators should not incur corrective action and third-party liability costs exceeding the aggregate amount in any given year.

B. Mechanisms for Meeting Financial Responsibility Requirements

Federal financial responsibility requirements may be met through one or more of the following mechanisms:

1. Self-insurance (provided the owner or operator can meet the requisite financial criteria);
2. A guarantee;
3. Insurance or risk retention group coverage;
4. Surety bond;
5. Letter of credit;
6. Fully-funded trust fund;
7. State fund or other state assurance; or
8. An other acceptable State required mechanism.

RCRA §6991b(A)(1), 40 CFR §280.95-280.103. If the owner and operator are different parties, only one party is required to demonstrate financial responsibility. 40 CFR §280.90(e).

However, both owners and operators remain legally responsible for performing corrective action, and each could be sued by third parties. UST owners may use separate mechanisms or combinations of mechanisms to demonstrate financial

responsibility for each category. In addition, an owner or operator may provide coverage for subsets of tanks with different combinations of mechanisms. 53 FR 12803 (4/17/88), preamble and 40 CFR §280.93(e).

C. Availability of Financial Mechanisms

In practice, some of the allowable mechanisms listed by EPA are not widely used or are not available to many UST owners and operators. For example, the self-insurance option is limited to the largest firms in the regulated community. 53 FR 43341. Self-insurers must have a net worth of at least \$10 million. Similarly, in order for an owner or operator to use the guarantee option, the guarantor must meet the self-insurance requirements and be a corporate affiliate or have a "substantial business relationship" with the UST owner or operator.

UST owners or operators may use letters of credit to satisfy their financial responsibility requirements. However, the collateral requirements for letters of credit may approach or exceed the face value of the letter of credit itself. Thus, this mechanism is prohibitively expensive for many UST owners and operators. EPA also permits UST owners or operators to use surety bonds, but these bonds have not been widely used to demonstrate compliance with other environmental financial responsibility requirements.

Insurance is the "mechanism of choice" for most tank owners and operators. There are several environmental impairment liability insurers that are writing pollution coverage for UST owners and operators. The cost, coverages, and application requirements should be investigated by anyone seeking to minimize their liabilities exposure. Many insurers require a site assessment prior to issuing policies and exclude pre-existing conditions.

Because many UST owners or operators have had difficulty in obtaining insurance or otherwise meeting their financial responsibility requirements, more than forty states have passed State trust fund laws (see Appendix A.) As noted above, EPA has delayed complete implementation of the regulations for an additional year to allow owners and operators to come into full compliance.^{/2/}

III. STATE TRUST FUNDS

State trust funds are designed to help owners and operators meet the financial responsibility requirements discussed above. 40 CFR §280.101. These funds cover corrective action costs, and generally also cover liabilities to third parties. The funds frequently have a deductible for which each owner or operator must supply independent coverage.

^{/2/} Although certain statutory financial responsibility requirement deadlines have been extended, UST owners or operators currently face statutory and common law liabilities in the event of a release.

The majority of state trust funds have a maximum fund liability limit or "ceiling". Usually, the ceiling is \$1,000,000 per occurrence, in accordance with the federal requirement for financial responsibility for petroleum marketing firms and large non-petroleum marketing firms.

State trust funds are generally financed by revenues generated by petroleum sources fees, or by fees and taxes of retail sales on a per gallon basis. Several states supplement or provide the entire fund capital from general revenues. Some states require mandatory participation in the fund, regardless of whether the UST owner or operator can demonstrate independent financial responsibility. Compliance with UST technical standards may be a prerequisite for obtaining trust fund monies. A few states have established incentive programs which provide low interest loans or grants to help UST owners or operators upgrade their tank systems.

IV. PROPOSED MASSACHUSETTS TRUST FUND BILL

A Massachusetts Underground Storage Tank Petroleum Product Cleanup Fund has been under consideration by the state legislature for several years. Several House and Senate proposed bills were combined and redrafted by the Natural Resources Committee earlier this year. The revised bill, H6174 proposed as M.G.L. chapter 21J, Underground Storage Tank Petroleum Product Cleanup Fund, was passed by the House on July 26, 1990. It is currently being reviewed by the Senate Ways and Means Committee and is expected to be brought to the Senate floor for vote later this year.

Under H6174, a fee of \$50 would be assessed to dispensing facilities upon each delivery of petroleum, and an annual fee of \$200 would be assessed on tanks used for storing petroleum^{/3/} until a \$30,000,000 fund is established.^{/4/} The purpose of the fund is to expedite environmental cleanup actions by providing partial reimbursement for cleanup expenses incurred as a result of releases of petroleum. The bill provides reimbursement for both remediation costs and third-party claims due to sudden and non-sudden releases.

The bill incorporates three deductibles depending on the number of sites owned. Owners or operators of one site can seek reimbursement from the Fund after paying \$5,000 in cleanup costs. Owners or operators of two sites have a \$7,000 deductible, and owners or operators of three or more sites have a \$10,000 deductible.^{/5/} The bill also includes a ceiling of \$1,000,000 per release for cleanup costs. Costs beyond \$1,000,000 per release would be borne by the owner or operator. There is no deductible and no ceiling for

/3/ Tanks used for residential or farm purposes, or for storing heating oil are excluded from the requirements of chapter 21J. Waste oil tanks are not subject to the annual tank fee.

/4/ Once the Fund reaches \$30 million the fee would be discontinued until or unless unobligated Fund monies dropped below \$10 million.

/5/ Earlier versions of House and Senate bills contained five thousand or ten thousand dollar deductibles to be applied to all owners and operators.

third-party claims, but under the proposed bill an owner or operator cannot seek reimbursement for third party claims from the Fund unless there is a final court determination that the third party bodily injury or property damage is due to a release of a petroleum product from an underground storage tank system. In order to obtain reimbursement from the fund an owner or operator must be in full compliance with all underground storage tank or underground storage tank system registration, maintenance and operation requirements.

The bill provides that a review board be established to oversee administration and implementation of the Fund, and to adopt rules and regulations for the administration of the Fund and collection and payment of fees.

XP-6229/w

11/18/91