

Regulation of Underground Storage Tanks: A Farmer and His Money Are Soon Parted

The Environmental Protection Agency is now proceeding at full throttle to make up for half a century of environmental neglect by government and industry. Years of unmitigated pollution on all fronts mandates an aggressive, result-oriented approach. Yet this long-needed strategy can drastically affect those who have come to rely on past acquiescence. For decades fuel tanks were placed underground without a second thought. But recent concern over soil and ground water contamination has caused a flurry of regulatory activity. The comment that follows addresses the EPA regulations and the corresponding cost of compliance. Underground storage tank owners face an uncertain future fraught with confusing financial and legal consequences. This comment seeks to inform those who may be affected by the new laws as to all their options, including financial, legal and practical considerations. The author issues a wake-up call for owners of federally-exempt farm tanks to act now with an informed decision, before imminent regulations force unwise and expensive action.

INTRODUCTION

At one time, ownership of an underground fuel tank was a simple matter. The only considerations in placing an underground tank on a farm were the cost of installation and convenience. But at present, leaking tanks have resulted in a tangled web of state and federal regulations, leaving farmers unsure of the economic practicality of continued tank ownership.

The U.S. Environmental Protection Agency's (Agency) regulations¹ divide underground tanks located on farms into two groups. The first group consists of tanks statutorily defined as Underground Storage Tanks (USTs).² These tanks, although located on farms, exceed an

¹ Underground Storage Tanks; Technical Requirements and State Program Approval; Final Rules, 53 Fed. Reg. 37,082 (1988) and Underground Storage Tanks Containing Petroleum—Final Responsibility Requirements and State Program Approval Objective; Final Rule, 53 Fed. Reg. 43,322 (1988) (codified at 40 C.F.R. Parts 280 and 281).

² An UST is defined for regulatory purposes as a tank system, which includes both

1100 gallon capacity and are termed agricultural USTs.³ They are subject to federal, state and local regulation.⁴ All other tanks are not considered USTs by the Agency. For example, a farm tank⁵ is an underground tank located on land that is used for agricultural purposes and stores less than 1100 gallons of gasoline. Because it is not an UST, a farm tank is exempt from federal regulation.

This comment will address the choices faced by owners of underground storage tanks as they comply with the Agency's technical and financial requirements.⁶ Various considerations for all tank owners will be explored, including the impact of current state and federal regulations, compliance costs, and the availability of financial assistance. Since Congress has made clear that leaking tanks and the resulting contamination are intolerable, the questions, then, are "how much" and "who's next."

I. A HISTORICAL PERSPECTIVE

A. *Underground Storage Tank Use*

After World War II, fuel storage tanks were placed underground to reduce fire hazards and to increase the amount of usable land.⁷ For the farmer, underground tanks provided an immediate supply of gasoline and the economic advantage of buying in bulk quantities. As farms grew and machinery use increased, tank ownership was favored. The tanks built in the 1940's and 1950's were constructed of a single wall of steel without corrosion protection. Advances in tank construction technology resulted in noncorrosive fiberglass tanks by the 1970's;⁸ but without the realization that older tanks will leak, few farmers had the incentive to purchase these tanks. Further advances have increased leak

the tank and associated underground piping, that has at least 10% of its volume underground. Farm tanks of 1100 gallons or less used to store fuel for non-commercial purposes, tanks containing heating oil or waste water, septic tanks and storage tanks on or above the floor of an underground area are exempt. 42 U.S.C. § 6991(1) (1991).

³ 53 Fed. Reg., *supra* note 1, at 43,368. The EPA estimates 46,000 agricultural USTs nationwide. *Id.*

⁴ *Id.*

⁵ A farm tank is defined as "a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. 'Farm' includes fish hatcheries, rangeland and nurseries with growing operations." 40 C.F.R. § 280.12 (1990).

⁶ See generally, 53 Fed. Reg., *supra* note 1.

⁷ John Matras, *Tanks Aged by Rust May Bust the Mom-and-Pop Gas Station*, AUTOWEEK, Aug. 21, 1989, at 37.

⁸ 53 Fed. Reg., *supra* note 1, at 37,089.

detection sensitivity and have provided additional noncorrosive materials making ground water and soil contamination preventable.

B. *Environmental Concerns Lead to Regulatory Action*

By the 1980's, it was not a question of "if" a steel tank would leak, but "when." Environmental concerns regarding leaking tanks increased as benzene, a constituent of gasoline, was identified as a carcinogen.⁹ By 1989, leaking underground storage tanks were considered as dangerous as hazardous waste sites.¹⁰ Worse, the government projected that ten to thirty percent of all tanks leak.¹¹

To protect public health, state legislatures were the first to regulate underground storage tanks.¹² However, the state regulations varied immensely prompting the Agency, in 1988, to establish federal standards and create a two-phase system.¹³ Phase one requires upgrades to meet technical standards;¹⁴ while phase two requires demonstration of financial responsibility for cleanups and third party claims.¹⁵

The Agency faces a challenge in regulating the more than two million underground storage tanks at over 700,000 sites nationwide.¹⁶ The regulatory program is further complicated by the fact that the majority of underground storage tanks are owned and operated by small businesses.¹⁷ These owners, as well as farmers and other private tank owners, are not prepared to deal with complex regulations.¹⁸ Consequently, the Agency has provided concise regulations and has delegated implementation of the program to local authorities.¹⁹

⁹ Fran Jeffries, *Small Gas Stations Feel Pinch of New EPA Rules*, THE COURIER-JOURNAL, Jan. 8, 1990, sec. B at 8.

¹⁰ *Id.*

¹¹ 53 Fed. Reg., *supra* note 1, at 37,095.

¹² *Id.* at 37,096.

¹³ *Id.* at 43,323.

¹⁴ *Id.* at 37,098.

¹⁵ *Id.* at 43,324.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 53 Fed. Reg., *supra* note 1, at 37,084.

II. THE ENVIRONMENTAL PROTECTION AGENCY'S SOLUTION

A. Phase I: Technical Standards

The Agency's technical standards emphasize leak prevention from four sources of release:²⁰ 1) corrosion of unprotected tanks; 2) leaks in delivery piping caused by corrosion, damage during installation, or joint failure; 3) leaks from vent pipes and other tank-top fittings caused by overfilling; and 4) spills and overfills.²¹

The standards for new tanks mandate structural integrity through requirements for proper tank design, construction and installation. The tanks must also have devices to prevent overfill and contain spills.²² Finally, new tanks owners must use recommended methods for detecting leaks.²³

Further, the regulatory program requires existing²⁴ tanks to be upgraded or closed by 1998.²⁵ An upgraded²⁶ tank must meet the new tank standards for overfill and spill prevention devices. The upgrading of older single-walled steel tanks may include interior lining, cathodic protection,²⁷ or both.²⁸ Existing tanks must also comply with release detection standards. A five-year compliance schedule,²⁹ based on tank age, requires all tanks to comply by 1993. Tanks not meeting the dead-

²⁰ "Release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank into ground water, surface water or subsurface soils." 40 C.F.R. § 280.12 (1990).

²¹ 53 Fed. Reg., *supra* note 1, at 37,088.

²² 40 C.F.R. §§ 280.20(a),(c) and (d) (1990).

²³ Acceptable methods of release detection include inventory control, manual tank gauging, tank tightness testing, automatic tank gauging, vapor monitoring and interstitial monitoring. 40 C.F.R. § 280.43 (1990).

²⁴ An UST is considered existing if its installation commenced on or before December 22, 1988. 40 C.F.R. 280.12 (1990).

²⁵ 40 C.F.R. § 280.21(a) (1990).

²⁶ "Upgrade" means the addition or retrofit of some systems such as cathodic protection, lining or spill and overfill controls to improve the ability of an underground storage system to prevent the release of product." 40 C.F.R. § 280.12 (1990).

²⁷ "Cathodic protection" is a technique used to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell." *Id.*

²⁸ 40 C.F.R. §§ 280.21(a),(b) and (d) (1990).

²⁹ UST installation/release detection compliance dates are as follows:

Installation prior to 1965: compliance in 1989;

Installation from 1965-69: compliance in 1990;

Installation from 1970-74: compliance in 1991;

Installation from 1975-79: compliance in 1992; and

Installation from 1980-88: compliance in 1993.

40 C.F.R. § 280.40(c) (1990).

line for leak detection compliance must be closed.³⁰

The Agency's tank closure standards prevent leaks from unused tanks. To close a tank, its contents must be removed and the interior cleaned. Afterward, the tank may either be: 1) removed; or 2) left in place, filled with an inert substance, and sealed.³¹ All tank closures require site assessment³² to ensure that there have been no past releases. If a release has occurred, then corrective action³³ must be taken.³⁴

B. Phase II: Financial Responsibility

In addition to meeting technical standards, underground storage tank owners must secure financial assurance³⁵ to pay for corrective action (cleanup) and third party claims due to releases.³⁶ The owners or operators of underground storage tanks with less than a 10,000 gallon average monthly throughput³⁷ must have coverage of \$500,000 per occurrence.³⁸ Also, owners or operators of 100 underground storage tanks or fewer must maintain an annual aggregate coverage of one million dollars.³⁹ Owners of fewer than thirteen tanks have obtained an extension until December 31, 1991 to prove financial responsibility.⁴⁰

³⁰ 40 C.F.R. § 280.41(a)(2) (1990).

³¹ 40 C.F.R. § 280.71(b) (1990).

³² Site assessment involves the collection and analysis of soil samples. 40 C.F.R. § 280.72 (1990).

³³ Corrective action includes mitigation of safety and fire hazards, removal of saturated soils and floating free product and an assessment of the extent of further action needed. 53 Fed. Reg., *supra* note 1, at 37,098.

³⁴ 40 C.F.R. §§ 280.60 *et seq.* (1990); *see generally*, C. Gauthier, *The Enforcement of Federal Underground Tank Regulations*, 20 ENVTL. L. 261 (1990)(explaining various soil cleaning methods).

³⁵ 53 Fed. Reg., *supra* note 1, at 43,325. Acceptable mechanisms for compliance are: financial test of self-insurance, guarantee, insurance or risk retention group coverage, surety bond, letter of credit, use of a state-required mechanism, state trust fund or other assurance, and trust fund. *Id.*; 40 C.F.R. §§ 280.94 *et seq.* (1990).

³⁶ 40 C.F.R. § 280.93(a) (1990). Third-party liability includes claims for bodily injury and property damage. *Id.* Both terms have the meaning given to them by applicable state law. 40 C.F.R. §§ 280.92(b) and (k) (1990).

³⁷ Throughput is the volume of material that passes out of the UST system. It is calculated as the average monthly volume change during the previous calendar year. 40 C.F.R. § 280.93(a)(1) (1990).

³⁸ 40 C.F.R. § 280.93 (a)(2) (1990). "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in a release from an underground storage tank." 40 C.F.R. § 280.92(g) (1990).

³⁹ 40 C.F.R. § 280.93(b)(1) (1990).

⁴⁰ Ruth Gastel, *Environmental Pollution: Insurance Issues*, INSURANCE INFORMATION INSTITUTE (Oct. 1991) available in LEXIS, Nexis Library, Omni File.

III. FARM TANK EXEMPT STATUS ERODES

Federal regulation of the estimated 260,000 currently exempt farm tanks⁴¹ is under consideration. To this end, an Agency study characterized the risk factors of exempt tanks as compared to retail gasoline station tanks.⁴² The study found the majority of farm tanks are constructed of unprotected steel and are over fifteen years old.⁴³ As they are smaller, they are usually made of a lighter gauge steel which may be more susceptible to corrosion. Furthermore, few exempt tank owners practice any leak detection or prevention methods.⁴⁴ Finally, farm tanks may be at special risk because farmers, who have the heavy equipment necessary for tank installation, may incorrectly install their own tanks. The farmers may also use native soil as a backfill, thereby increasing the rate of tank corrosion, and install previously used and discarded tanks without proper inspection or testing.⁴⁵ Although the volume of gasoline that could potentially leak into the environment from a farm tank is small, the risk of such a leak occurring appears disturbingly high. Thus, as large tanks are meeting federal standards, regulatory attention is focusing on exempt tanks.

In a recent report to Congress, the Agency made the following recommendations: 1) ban the installation of new unprotected tanks; 2) continue exemptions for existing tanks; and 3) develop educational and technical assistance programs at the state level.⁴⁶ This proposed regulation would be delegated to state and local governments.⁴⁷ The Agency's discussion with state representatives "indicated that many states appear to be waiting to see whether Congress and EPA will address exempt tank systems before they pass new legislation."⁴⁸

⁴¹ Exempt tanks in the EPA report include both farm tanks and heating oil tanks. OFFICE OF UNDERGROUND STORAGE TANKS, U.S. ENVIRONMENTAL PROTECTION AGENCY, REPORT TO CONGRESS: UNDERGROUND HEATING OIL AND MOTOR FUEL TANKS EXEMPT FROM REGULATION UNDER SUBTITLE I OF THE RESOURCE CONSERVATION AND RECOVERY ACT at ii (May 1990) [hereinafter REPORT TO CONGRESS].

⁴² OFFICE OF UNDERGROUND STORAGE TANKS, U.S. ENVIRONMENTAL PROTECTION AGENCY, BACKGROUND DOCUMENT FOR A REPORT TO CONGRESS CONCERNING: UNDERGROUND HEATING OIL AND MOTOR FUEL TANKS EXEMPT FROM REGULATION UNDER SUBTITLE I OF RCRA at ES-3 (May 1990) [hereinafter BACKGROUND DOCUMENT].

⁴³ *Id.*

⁴⁴ REPORT TO CONGRESS, *supra* note 41, at iii.

⁴⁵ BACKGROUND DOCUMENT, *supra* note 42, at 2-18.

⁴⁶ REPORT TO CONGRESS, *supra* note 41, at iv.

⁴⁷ *Id.* at v.

⁴⁸ BACKGROUND DOCUMENT, *supra* note 42, at 5-3.

Although Congress has not yet acted on the Agency's report, eight states⁴⁹ regulate farm tanks. For example, Montana does not exempt any farm tanks.⁵⁰ Iowa's regulations exempt existing farm tanks, but govern all new⁵¹ tanks. Iowa also requires all tank owners to register with the state and pay fees.⁵² In California, the term "farm tank" is strictly defined by both tank size and tank use. Therefore, a change in tank usage, such as change in land use, change in fuel use, or non-use of the tank can nullify a California exemption.⁵³

Many states also have closure requirements that are stricter and more costly than the federal standards. These requirements include permits, inspections, and performance of site assessments at all closures. Four states⁵⁴ prohibit a less expensive in-ground permanent closure and require that all tanks be removed.⁵⁵

In addition to state regulations, underground tanks are regulated at local levels, which may be stricter than state standards. Dade County, Florida and Suffolk County, New York are examples of counties that, through local ordinances, regulate farm tanks despite state and federal exemptions.⁵⁶

Since a farm tank can be regulated at three levels of government, a lack of regulation at one level could result in a lower level picking up the regulatory slack. Thus, little by little, regulation is eroding the exempt status of farm tanks.

IV. THE FINANCIAL DILEMMA

A. *Mandatory Upgrades*

Stringent regulations and the accompanying costs of compliance make the continued ownership of an underground tank an important

⁴⁹ California. Letter from Mike McDonald, Manager Underground Storage Tank Program, State Water Resources Control Board, to Local Implementing Agencies, LG-109: Determination of Farm Tank Status (July 19, 1990) (on file at REVIEW offices); Iowa. 2 UNDERGROUND STORAGE TANK GUIDE, Tab 900 at 175 (J. Leiter ed., May 1991); Maine, Massachusetts, Montana, Ohio, Wisconsin and Wyoming. BACKGROUND DOCUMENT, *supra* note 42, at 5-5 to 5-8.

⁵⁰ 2 UNDERGROUND STORAGE TANK GUIDE, Tab 900 at 231 (J. Leiter ed., July 1990).

⁵¹ New tanks are those installed after July 1, 1987. 2 UNDERGROUND STORAGE TANK GUIDE, Tab 900 at 175 (J. Leiter ed., May 1991).

⁵² *Id.*

⁵³ Letter from Mike McDonald, *supra* note 49.

⁵⁴ Illinois, Massachusetts, Michigan and Vermont.

⁵⁵ See generally, 2 UNDERGROUND STORAGE TANK GUIDE, Tab 900 (J. Leiter ed.).

⁵⁶ BACKGROUND DOCUMENT, *supra* note 42, at 5-4.

business decision. In approaching this decision, tank owners must analyze their available options. Although federal regulation forces this analysis onto non-exempt tank owners, the shifting regulatory climate creates a similar need for farm tank owners.

1. Upgrade or Replacement

Prior to enacting its regulations, the Agency prepared economic impact analyses based on retail gas stations.⁵⁷ The study projected the cost of upgrading one steel tank to be \$9950. The estimate includes \$6000 for tank lining, \$3050 for cathodic protection, and \$900 for spill and overflow prevention devices. Tank replacement, projected at \$43,000, includes \$30,500 for a new tank⁵⁸ and \$12,500 for removal of the old tank.⁵⁹

Upgrading a tank in good or repairable condition can result in significant savings. However, tank replacement can be a worthwhile investment for the farmer who foresees a long-term need for an underground tank, since the technologically improved construction of a new tank makes it virtually leak proof. Furthermore, tank replacement may be the only option for a farmer requiring an underground tank and whose existing tank cannot be upgraded.

In addition to the expense of compliance with technical requirements, tank owners must carry insurance. Insurance costs can vary greatly depending on the method of coverage. Additionally, the owner will have to pay state fees which can range from \$3 to \$100 per tank⁶⁰ and other costs such as leak detection methods which can range from \$200 to \$12,000 per tank.⁶¹

⁵⁷ OFFICE OF UNDERGROUND STORAGE TANKS, U.S. ENVIRONMENTAL PROTECTION AGENCY, 1 REGULATORY IMPACT ANALYSIS OF TECHNICAL STANDARDS FOR UNDERGROUND STORAGE TANKS (Aug. 24, 1988) [hereinafter REGULATORY IMPACT ANALYSIS].

⁵⁸ Since these costs were projected for a gasoline station, this tank is likely a 10,000 gallon tank. The new tank is an STI-P3. REGULATORY IMPACT ANALYSIS, *supra* note 57, at 7-3. STI-P3 is a steel tank with external noncorrodible coating and a self-sacrificing factory applied anode. 53 Fed. Reg., *supra* note 1, at 37,089.

⁵⁹ REGULATORY IMPACT ANALYSIS, *supra* note 57, at 7-3.

⁶⁰ See generally, 2 UNDERGROUND STORAGE TANK GUIDE, Tab 900 (J. Leiter ed.).

⁶¹ 1 UNDERGROUND STORAGE TANK GUIDE, Tab 200 at 172 (J. Leiter ed., Dec. 1989).

2. Removal

The cost of closing a tank site, as projected by the Agency, averages \$12,500.⁶² Further, until the tank is removed, the tank owner must comply with leak detection methods,⁶³ continue to pay fees, and pay for tank insurance. Other state or local requirements such as site assessments will also add to closure costs.

An important consideration prior to embarking on tank removal is the availability of retail gasoline. Federal regulations are expected to adversely impact small gasoline stations nationwide. The Agency projects⁶⁴ that among small rural stations, eighty-nine percent could experience severe financial distress⁶⁵ and fifty-three percent could fail.⁶⁶ If these projections are accurate, rural tank owners may be forced to maintain their tanks despite the cost.

3. Aboveground Storage Tanks

In balancing the convenience of an on-location supply of gasoline and the cost of maintaining an underground tank, one option is to place the tank above ground. Aboveground Storage Tanks (ASTs) have the advantages of visual leak monitoring and fewer regulations. There are no federal regulations for aboveground storage tanks, and only ten states currently regulate them.⁶⁷ While aboveground tanks lessen environmental risks, they increase fire risk and may occupy otherwise usable land. Other disadvantages may include requirements of building a dike or curb around the tank, roofing, drainage or temperature control. These requirements may increase the normally low installation costs.⁶⁸ Also, the tank will require pressurized pumping to fill it and is, therefore, more susceptible to spills and overfills.⁶⁹ Ultimately, however, the lower installation costs and lack of regulations may make the

⁶² This figure represents the removal of a 10,000 gallon tank.

⁶³ 40 C.F.R. § 280.41(a)(2) (1990).

⁶⁴ OFFICE OF UNDERGROUND STORAGE TANKS, U.S. ENVIRONMENTAL PROTECTION AGENCY, REPORT TO THE SENATE APPROPRIATIONS COMMITTEE (Feb. 1991) [hereinafter REPORT TO THE SENATE].

⁶⁵ Severe financial distress is defined as "the situation in which, after imposition of regulatory costs, the affected business is losing money." *Id.* at IV-6.

⁶⁶ Business failure is defined as closure of the business or entering bankruptcy. *Id.*

⁶⁷ California, Connecticut, Florida, Illinois, Iowa, Kansas, Montana, New York, Pennsylvania and Texas. See generally, 2 UNDERGROUND STORAGE TANK GUIDE, Tab 900 (J. Leiter ed.).

⁶⁸ 1 UNDERGROUND STORAGE TANK GUIDE, Tab 100 at 226 (J. Leiter ed., July 1990).

⁶⁹ *Id.* at 225.

aboveground storage tank an affordable option for farmers.

4. Cost of Cleanup

In each of the above options, the cost of cleanup of contamination was not considered. Whether the tank is removed, replaced, or upgraded, the site can prove to be contaminated. Although this is an unknown factor with any option, the tank owner should be aware of the possible costs. The Agency projected these costs to be \$27,739 for a simple cleanup and up to \$224,147 for a cleanup of a widely dispersed release.⁷⁰

B. Financial Responsibility

To comply with financial responsibility requirements, tank owners are likely to use private insurance companies. The Agency reports that insurance premiums for an average retail gas station (with three 10,000 gallon tanks) costs between \$2000 and \$5000 annually.⁷¹ The 1991 Joint Survey of Gasoline Marketer UST Activity⁷² reports that small marketers⁷³ paid an average of \$1774 per tank for insurance premiums in 1990.⁷⁴ The Petroleum Marketers Association of America (PMAA)⁷⁵ 1991 UST Survey⁷⁶ reported an average premium of almost \$3300 per tank for owners of one to twelve underground storage tanks, with only ten percent of those surveyed obtaining coverage through private insurance companies.⁷⁷

⁷⁰ REGULATORY IMPACT ANALYSIS, *supra* note 57, at 7-3.

⁷¹ REPORT TO THE SENATE, *supra* note 64, at III-3.

⁷² National Association of Convenience Stores, Petroleum Marketers Association of America and Society of Independent Gasoline Marketers of America, *Summary: 1991 Joint Survey of Gasoline Marketer Underground Storage Tank Activity* (Jan. 1991) (on file at REVIEW offices).

⁷³ A small marketer owns 100 or fewer tanks for the purposes of this survey. *Id.* at 5.

⁷⁴ *Id.*

⁷⁵ The Petroleum Marketers Association of America is a national organization representing approximately 11,000 independent motor fuel and heating oil marketers and distributors. PETROLEUM MARKETERS ASSOCIATION OF AMERICA, *THE VITAL LINK* (on file at REVIEW offices).

⁷⁶ "PMAA's UST survey was sent to 2,000 randomly selected marketers across the country. Responses were received from nearly 300 marketers operating in 45 states." Petroleum Marketers Association of America, *Summary: 1991 Underground Storage Tank Activity Survey* at 1 (Feb. 8, 1991) (on file at REVIEW offices) [hereinafter PMAA Survey].

⁷⁷ *Id.* at 3.

Since insurance coverage is either non-existent, difficult to obtain, or expensive,⁷⁸ many underground storage tank owners find themselves in a financial dilemma.⁷⁹ Insurance companies prefer to insure upgraded tanks but the upgrade itself is expensive. To secure tank upgrade loans, tank owners seek to use their real property as collateral. However, banks are wary of making loans when the real property collateral is possibly contaminated. Hence, no loan, no upgrade, and no insurance.⁸⁰

In an effort to assist individual tank owners, state legislatures have formed state-supported trust funds.⁸¹ Thus far, forty-six states have established programs to provide cleanup cost coverage and most also provide third-party liability coverage. Deductibles range from \$0 to \$300,000. Some states charge a per tank fee to participate in the fund; others charge a per gallon fee or combine the two methods.⁸²

Although, state funds are more affordable and have fewer eligibility requirements than private insurance, they have limitations. As the Agency reports,

[t]ypically, State funds incorporate eligibility requirements, such as (1) demonstration that facilities are in compliance with applicable technical requirements, (2) evidence of satisfactory inventory control and record-keeping practices, (3) satisfaction of a financial test of self-insurance for the deductible amount, or (4) completion of a site assessment or a tank tightness test.⁸³

Meeting these eligibility requirements may be difficult for some underground storage tank owners. The compliance with technical requirements, site assessments, and tank tightness testing, can be costly and force tank owners to seek loans. Even with coverage under a state trust fund, some tank owners may require private insurance to cover the

⁷⁸ *Fuel-Tank Insurance: Required But Scarce*, 78 NATION'S BUSINESS, No. 1 at 6 (Jan. 1990); William Robbins, *Fuel-Leak Rules May Hasten End of Mom and Pop Service Stations*, N.Y. TIMES, June 19, 1989, sec. A at 1, col. 5 (Late ed. - Final).

⁷⁹ 1 UNDERGROUND STORAGE TANK GUIDE, Tab 100 at 263 (J. Leiter ed., Jan. 1991); Ted Cilwick, *American Album: As Stations Go Under, Filling Up Becomes a Tankful of Trouble*, L.A. TIMES, Apr. 29, 1991, part A at 5, col. 1 (Home ed.); Cynthia May, *Tank Insurance Woes Spark Hearing*, 18 ENERGY REP. 114 (Feb. 26, 1990); Peggy Smedley, *Why Scarce Loans for UST Upgrades Frustrate Marketers*, 81 NAT'L PETROLEUM NEWS, No. 12 at 47 (Nov. 1989).

⁸⁰ 1 UNDERGROUND STORAGE TANK GUIDE, Tab 100 at 263 (J. Leiter ed., Jan. 1991); Smedley, *supra* note 79.

⁸¹ Stacy Adler, *State Funds Provide Tank Coverage*, BUSINESS INSURANCE, Nov. 20, 1989, Spotlight Report at 28.

⁸² See generally, 1 UNDERGROUND STORAGE TANK GUIDE, Tab 700 (J. Leiter ed.).

⁸³ REPORT TO THE SENATE, *supra* note 64, at II-11.

deductible.⁸⁴

C. Availability of Financial Assistance

Twelve states provide financial assistance for tank upgrades as part of their trust fund programs, but they have diverse eligibility requirements.⁸⁵ A tank owner whose state does not provide assistance or an owner who does not qualify, must turn to lending institutions. Lenders, however, are openly expressing their reluctance to grant loans for tank upgrades or cleanups because of environmental liabilities.⁸⁶ As was noted by the PMAA Survey,⁸⁷ environmental liability was the predominate reason that over seventy-five percent of lenders denied upgrade loans. Those owners able to secure loans were met with costly and stringent terms, including environmental site assessments,⁸⁸ personal guarantees for environmental matters, the lender's ability to substitute collateral, and site or tank cleanup prior to the loan disbursement.⁸⁹

Lenders are further reluctant to assist tank owners fearing that their liability, under statutes governing the underground storage tank program, may be construed as broadly as liability under CERCLA⁹⁰ (Superfund).⁹¹ Actually, underground storage tank releases are not subject to Superfund's response authorities, but are regulated pursuant to the Leaking Underground Storage Tank (LUST) Trust Fund.⁹² The LUST Trust Fund is used to pay cleanup costs when the tank owner or operator cannot be found or refuses to comply with a cleanup order

⁸⁴ See Matras, *supra* note 7.

⁸⁵ Arizona, California, Iowa, Maine, Michigan, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota and Vermont. REPORT TO THE SENATE, *supra* note 64, at V-4A.

⁸⁶ Smedley, *supra* note 79.

⁸⁷ PMAA Survey, *supra* note 76, at 7.

⁸⁸ "A complete environmental audit can cost up to \$10,000 per site." Petroleum Marketer Association of America, Summary: Underground Storage Tank Financing Problems, Statement of Need for Guidelines Clarifying Lender Liability at 2 (Apr. 1991) (on file at REVIEW offices) [hereinafter PMAA Summary: Lender Liability].

⁸⁹ PMAA Survey, *supra* note 76, at 7.

⁹⁰ Comprehensive Environmental Response, Compensation and Liability Act of 1980, PUB. L. NO. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601 *et seq.*).

⁹¹ PMAA Summary: Lender Liability, *supra* note 88, at 2.

⁹² CERCLA excludes petroleum from its regulation. 42 U.S.C. §§ 9601(14) and (33) (1991). Petroleum is regulated pursuant to Subtitle I of the Resource Conservation and Recovery Act of 1984 (RCRA), PUB. L. NO. 89-272 (codified as amended at 42 U.S.C. §§ 6991 *et seq.*). PMAA Summary: Lender Liability, *supra* note 88, at 3.

and prompt action is required to protect the environment.⁹³ The tank owner may be required to reimburse the fund.⁹⁴

Both Superfund and LUST Trust Fund define liability in identical terms. In interpreting liability under Superfund, the courts have consistently imposed strict, joint and several liability on site owners. No decision has yet been made on LUST Trust Fund liability.⁹⁵ Both Superfund and LUST Trust Fund provide exemptions for secured creditors not managing the facility. This exemption was held not to apply to a creditor institution under Superfund in a recent Eleventh Circuit decision.⁹⁶ In light of this decision, a pending Senate bill⁹⁷ would limit liability of lenders under CERCLA and any other federal law imposing strict liability for releases.⁹⁸ It is anticipated that the bill's passage will encourage lenders to provide tank owners with loans easing the financial burdens involved in upgrades, replacements and obtaining insurance.

CONCLUSION

Initially, this comment posed two questions, "how much" and "who's next." In answering the query "how much," an underground tank owner's financial options are tied to the particulars of his tank. In addition to insurance and other fees, tank owners may incur costs for tank upgrade or replacement. On the other hand, an owner can face the price of removing his tank or placing one above ground. Regardless of the option pursued, current tank owners cannot escape these financial burdens. How much this burden will actually be rests on careful planning and the critical assessment of these options in light of the current trend of increased regulation. It is this trend that answers the question "who's next." A hierarchy of tanks at risk of leaking began to form with the large, older underground tanks at the top of the regulatory list. As these tanks comply with regulations, lower risk tanks rise to the forefront. Even aboveground tanks are moving into regulatory purview.

⁹³ 1 UNDERGROUND STORAGE TANK GUIDE, Tab 700 at 21 (J. Leiter ed., Jan. 1989).

⁹⁴ *Id.* at 22.

⁹⁵ PMAA Summary: Lender Liability, *supra* note 88, at 3.

⁹⁶ *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied* *Fleet Factors Corp. v. United States*, ___ U.S. ___, 111 S. Ct. 752.

⁹⁷ S. 651, 102d Cong., 1st Sess., Federal Deposit Insurance Improvements Act of 1991, Subtitle B, Asset Conservation and Deposit Insurance Protection Act of 1991 (1991).

⁹⁸ *Id.*

Federal regulation may be slow in coming to these lower risk tanks, but states and counties will not wait to protect the local water supply. Nor should farm tank owners wait for regulations before considering their options. In the end, the underground tanks that once provided farmers economic solutions, pose only questions as to the practicality of their continued presence on the modern farm.

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