

UNDERGROUND STORAGE TANK GUIDE

Environmental Compliance Series

THOMPSON

June 2008 | VOL. 20, No. 9

EPA UST Office Starts Process for Overhauling Federal Regulations

Talks with stakeholders are underway for the first federal rule-making concerning underground storage tanks (USTs) in 20 years. Regulatory changes are needed to address requirements in the Energy Policy Act, which was enacted in August 2005, but the Office of Underground Storage Tanks (OUST) is considering additional changes as well. Through a spokesperson, the U.S. Environmental Protection Agency (EPA) would confirm only a few details of the rulemaking. Currently, EPA intends to focus the rulemaking on UST provisions in the Energy Policy Act in Indian country. "In addition, because it has been 20 years since EPA promulgated the 1988 regulations and 10 years since the 1998 deadline, we will look at our existing regulations and begin a process to identify targeted changes," EPA Press Officer Roxanne Smith told the *Newsletter* in an e-mail. **Page 3**

Ga. Requires Secondary Containment Statewide, Except for Limited Areas

Secondary containment is now required for all new or replaced UST systems in Georgia, unless the owner can prove the system is not within 1,000 feet of drinking water. The new rule applies to all installations and replacements after April 7. The new regulations also require under-dispenser containment for any new systems. The burden is on the tank owner or operator to prove to the Georgia Environmental Protection Division (EPD) that their UST system is not within the 1,000-foot buffer. EPD estimates very few UST systems will meet this exemption. Exclusions could apply to remote fueling points that lack drinking water sources and are not attached to or near piping for public drinking water. **Page 4**

N.M. Requires Secondary Containment Statewide for Most New UST Systems

New regulations in New Mexico require secondary containment for all new and replaced UST systems after April 4. The new regulations are similar to the recent rules in Georgia in that owners must either use secondary containment for new or replaced systems or prove to the state that the tank system is more than 1,000 feet from any drinking water system or source. Tanks, piping, dispensers and all containment sumps for any piping and ancillary equipment that routinely contains regulated substances must have secondary containment and interstitial monitoring if it is replaced or newly installed after April 4. Replacement tanks and piping must be double-walled with an inner and outer barrier and a release detection system that meets new regulatory requirements for interstitial monitoring. **Page 2**

Also in This Issue

EPA Awards \$74 Million in Brownfields Grants, Many Will Help Clean Up Abandoned Gas Stations. The U.S. Environmental Protection Agency (EPA) recently awarded \$74 million in brownfields grants to 209 cities, towns and other groups. **5**

Oklahoma Rules Allowing USTs to be Used Like ASTs Under Review, New Legislation Pending. Changes to Oklahoma rules that allow underground storage tanks (USTs) to be used as aboveground storage tanks (ASTs) have fire officials and industry experts concerned about safety. As a result, the rules are expected to be further revised by a new bill..... **6**

Federal Court Says EPA Regulations for Financial Responsibility Overrule Florida Insurance Law. EPA regulations governing financial responsibility for USTs trump state insurance law, a federal court recently ruled. The case will proceed to determine if an UST owner can receive coverage for the cleanup of petroleum contamination or whether the insurer can deny coverage on other grounds..... **7**

In the Update

- Updates to UST requirements in Georgia and North Carolina

Coming Soon

- Updates to Tab 900 for Alabama, Arkansas, Michigan, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Tennessee, Texas, Virginia and West Virginia

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New Mexico Requires Secondary Containment Statewide for New UST Systems After April 4

New regulations in New Mexico require secondary containment for all new and replaced underground storage tank (UST) systems after April 4. The new regulations are similar to the recent rules in Georgia (see story, p. 4) in that owners must either use secondary containment for new or replaced systems or prove to the state that the tank system is more than 1,000 feet from any drinking water system or source.

The New Mexico Environment Department (NMED) began its rulemaking in fall 2006; the rule changes also include revisions for aboveground storage tanks (ASTs) (see *Newsletters*, February 2008, p. 5; December 2006, p. 5).

Tanks, piping, dispensers and all containment sumps for any piping and ancillary equipment that routinely contains regulated substances must have secondary containment and interstitial monitoring if it is replaced or newly installed after April 4. Replacement tanks must be double-walled with an inner and outer barrier and a release detection system that meets new regulatory requirements for interstitial monitoring. For example, the release detection system must be capable of detecting a leak from any portion of the tank system that routinely contains regulated substances.

Under-dispenser containment must be installed when dispensers are replaced. The containment system must be hydrostatically tested and approved by NMED prior to use. Systems may include dispenser liners, containment sumps, dispenser pans and dispenser sump liners. Replacement piping must be double-walled with an inner and outer

barrier and a release detection system that meets the new regulatory requirements for interstitial monitoring.

The new rules do not require secondary containment for: repairs meant to restore an UST, piping or dispenser to operating condition; or piping runs that are not new or replaced for USTs with multiple piping runs.

To avoid installing secondary containment, the UST owner or operator must demonstrate to NMED's satisfaction that no part of the UST system is within 1,000 feet of any portion of an existing community water system, potable drinking water well or source water. The owner or operator must submit a detailed to-scale map of the proposed UST system before any construction or replacement takes place. The map must show that no part of the UST system is within 1,000 feet of any existing community water system, any existing potable drinking water well, any potable drinking water well the owner or operator will install at the facility, or any source water. A certified statement also must be submitted to NMED explaining who conducted the research of existing drinking water systems and how the research was conducted. The research must, at a minimum, include measuring the distance from the UST system to groundwater wellheads, depth to groundwater, surface water intake points, water lines, water storage tanks and water distribution or service lines.

New Mexico's secondary containment regulations are in response to the federal Energy Policy Act of 2005, which required states that receive federal UST money to adopt either secondary containment for new and replaced systems near drinking water or financial responsibility for tank manufacturers and installers by Feb. 8, 2007. Very few states met this deadline.

NMED also eliminated a regulatory provision that required steel tank owners to submit a corrosion prevention plan. The provision, in place since August 2004, required owners and operators of steel tanks to submit a corrosion prevention plan for NMED's approval before installation of the tank system. The plans had to be approved in writing by a corrosion expert before being given to NMED. Existing steel tank owners were required to submit such plans by Aug. 15, 2004.

NMED said its inspectors have not received many of these plans and do not feel they are necessary. Owners and operators also argued that this requirement was more stringent than the federal rules. Changes also were made to conform requirements for steel piping to those of the federal regulations.

Underground Storage Tank Guide

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The *Underground Storage Tank Guide* (USPS 0006-145) is published monthly by Thompson Publishing Group, Inc., 805 15th St. NW, 3rd Floor, Washington, DC 20005. Periodicals postage is paid at Washington, D.C., and additional mailing offices.

POSTMASTER: Send address changes to: *Underground Storage Tank Guide*, Thompson Publishing Group, Inc., 5201 W. Kennedy Blvd., Suite 215, Tampa, FL 33609-1823.

For subscription service, call 800 677-3789. For editorial information, call 202 872-4000. Please allow four to six weeks for all address changes.

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See *New Mexico*, p. 6

OUST Begins Rulemaking to Address Energy Act And Other Changes to 20-year-old Regulations

Talks with stakeholders are underway for the first federal rulemaking concerning underground storage tanks (USTs) in 20 years. Regulatory changes are needed to address requirements in the Energy Policy Act, which was enacted in August 2005, but the Office of Underground Storage Tanks (OUST) is considering additional changes as well.

Through a spokesperson, the U.S. Environmental Protection Agency (EPA) would confirm only a few details of the rulemaking. Currently, EPA intends to focus the rulemaking on UST provisions in the Energy Policy Act in areas “where states are not implementing the requirements (e.g., in Indian country and to ensure a federal safety net throughout the country).”

“EPA has not yet begun the rulemaking process; we are in the initial stages and beginning administrative work internal to EPA.”

— EPA Press Officer Roxanne Smith

“In addition, because it has been 20 years since EPA promulgated the 1988 regulations and 10 years since the 1998 deadline, we will look at our existing regulations and begin a process to identify targeted changes,” EPA Press Officer Roxanne Smith told the *Newsletter* in an e-mail.

“These targeted changes could include such things as: identifying and eliminating outdated provisions; identifying and reducing portions of the regulations that create unnecessary regulatory burdens; and identifying and closing significant regulatory gaps,” Smith said. “Over the past decades, we’ve learned a great deal of additional information about UST systems and we believe the UST regulations should include additional knowledge we’ve gained.”

Smith said OUST has “initiated discussions with key [UST] stakeholders.” In mid-April, OUST invited representatives of eight petroleum associations to meet with OUST staff to discuss the upcoming rulemaking. EPA did not provide information on which other groups it has already met with concerning the rulemaking.

“EPA has not yet begun the rulemaking process; we are in the initial stages and beginning administrative work internal to EPA,” Smith said. “However, EPA has met with UST stakeholders such as states, tribes and industry and provided preliminary information on our rulemaking plans.”


EPA will hold preliminary discussions over the next several months to further engage UST stakeholders, Smith said. EPA would not release any information concerning when its next stakeholder meetings will be held.

EPA has begun internal administrative work and is in “the initial stages of beginning a rulemaking,” Smith said. OUST will soon begin internal work to “tier” the rulemaking.

“Tiering of rulemakings is EPA’s system of identifying the internal structure and schedule, as well as determining which offices within EPA will be involved in the rulemaking,” Smith said.

EPA also said it will be developing a timeline for the regulation. Since passage of the August 2005 energy law, OUST has known some regulatory changes would be needed to, at a minimum, address UST regulation on Indian lands. Because the majority of the UST Compliance Act, within the energy law, required EPA to adopt guidelines that would apply to state UST programs, there have been questions about whether OUST was given the proper statutory authority to adopt UST regulations to implement the 2005 requirements for Indian lands.

Specifically, it is unclear how OUST will implement the act’s provision that requires states that accept federal UST money to adopt either secondary containment near drinking water or financial responsibility for tank manufacturers and installers and installer certification. There is no clear way for an UST owner on Indian lands to comply with this provision. Nor is there a requirement for any UST owner to meet this or any state that wishes to forgo federal funding. Florida is the only state that declines this funding and it already requires secondary containment.

Many state UST programs have adopted secondary containment for new and replaced USTs near drinking water (see related stories, p. 2 and p. 4). Part of OUST’s rulemaking likely will determine whether tanks on Indian lands must meet one of the law’s two options or if another solution can be reached. 

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Ga. Requires Secondary Containment Statewide, Except for Limited Areas Far From Drinking Water

Secondary containment is now required for all new or replaced underground storage tank (UST) systems in Georgia, unless the owner can prove the system is not within 1,000 feet of drinking water. The new rule applies to all installations and replacements after April 7. The new regulations also require under-dispenser containment for any new systems. When dispensers are replaced, under-dispenser containment must be added.

The new requirements apply to any UST system that is within 1,000 feet of an existing community water system and its piping or within 1,000 feet of any existing potable drinking water well. The burden is on the tank owner or operator to prove to the Georgia Environmental Protection Division (EPD) that their UST system is not within the 1,000-foot buffer. Existing UST systems that are within 1,000 feet of drinking water do not need to be upgraded unless the tank or piping are being replaced.

Community water systems are defined by the rules as those that have at least 15 service connections or those that regularly serve an average of at least 25 individuals per day for at least 60 days of the year. A potable drinking water well is any hole that meets groundwater and supplies that water to either a non-community public water system or any household use (drinking, bathing and cooking) regardless of the number of users.

EPD estimates very few UST systems will meet this exemption. Exclusions could apply to remote fueling points that lack drinking water sources and are not attached to or near piping for public drinking water. Examples of such facilities may include commercial farming operations, remote industrial operations and remote fueling areas for the military.

Piping that routinely contains regulated substances also must have secondary containment. Generally, vent pipes, vapor recovery piping and fill lines are exempt. Piping must be upgraded with secondary containment when 25 percent or more of an existing piping run is replaced.

Under-dispenser containment must be liquid-tight on all sides. All penetrations to the containment must be sealed to contain leaks. Under-dispenser containment must be annually monitored for leaks or visually inspected for evidence of leaks.

Georgia has not yet adopted regulations for operator training, but has been working with neighboring states and the U.S. Environmental Protection Agency's regional office. EPD hopes to adopt a regional operator training approach, but may adopt its own state-specific operator training.

Stage I Controls

Georgia also recently adopted revised regulations for Stage I vapor recovery controls, which control gasoline vapors during the filling of storage tanks. The changes expand the area of the state where gasoline dispensing facilities, with either USTs or aboveground storage tanks, must install Stage I controls.

Facilities that dispense an average of more than 100,000 gallons of gasoline per month in Barrow, Bartow, Carroll, Hall, Newton, Spalding and Walton counties must have Stage I controls by June 1. Facilities in the same seven counties that have an average monthly throughput of 50,000 gallons to less than 100,000 gallons must come into compliance by Nov. 1. Those that dispense at least 10,000 gallons but less than 50,000 gallons have until May 1, 2009, to install Stage I controls.

In 2006 and 2007, the state began requiring Stage I controls in three counties: Catoosa, Richmond and Walker. New facilities or reconstructed facilities in any of these 10 counties must have Stage I controls at installation or reconstruction.

Most UST systems in the 13 counties near Atlanta must have Stage II vapor recovery controls, which control vapors during filling of motor vehicles. Stage II requirements will end in Georgia in 2013, in favor of Stage I controls. Stage I controls already are required in these 13 counties.

The new rules also adopt a schedule for existing Stage I equipment to be upgraded to "enhanced" Stage I equipment. Existing facilities in Catoosa, Richmond and Walker counties must upgrade by May 1, 2023. Facilities in the 13 Stage II counties must have enhanced Stage I equipment by May 1, 2012.

Generally, if a gas station's monthly throughput is less than 10,000 gallons per month neither Stage I nor Stage II controls are required. If throughput exceeds 10,000 gallons in any month, the station must install and maintain Stage I or Stage I and Stage II equipment if it is in any of the 23 counties. Facilities that are exclusively used to refuel vehicles with onboard vapor recovery do not need to install Stage II controls. Some independent small business marketers of gasoline that dispense 50,000 gallons per month or less also may be exempt from the Stage II rules. No changes were made to the state's Stage II requirements.

See *Georgia*, p. 5

EPA Awards \$74 Million in Brownfields Grants, Many Will Help Clean Up Abandoned Gas Stations

The U.S. Environmental Protection Agency (EPA) recently awarded \$74 million in brownfields grants to 209 cities, towns and other groups. The money will go to communities and groups in 43 states, two U.S. territories and two Indian tribes to help revitalize former industrial and commercial sites and convert the sites to productive community use, EPA said.

“By revitalizing and restoring neighborhoods nationwide, EPA’s Brownfields Program is proving that being a little green is doing a lot of good,” EPA Administrator Stephen L. Johnson said, in an April 7 statement. “These grants will help convert even more environmental eyesores back into sources of community pride.”

EPA defines brownfields as sites where expansion, redevelopment or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant. In January 2002, the brownfields law was amended to allow for the cleanup of petroleum contamination. Abandoned gas stations are often listed as brownfields sites. EPA estimates there are 450,000 brownfields sites nationwide.

The 314 grants include: 194 assessment grants of \$38.7 million for planning and site assessment; 108 cleanup grants totaling \$19.6 million; and \$15.7 million in 12 revolving loan fund grants that will allow recipients to capitalize on the loan funds and issue subgrants for cleanups.

One of the larger grants, \$1 million in a revolving loan fund grant, went to the Petaluma Community Development Commission. The funds, \$700,000 for hazardous substances and \$300,000 for petroleum, will be used to capitalize a revolving loan fund from which the commission will provide loans and subgrants to support cleanups. The funds also will be used to establish, market and operate the fund, EPA said.

The city of Petaluma, Calif., is north of San Francisco Bay and has at least 70 potentially contaminated properties, EPA said. An industrial legacy of using the city and its river for agriculture, industry, shipping and trade have

deterred redevelopment. The funds are expected to promote economic recovery in the city and provide a mix of land uses, public access and recreation along the city’s river. Petaluma also was awarded brownfields assessment grants in 2004 and 2005.

A \$400,000 grant will go to address petroleum contamination in Camden, N.J. The city’s Camden Redevelopment Agency will use the money to clean up two lots at a former automotive center. There are 11 abandoned underground storage tanks (USTs) on the site, EPA said. “Soil and groundwater sampling indicate the presence of benzene and polyaromatic hydrocarbons,” the agency said. The money will pay for tank removal, removal and disposal of the tanks’ contents, and proper disposal of tons of petroleum-contaminated soil. Short-term groundwater cleanup also will be conducted.


Contamination at this site poses a threat to human health and the environment, including the nearby Cooper River. The site is expected to become part of an office park after the cleanup is complete. The Camden Redevelopment Agency has identified 52 brownfields in the city.

Two brownfields grants also will address many closed gas stations and abandoned USTs in New Orleans. A \$200,000 petroleum assessment grant will help address 177 closed service stations.


The city’s \$200,000 hazardous substance assessment grant will be used to conduct nine environmental site assessments and support community involvement activities. The city has identified 267 potential hazardous substance brownfields. The contaminated and/or abandoned properties are interfering with city’s ability to redevelop in the aftermath of Hurricane Katrina.

The city will prioritize site assessment based on sites that ultimately will be used for housing and greenspace. The assessment will clarify environmental conditions and is expected to help expedite redevelopment.

The Kansas Department of Health and Environment (KDHE) also received a brownfields assessment grant of \$200,000 for petroleum contamination. KDHE will use the funds to inventory brownfields sites and conduct 21 to 26 assessments in an eight-county rural area. The funds also will support community outreach activities.

KDHE has identified 769 USTs in the area; the brownfields funds will help determine environmental conditions at these sites and begin planning for cleanup and redevelopment. 

Georgia (continued from page 5)

The Board of Natural Resources approved EPD’s UST rules Feb. 27. The regulations took effect April 7. The Stage I rules were approved April 23 and will take effect June 1. For a copy of the UST rule changes, see <http://www.gaepd.org/environet/15>. For the Stage I changes see <http://www.gaepd.org/environet/1>. Details of Georgia’s UST program are included in ¶940 of the *Guide*. 

Oklahoma Rules Allowing USTs to be Used Like ASTs Under Review, New Legislation Pending

Changes to Oklahoma rules that allow underground storage tanks (USTs) to be used as aboveground storage tanks (ASTs) have fire officials and industry experts concerned about safety. As a result the rules are expected to be further revised with a new bill, HB 3303.

An earlier law was intended to assist businesses that could not afford to replace older petroleum storage tanks. The earlier rules used in Oklahoma were considered too stringent by some, because they required AST owners to either correct identified problems with their tanks or replace them. For many small businesses, forced tank replacements are very costly.

The previous rules from the Oklahoma Corporation Commission (OCC) stated that only storage tanks designed and listed for aboveground use can be used aboveground — generally the industry standard. In addition, tanks designed and built for underground use cannot be installed for aboveground use.

After the earlier bill was enacted by the Oklahoma legislature, OCC adopted new rules to reflect the changes. The current requirements state that “the material and construction of the tank must be compatible with the material stored and the conditions of storage such as pressure and temperature.” Another section of the OCC rules pertaining to emergency pressure venting also was deleted.

New Mexico (continued from page 2)

Many of the changes were for clarification, to ensure that the rules are consistent with federal UST rules and to reduce redundant provisions in the rules.

NMED made clarifications concerning the collection of annual fees. The fee amount, \$100 per tank, did not change. Annual fees are due each July 1st. Fees for new tanks are due within 30 days of placing the tanks into service. The rule changes clarify when late fees are owed on late filing of the fees. Late fees are \$25 or 25 percent of the unpaid balance, whichever amount is greater.

Other regulatory clarifications pertain to requiring initial testing at UST installation. Such testing has long been required as part of the manufacturer’s instructions. The clarification emphasizes that this testing is required for owners and operators. Another clarification states that owners and operators are responsible for their systems being compatible with the stored substance. This already was required, but was necessary to restate as

According to Wayne Geyer, executive vice president of the Steel Tank Institute and a member of the *Guide’s* editorial board, there are many safety issues associated with the newly adopted rules, and that they set “a bad precedent.” According to Geyer, the biggest problem with this decision is that USTs have no emergency venting. ASTs have emergency vents to remove high pressures within the tank in the event of a fire. Geyer said that tanks lacking these vents would create a “human safety issue” with local fire departments.

According to Geyer, there have been previous fires involving tanks without an emergency vent. Firefighters were injured when the tank pressurized from the vapors inside and exploded. Horizontal USTs used aboveground could likely blow out from the ends in the event of a fire, up to 100 feet, according to Geyer.

The Oklahoma State Fire Marshal, Robert Doke, shared these concerns, stating that any time a piece of equipment is used in a setting that is different than what it was intended for, “you are flirting with disaster.”

In response to these concerns, HB 3303 would prohibit USTs from being used as ASTs. According to OCC Public Information Manager Matt Skinner, the bill is expected to receive legislative approval. Existing UST as AST installations would be allowed under the current draft of HB 3303. 🏠

some parts of older fiberglass-reinforced plastic tanks may not be compatible with E85 fuels, NMED said.

The new rules also explicitly prohibit using USTs as ASTs. This was not allowed by referring to national fire codes and other standards; the change makes the prohibition more explicit. The new regulations also require that any UST currently being used as an AST be closed by July 1, 2011. This date also applies to upgrades needed for some existing ASTs.

Changes to the NMED’s rules for tank installer certification clarify that certification is needed for tank work that includes installations, replacements, repairs, modifications and removals. Certifications must be renewed every four years. Another clarification requires tank workers that are certified by passing an International Code Council (ICC) exam must re-take the ICC’s test every two years. The ICC exam is not a requirement for New Mexico certification.

For a copy of the new regulations, see <http://www.nmenv.state.nm.us/ust/draftregs.html>. 🏠

Federal Court Says EPA Regulations for Financial Responsibility Overrule Florida Insurance Law

The U.S. Environmental Protection Agency's (EPA) regulations governing financial responsibility for underground storage tanks (USTs) trump state insurance law, a federal court recently ruled. The case will proceed to determine if an UST owner can receive coverage for the cleanup of petroleum contamination or whether the insurer can deny coverage on other grounds (*Mid-Continent Cas. Co. v. King*, 2008 WL 706541 (N.D. Fla. March 11, 2008)).

“While Mid-Continent is surely correct in pointing out that insurers might be less likely to insure gasoline stations under this interpretation, the court agrees with [the 9th Circuit] and the EPA that rescission [of the policy] would have a greater negative effect on UST operator’s ability to fund cleanup of contamination.”

— U.S. Senior District Judge Maurice M. Paul

The litigation involves a gas station in Cross City, Fla., owned and operated by L.B. King of King’s Oil & Tires. In September 1997, King hired a contractor to upgrade the station’s tanks. At the time, the contractor detected diesel contamination. It’s disputed whether King was told of the contamination in 1997 or not.

King obtained an insurance policy for the USTs from Mid-Continent Casualty Co., which is based in Oklahoma. The policy covered claims from April 3, 2003, to April 3, 2004, and included a retroactive coverage date, like many UST policies, to cover claims occurring after April 3, 1998, and before April 3, 2004.

“When he applied for the insurance, King did not disclose the 1997 diesel contamination,” the court said. “King testified that he was unaware of the 1997 contamination when he applied for coverage, but also that he may have received the 1997 contamination report [from the contractor] before 2003.”

King notified Mid-Continent of the 1997 contamination in September 2003, when he made a claim for coverage under the insurance policy, the court said. After this claim, Mid-Continent issued a “reservation of rights” letter to preserve its future right to deny coverage of the claim. The insurer later denied coverage because, in its opinion, the contamination occurred before the policy’s retroactive date.

In March 2004, the same contractor removed two tanks from King’s station. An environmental assessment found gasoline, kerosene and diesel contamination. King filed a second claim on April 1, 2004, for cleanup costs of this release. Again, Mid-Continent sent a reservation of rights letter asserting certain policy exclusions. In December 2005, Mid-Continent denied coverage for the 2004 release stating that the contamination was not a confirmed release or a spill from an UST system, as defined in the policy.

Then, in June 2006, Mid-Continent sought to void the policy entirely under state law for material misrepresentations (namely, the non-disclosure of the 1997 contamination) by King in his application for insurance. Mid-Continent also asked the court for declaratory relief that the policy does not cover the April 2004 release because: it is not a confirmed release under the policy; and it is excluded from coverage because it actually occurred prior to the 1998 retroactive date of the policy.

King asserted four affirmative defenses in the case and also filed a counterclaim against Mid-Continent. King argued that:

- the release was discovered in March 2004, which falls within the policy period;
- Mid-Continent’s April 2004 reservation of rights letter only asserted one type of exclusion under the policy, thereby waiving any other exclusions of coverage such as misrepresentation;
- when King notified Mid-Continent of the 1997 discharge in September 2003 and Mid-Continent denied coverage rather than canceling the policy, the company waived its rights to the misrepresentation argument; and
- the failure to disclose the 1997 contamination was not material as Mid-Continent would have issued King an insurance policy anyway.

King’s counterclaim argued that Mid-Continent had a duty to pay cleanup costs for the April 2004 release and that the company breached the insurance contract by not paying for the costs. King also sought attorneys fees. Mid-Continent answered King’s counterclaim with 24 affirmative defenses, the court said.

Both King and Mid-Continent sought summary judgment. Seeking partial summary judgment, King argued that federal financial responsibility regulations “preclude rescission of UST insurance policies, even in cases of

See *Insurance Case*, p. 8

Insurance Case (continued from page 7)

misrepresentation by an insured.” In addition, Florida has adopted the federal financial responsibility regulations, specifically 40 C.F.R. §280.97, which reads, in part:


Cancellation or any other termination of the insurance by the (“Insurer” or “Group”), except for non-payment of premium or misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured. Cancellation for non-payment of a premium or misrepresentation will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured.

The federal court cites a 2004 precedent from the U.S. Court of Appeals for the 9th Circuit that found that this regulatory provision requires insurers to give tank owners notice for misrepresentation and does not allow insurers to void insurance policies *ab initio* — meaning from the start as if no policy had been issued.

“Mid-Continent asks the court to reject this interpretation, and argues that interpreting the EPA financial responsibility regulations to preclude rescission of a UST policy in cases of misrepresentation would be against public policy in Florida,” Senior District Judge Maurice M. Paul wrote for the U.S. District Court for the Northern District of Florida. “Mid-Continent argues that [Florida insurance law], which generally permits rescission of insurance policies in cases of misrepresentation, should govern.”

Paul, however, disagreed with Mid-Continent and ruled with the 9th Circuit’s opinion and EPA’s friend of the court brief it had filed in that case. Citing the 9th Circuit, Paul wrote that “the exclusive remedy for a UST policy provider, in the event of an insured’s misrepresentation, [is] a *future* refusal to provide insurance. This interpretation precludes the remedy of rescission.” [Emphasis by 9th Circuit.]

“While Mid-Continent is surely correct in pointing out that insurers might be less likely to insure gasoline stations under this interpretation, the court agrees with [the 9th Circuit] and the EPA that rescission *ab initio* would have a greater negative effect on UST operator’s ability to fund cleanup of contamination,” the court said. “Allowing rescission *ab initio* would widen the ‘gaps’ during which an operator would not be insured and would fail to protect the environment and innocent third parties during these widened gaps. Therefore, the court concludes that ... Mid-Continent may not rescind the policy *ab initio* based on its belief that King misrepresented material facts on his application,” Paul said.

Mid-Continent argued that King waived his right to the federal preemption argument because he did not raise it as an affirmative defense. Although the court said that generally an affirmative defense needed to be raised earlier in the proceedings, it said that King could use the preemption argument. The case will continue as neither King nor Mid-Continent fully won their argument for summary judgment. 

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