ACE ADVISORY

STORAGE TANKS: OVERCOMING THE NEW REGULATORY AND FINANCIAL HURDLES

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Businesses that use underground petroleum storage tanks face new challenges in dealing with changes at the state and federal level that affect everything from training to tank design and financial responsibility requirements. This year, the U.S. Environmental Protection Agency (EPA) is expected to approve a significant update to its 1988 underground storage tank (UST) regulations, adding new requirements for tank construction, for training, and for operating and monitoring tank systems.[1] These mandates may require removal or replacement of existing tanks with insufficient safeguards.

At the same time, more states are seeking to wind down tax-funded cleanup programs that have provided financial backstops for tank operators and that have financed the cleanup of tens of thousands of tanks nationwide. Even as states seek to shift this financial burden to business owners, the costs associated with cleaning up spills continues to climb. Without the state-backed programs, operators either have to set aside sufficient funds, typically a $1 million minimum, or procure insurance.

As states move away from providing cleanup funds, business owners must be ready to perform greater due diligence on the properties they already own as well as those they may be contemplating buying. Because the tank systems - and the regulations - are complex, current and prospective owners should consider seeking expert advice to help manage the systems and the various requirements, including spill reporting. This should include reviewing their insurance program to make sure that it provides adequate coverage for the potential exposures. Insurance is an affordable alternative, depending upon history, condition and current exposure.

Changing State and Federal Regulations

Nationwide, there are more than half a million underground storage tanks that hold petroleum or hazardous substances,[2] down from more than 2.1 million regulated tanks when federal regulations began in the 1980s. Until the 1980s,[3] most tanks were single-walled and made of bare steel, which is likely to corrode over time. The chief threat posed by such tanks is the potential impact on soil and ground water.

The EPA's original regulations sought to upgrade tanks to reduce the likelihood of a spill, to better detect leaks and spills, and to require secondary containment systems. The regulations also required owners to demonstrate the financial resources to pay for any cleanups. The EPA's proposed updated requirements include increased regulation of tanks, new tanks be double-walled, removal of tanks that are not upgraded, and replacement with double-walled piping of any lines that are repaired. The EPA also will require training for tank operators as well as more frequent inspections and testing, In addition, some states have required mandatory upgrades from single- to double-walled tanks. Florida required all single-wall tanks to be upgraded as of December 31, 2009. In the Northeast, Massachusetts will no longer allow single-walled steel tanks as of August 2017.[4]

Moving Away from State Funds

Across the country, owners and operators of underground storage tanks are required to demonstrate the financial assurance to pay for the cleanup of any spills and to compensate third parties for potential bodily injury or property damage. The three methods for doing that are the state programs funded by a portion of gasoline tax receipts or other fees, self-insuring, or buying insurance. Self-insuring is difficult for smaller operators that would have to establish a collateralized account with a $1 million requirement. Service station owners need to post or have available certificates of financial responsibility, which are checked by state auditors.

Thirty-five states have funds that pay for either new and/or past releases, according to the EPA.[5] Given the volatile economic conditions of recent years and the impact on tax revenues, some states are looking to dissolve their funds.

Among the states, California will stop accepting new claims for its UST Cleanup Fund at the end of 2015.[6] In California, the average cost of a closed claim was about $180,000 as of January 2013, but the state Water Board estimated that current claims were averaging $500,000 with a projected total of $750,000 per claim.[7] California's fund had spent $3.2 billion since its inception on more than 8,000 closed claims and 3,000 active claims as of January 2013.

Arizona, Connecticut, Florida and Wisconsin have funds that pay for past releases only. Texas ended its petroleum storage tank remediation fund and stopped making new reimbursements in September 2012.[8] Connecticut is phasing out its program under legislation passed in 2012.[9] The Connecticut program had been challenged by funding issues.[10] The states that have no fund to provide the federally required coverage include New Jersey and Washington.

Increased Due Diligence

In recent years, major oil companies have sold off large numbers of their company-owned services stations because of slim or non-existent profit margins. The major oil companies own only about three percent of the more than 157,000 service stations nationwide, with independent owners accounting for most of the rest.[11] This divestment by the oil majors has led to a large number of transactions in the industry. Many new or prospective owners may be unaware of the requirements for operating tanks, and the associated costs, or the potential pollution exposures that they may face and the necessity of demonstrating the financial capability to pay for cleanups. As they acquire a business, new owners may find that they have also acquired a very expensive liability from previously undetected spills from older tanks. Industry data shows that older tanks are more prone to leaking. In cases where tanks have to be upgraded, the removal of the tanks significantly increases the likelihood of a pollution claim.

As businesses seek to meet the stricter federal requirements, while potentially taking on greater financial responsibility, they should adopt a more proactive approach to evaluating and mitigating the risks associated with their underground storage tanks.

As states move away from providing cleanup funds, business owners must be ready to perform greater due diligence on the properties they already own as well as those they may be contemplating acquiring. Critical information includes the installation dates of the tanks and the construction type of the tank, for instance whether it is bare steel or fiberglass. Tanks that rely on an internal lining as their sole means of corrosion protection may have to be upgraded under the new EPA rules. If the tanks are double walled, but the piping is single walled, that will increase the potential risks. Additionally, while it is true in most cases that owners and operators of underground and aboveground tanks need to demonstrate financial responsibility, not all tanks are regulated. For example, farm or residential underground storage tanks with less than 1,100 gallon capacity are not subject to regulation. Only four states – Florida, Virginia, Delaware and New Mexico - currently require aboveground storage tanks, inclusive of day tanks, to maintain some sort of financial assurance.

Tanks typically have a service life of 30 years, so the age of the tanks is crucial information. Older tanks are likely to require more detailed examination and may be expensive to insure, or in some cases, uninsurable because of prior spills or losses. Tanks that are scheduled to be removed or replaced may also be difficult to insure because of the higher likelihood of existing pollution conditions.

A Proactive Approach to Risk Management

As businesses seek to meet the stricter federal requirements, while potentially taking on greater financial responsibility, they should adopt a more proactive approach to evaluating and mitigating the risks associated with their underground storage tanks. Training is an important consideration, both to meet state or federal mandates and to develop and deploy best practices for operation, maintenance and emergency response. Business owners should consult with tank management experts for training and for help in managing their tank systems to reduce their exposures, enhance spill prevention and develop countermeasures plans. Experts can help in assessing the conditions of existing tanks and secondary containment systems and recommend upgrades where necessary to comply with regulations.

To better manage costs and potentially limit liability in the event of a spill, companies may want to work with an insurance carrier that can provide immediate support after a spill to handle reporting requirements. The failure to meet the reporting requirements can result in costly fines. When it comes to financial responsibility, insurance may be an affordable alternative driven by the age and condition of the tanks. Tank insurance is readily available in the marketplace today through either online portals or traditional desktop underwriting.

Operators of underground storage tanks face challenges on a number of fronts today, from stricter regulations to heightened financial responsibility. Because of the complexities involved in the systems, the regulations and the economic ramifications, tank operators should seek out expert help to make sure that they are not only meeting the regulations, but also protecting the environment and their businesses.

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Endnotes:

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