



General Counsel Corner

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A New Era for Underground Storage Tank Release Investigations and Recoveries

Dealers may be seeing a new, more aggressive investigation from their state inspector, State Fund or insurance adjuster if they report a release in the near future. While this at first may appear to be yet another imposition during difficult times, a dealer may well benefit by assisting in the investigation.

Mr. Thomas Schruben, a consultant who impressed me with his considerable experience, recently discussed important changes in the way that state regulators and State Fund administrators are handling new release investigations. Mr. Schruben authored EPA regulations for underground storage tanks in the 1980's, and since then has been insuring underground storage tanks and providing risk management advice to tank owners and State Funds.

Mr. Schruben said that, from EPA's perspective, phenomenal progress has been made in the underground storage tank world since 1988. Over 90% of all tanks have been upgraded to meet the 1998 "protected system" standards. Approximately 1.5 million tanks have been closed under the program; 420,000 releases confirmed; and 270,000 clean ups completed. This level of activity and compliance is unprecedented in clean-up programs.

While there are still at least 150,000 clean ups to complete, new releases are down significantly, with only 6,526 releases confirmed in 2001. This is a significant improvement from the average of past years, during which over 32,000

releases were reported annually over a ten-year period.

The risks from underground storage tanks have not been eliminated, however, and a host of issues have been raised. Are the new systems working as well as it was thought they would? Is release detection finding the releases? Are enough new releases being caught before they do significant damage?

With fewer new releases to deal with and the overwhelming level of compliance with the 1998 standards, the attention of the regulators and the fund administrators is shifting toward investigating the causes of today's failures and holding accountable those who are responsible.

In the past, releases could be chalked up to steel tanks and piping that were not protected from corrosion, or to an accumulation of spills and overfills. When a release was discovered during the removal of an underground storage tank system, no one took the time to figure out exactly how the release occurred and who was responsible. The inspector would perform a cursory inspection of the tank and look for obvious signs of corrosion or overfills. Even if the inspector could not identify a specific cause for the release, the presumption was that it resulted from long past practices.

Today almost all underground storage tank systems have been upgraded to "protected systems," and most dealers have

been checking for leaks for ten years or more. When a release is discovered today, it may still be a new discovery of an old release from an old underground storage tank system, but it is increasingly likely that the release resulted from the failure of a “protected system.”

To make matters worse, if the release detection device failed, discovery of the release could have been substantially delayed. This would compound the damages caused by the release because the longer the petroleum is in the ground, the harder it is to clean it up, and the more time it has to cause problems off site.

Theoretically, failures in new “protected systems” should be few and far between, and monthly monitoring and tightness testing should discover quickly what few releases do occur. Because these systems are supposedly designed, manufactured and installed with great care to prevent releases and to alert the operator if there is a problem, the dealer can expect the regulator, State Fund inspector or insurance adjuster to scrutinize a release much more carefully than would have occurred a few years ago.

Many questions are likely to be asked, including the following:

- Was it a new release or a new discovery of an old release?
- Was the release caused by equipment failure?
- Did poor installation practices cause the failure?
- Was the tank system serviced improperly?

- Why did the release detection system fail to alert the operator?
- Were the alarms or overfill equipment disabled or damaged?

It is critical to track down the causes of today’s failures. First, it is in the industry’s best interest to operate safely and cleanly. If a particular type of equipment is prone to failure, or if a mistake is being made in installation, servicing or filling the underground storage tank, or if equipment is just showing its age, action should be taken to prevent future releases.

Second, the entity that provided defective equipment or negligent services should be held accountable for its actions. The financial burden of a release is enormous, and should be borne not by the dealer, but by the entity that provided defective equipment or negligent services.

Mr. Schruben observes, “Reports come in every day of failures in piping, tanks, sumps, flexible connectors, leak detection equipment, tank linings, cathodic protection upgrades, release sensors, statistical inventory reconciliation services, and precision tank tests.” Here are examples of recent failures that inspectors and State Fund adjusters have found:

- South Dakota is suing a fiberglass piping manufacturer for defective pipe. State inspectors found one site where the pipe had a pinhole leak due to alleged faulty manufacturing, and suspect similar conditions at other sites. The piping passed volumetric tightness tests, yet over time released large quantities of product.

- There have been numerous reports of flexible connector and flexible pipe failures.
- Inspectors in several states are finding cracked spill buckets and containment sumps.
- Inspectors are discovering overflow shut off devices that have been jammed open and disabled.
- A recent inspection report in California found that 85 out of 240 (over 35%) of the secondary containment systems did not pass the State's criteria for effectiveness. Many of the failures were easy to correct, but many required excavation and costly repairs.
- Another California inspection program found that 13% of the liquid sensors in secondary containment sumps would not have signaled a release because of improper installation or maintenance.
- Inspectors in Santa Clara County, California found that vapor releases from small holes in tank systems were contributing to MTBE contamination of the ground water. The vapors were escaping even from tanks that had passed traditional tightness tests.

Some of these failures are probably accidents or the accumulated effects of age. However, some are clearly the result of defective products, improper installation, negligent servicing or malicious tampering. Regulators, State Fund administrators and insurance claims adjusters are looking to hold the

responsible parties accountable, and are pursuing recoveries.

One of the reasons that State Funds are interested in pursuing recoveries now is that many of them need the cash. Collectively, the reserves of the State Funds have fallen from \$1.91 billion in 2001 to \$1.75 billion in 2002, while outstanding claims have risen from \$1.28 billion to \$1.82 billion. This is not a positive balance no matter who conducts the audit!

In addition, state legislatures, strapped for cash in a troubled economy, are tapping into the underground storage tank funds' reserves to support spending on other legislative priorities. Ten funds were raided in 2001 for a total of approximately \$100 million; more raids are expected this year and the next.

State Funds are not the only parties who may have losses to recover. The dealer likely will bear significant losses beyond those suffered by the State Fund or an insurance company's losses in the event of a release. These losses may include:

- Business interruption losses of revenue from the time the station is closed for clean up and repairs until sales recover to pre-clean up levels;
- Loss in property value from the contamination and the stigma associated with the system failure;
- Equipment removal and replacement costs;
- The cost of the dealer's and his/her employees' time for handling the investigation, clean up and reconstruction of the business;

- Clean up costs that are not reimbursed by the State Fund or insurance;
- Expenses and settlement costs for third party claims that are not covered by the State Fund or insurance;
- The cost of inspectors and expert consultants to help the dealer look for and prevent similar failures in other systems; and
- Attorney's fees and legal expenses.

Often the dealer's share of the costs is much greater than the State Fund or insurance company's expenses. This is why it is in the dealer's interest to assist the regulator, State Fund or insurance company if it pursues an investigation into a system failure. Those entities are often willing to pursue recovery litigation at their expense, and share the proceeds of the recovery with the dealer. Indeed, it is common for insurers to share the recoveries with their insureds in proportion to each party's total loss and expenses.

State Fund adjusters, regulators and local dealer associations can sometimes help the dealer get in touch with people with similar failures. Mr. Schruben says, "Experience has shown that in many underground storage tank recoveries bundling similar claims is the most effective way to recover losses."

Here are some of the reasons:

- The combined weight of evidence from a group of facilities with similar failures is often stronger

than an isolated incident because it can show a pattern of failures.

- Costs for attorneys and experts are spread over the group of cases, allowing experts and attorneys with experience with underground storage tank failures to be brought in to assist with the case.
- A group of claims is more likely to get the attention and support of State Fund administrators and insurers; and
- Larger claims with multiple parties are more likely to get the attention of senior management of the responsible parties and their insurers, leading to quicker, more equitable resolutions.

Some steps that Mr. Schruben suggests that a dealer take if a release from a "protected system" is discovered:

- Have an independent expert at the site when removing failed equipment or investigating suspicious releases. Many state inspectors and State Fund adjusters have the experience and the qualifications for this task, and there are also private experts who can assist on site.
- Preserve the evidence. Do not let contractors or manufacturers representatives take possession of failed equipment. Take pictures of the system as it is being uncovered. Establish a chain of custody for any removed parts that might later be used in evidence.

- Gather installation, servicing, release detection and insurance records so that they are ready for attorneys and other interested parties to review.
- Work with your dealers association, state regulators and State Fund to locate others with similar problems. These resources also can provide guidance as to who has developed expertise dealing with a particular type of case, and how the dealer can best proceed.

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