



Federal Underground Storage Tank Compliance Deadline and EPA'S Enforcement Strategy

This memorandum discusses the Environmental Protection Agency's enforcement strategy upon the expiration on December 22, 1998 of the ten-year period for achieving compliance with federal underground storage tank regulations. Although the Agency has reiterated its long-held stance against any extension or exception to this deadline and its accompanying \$11,000 per tank per day penalties, with hundreds of thousands of such tanks still out of compliance, the Agency has released guidance documents outlining its "prioritized" enforcement strategy.

The Federal UST Regulations

Introduction. Pursuant to Subtitle I of the federal Resource Conservation and Recovery Act of 1976 ("RCRA"),¹ the United States Environmental Protection Agency ("EPA") adopted regulations in 1988 to establish a regulatory program for new and existing underground storage tanks ("USTs").² The rationale behind this regulatory program was to reduce the potential for petroleum or hazardous substance leaks from USTs, which lead to groundwater and drinking water contamination. The regulations (the "Federal UST Regulations") came into effect on December 22, 1988 and required that all USTs installed after such date meet tough requirements for "new" USTs. The owners and operators of "existing" USTs (*i.e.*, those installed before December 22, 1988) were given ten years to come into compliance with the Federal UST Regulations. Thus, the owners and

operators of existing USTs have been provided with a ten-year compliance period, ending December 22, 1998, within which they should have upgraded, replaced or closed their substandard USTs to meet the new and detailed requirements regarding protection against leaks, spills, overfills and corrosion.

Cost Estimates. Although exact costs depend on site-specific conditions, EPA has provided rough cost estimates for the three options available to the owner or operator of an existing UST system (assuming a hypothetical three tank system): (1) upgrading for \$12,700; (2) replacement for \$80,000 to \$100,000; or (3) closure for \$15,000 to \$33,000. These cost estimates do not include potential investigation and remediation costs for detected leaks, which could raise costs considerably. The cost of noncompliance with the Federal UST Regulations after the December 22, 1998 deadline (the "Deadline") can be steep. After the Deadline, those UST owners or operators who remain out of compliance are subject to penalties of up to \$11,000 per UST violation for each day past the Deadline. EPA has repeatedly asserted over the past decade that enforcement will be strict, without the possibility for extensions or exceptions to the Deadline.

The Enforcement Scheme. The enforcement of the Federal UST Regulations is designed to occur at both the federal and state levels. Under the UST regulatory program established by RCRA, states have been permitted to submit their own UST regulatory programs (at least as

stringent as the federal program) that, upon EPA approval, they would then have the delegated authority to implement and enforce. Most states have opted and gained approval for their own programs. In those states where such delegated authority was not received, EPA retains primary enforcement authority, as it does with respect to Indian and federal lands. Even in those states with EPA-approved programs, where states have primary enforcement authority, EPA still has the authority to enforce the state programs it approved, in spite of the fact that such programs may be more stringent than the federal program. (EPA does not have the authority, however, to enforce state programs to the extent that they are broader in scope than the federal program, such as those that include the regulation of residential heating oil tanks.) Notably, EPA does not have the authority under RCRA to directly shut down substandard USTs (unless a leak is detected), as its enforcement is limited to issuing administrative penalty orders or field citations. Approximately 20 states, however, have recently passed “red tag” legislation, which enables them to shut down substandard USTs after the Deadline by banning fuel delivery to the noncompliant USTs (in a few cases holding suppliers as well as owners and operators liable for breaching the ban).

EPA's Enforcement Strategy

Introduction. According to EPA, over 1.2 million of the 2.1 million USTs existing in 1988 at the time of the adoption of the Federal UST Regulations have since been taken out of operation and thus no longer present contamination risks. Nevertheless, EPA states that over the past decade more than 330,000 leaks have been reported from substandard USTs. Moreover, of the 892,000 USTs still in operation as of December 9, 1998, EPA notes that only approximately 500,000 (56%) of them meet the Federal UST Regulations. In anticipation of such massive noncompliance with the Federal UST Regulations upon the Deadline, EPA issued guidance documents earlier in the year detailing and clarifying EPA's planned enforcement stance.

EPA's August 10, 1998 Guidance Document. On August 10, 1998, EPA released a guidance document describing its enforcement strategy for the Federal UST Regulations after the Deadline (the “Enforcement Strategy”).³ First and foremost, EPA makes it clear that “the Agency will not extend the deadline” and that the “regulations do not provide for a grace period in which violations can be corrected without a penalty” (emphasis in original). Second, because most states have been delegated authority under the federal UST regulatory program to run their own programs, EPA acknowledges that generally the states will continue to be the primary enforcers, with EPA's role being to augment the states' efforts “where necessary.” EPA fully expects that states will expeditiously identify substandard USTs and timely enforce their regulatory programs. EPA reserves the authority to enforce the Federal UST Regulations in any state, but indicates that it will concentrate its activities in “states that have less active UST enforcement programs,” as well as jurisdictions where EPA has the only enforcement authority (e.g., states without EPA-approved programs and Indian and federal lands). EPA notes that, because it is essential that its Regional Offices have flexibility in determining when to initiate federal enforcement actions since they are the ones with ultimate enforcement responsibility, EPA will not establish criteria limiting their decision-making. Third, EPA recommends that those USTs that cannot meet the Deadline should take advantage of the “temporary closure” provisions of the Federal UST Regulations that allow substandard USTs to be upgraded, replaced or closed after the Deadline without risk of monetary penalty as long as the USTs are properly shut down temporarily pending the work. EPA notes, however, that substandard USTs can only remain in temporary closure for twelve months, and no substandard USTs should remain in temporary closure after December 22, 1999 even if they were placed in such status after December 22, 1998.

EPA's December 9, 1998 Guidance Document. In an effort to provide clarification regarding the Enforcement Strategy, EPA released a supplemental guidance document on December 9, 1998 (the “December

Supplement”).⁴ While denying that EPA is extending the Deadline for anyone, the December Supplement states that EPA will “use its limited resources” and focus its enforcement over the next six months on the following high priority sites: (1) federal facilities; (2) multiple UST facilities; (3) large facilities with multiple USTs; and (4) facilities that are endangering sensitive ecosystems or sources of drinking water. Over the next six months EPA will expressly “not focus” on the following low priority sites: (1) small UST facilities (generally four or fewer tanks) owned and operated by one person not owning or operating other regulated UST facilities; and (2) USTs owned or operated by local governments and states. EPA notes, however, that both the high and low priority sites, notwithstanding whatever enforcement strategy EPA may hold for each, are still subject to penalties for noncompliance under state enforcement actions and citizen suits. In addition to the enforcement leniency expressed by EPA in favor of small businesses and local governments, EPA states in its December Supplement that it will engage in compliance assistance to those parties as well, providing them with compliance assistance information and helping them in locating necessary funding. EPA even points out that small businesses and local governments can take advantage of EPA’s “self-disclosure” and “self-correction” program, which allows those parties to promptly disclose and expeditiously correct violations of federal environmental requirements “to mitigate gravity penalty amounts by 75% and in some cases up to 100%,” resulting in the payment of minimal civil penalties since EPA only recovers the economic benefit accrued due to the delay in compliance.

The Reaction of the Petroleum Industry. Upon the release of the December Supplement, trade groups representing petroleum wholesalers, distributors and large-scale owners and operators became outraged, claiming that the low priority status given to small businesses and local governments by EPA is effectively a six-month extension of the Deadline. In particular, the concern of these trade groups has been raised for two reasons. First, the petroleum industry trade groups argue that the “six-month extension” is patently unfair, on the one hand giving their noncomplying small business competitors the time and

ability to “cut sweetheart deals” with EPA, while on the other hand giving those state governments that will primarily enforce the Federal UST Regulations upon the petroleum industry the capacity to avoid compliance with the very same regulations. Indeed, according to the trade groups, after extensive effort and expense, virtually all (between 97.5% and 100%) of the USTs owned or operated by their members were in compliance at the Deadline, whereas only about one-third of the USTs owned or operated by local and state governments were. Moreover, while exact compliance figures for the small business USTs are unavailable, EPA estimates that “most” of the nearly 400,000 USTs suspected out of compliance at the Deadline are owned or operated by small businesses.

The trade groups also are dissatisfied with the December Supplement because it has created a liability dilemma for petroleum distributors. While most distributors supply large-scale owners and operators, some distributors supply those small businesses that have now been effectively granted a six-month extension. Such distributors are concerned because of the fact that approximately 20 states have passed “red tag” legislation that gives them the power to ban delivery of petroleum to substandard USTs, including for some states the power to hold responsible the distributors as well as the UST owners and operators. Moreover, even in states that do not expressly hold distributors liable under “red tag” legislation, a 1997 Indiana appeals court decision interpreting “UST operator” broadly enough to include suppliers suggests that distributors must be wary of being held liable for substandard UST facilities in such states as well.⁵ In both cases, distributors are concerned that they cannot stop delivery to small businesses with noncompliant USTs (as is customarily the contractual right of the distributor) without being held in breach of contract if the small businesses are allowed by EPA to continue operating substandard USTs after the Deadline (*i.e.*, such businesses could argue that they are not in noncompliance as per EPA’s December Supplement, and that they have a contractual right to continue to be supplied with petroleum).

Future Developments. In response to some of these industry concerns, EPA announced on December 21, 1998 that it has no intention of undermining state enforcement efforts, presumably indicating that it will not interfere with aggressive state enforcement programs that choose to go after small businesses or local governments. In addition, to provide clarification of “misperceptions” raised by the two earlier guidance documents, EPA has

suggested that it may release yet another guidance document shortly after the Deadline. Such a clarifying memorandum would address the issue of liability repercussions for the distributors and state whether those UST owners and operators who participate in the self-disclosure program will be allowed to remain open and operating.

Endnotes

- ¹ 42 U.S.C. §§ 6991-6991i.
- ² 40 C.F.R. Part 280.
- ³ United States Environmental Protection Agency, *EPA’s Strategy for Enforcement of Regulatory Requirements Applicable to Underground Storage Tank (UST) Facilities*, August 10, 1998 (and attached cover memorandum).
- ⁴ United States Environmental Protection Agency, *Supplemental Information Regarding the August 10, 1998 Enforcement Strategy*, December 9, 1998 (and attached cover memorandum).
- ⁵ *Shell Oil Co. v. Meyer*, No. 79A04-9512-470 (Ind. Ct. App. August 19, 1997).

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. For more information on topics covered in this issue, please contact:

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