

Leasing Retail Motor Fuel Facilities to Independent Operators: Arkansas Storage Tank Trust Fund Eligibility Risks?

Walter G. Wright, Jr.¹

I. Overview

The federal and Arkansas underground storage tank (“UST”) statutes and regulations have for over a quarter of a century placed responsibility for compliance on both the owner and operator of the system. For example, 8-7-807 of the Arkansas Code states in part:

(a)(1) Upon a determination that a release of a regulated substance from a storage tank has occurred, the owner or operator shall notify the Arkansas Department of Environmental Quality. The owner or operator shall immediately undertake to collect and remove the release and to restore the area affected in accordance with the requirements of this subchapter. (emphasis added)

As a result, both the owner and operator are required to meet the applicable UST requirements.

These are not new requirements and similar provisions are found in other states. Consequently, I believe most Arkansas jobbers recognize this dual responsibility. However, there may not be a similar understanding of how this dual responsibility can potentially jeopardize Arkansas Petroleum Storage Tank Trust Fund (“Trust Fund”) eligibility.

Many Arkansas jobbers lease one or more retail motor fuel facilities to independent companies or individuals. Leasing such facilities with an accompanying motor fuel supply agreement is an equally common commercial arrangement in Arkansas. However, a key question is whether a jobber (UST owner) leasing a retail motor fuel facility understands that the lessee’s (UST operator) failure to meet certain release reporting requirements might lead to denial of a Trust fund claim for both parties? Such denial could potentially require the jobber to fund tens or hundreds of thousands of dollars in corrective action costs without the assistance of the Trust Fund.

Consider the following scenario:

W. Wright Petroleum (“Wright”) leases a convenience store (with USTs) to independent operator/lessee E. Martin, Inc. (“EMI”). The lease specifies that EMI must strictly comply with all UST regulations including leak detection and release reporting requirements. Fumes from a sewer adjacent to the leased facility are reported by EMI to the Arkansas Department of Environmental Quality (“ADEQ”) as a suspected UST release. Wright undertakes the initial investigation required by the regulations and requests an ADEQ determination of Trust Fund

1. Walter is partner at the Mitchell Williams Law Firm in Little Rock, Arkansas and has served as General Counsel for the Arkansas Oil Marketers Association for over 25 years. He previously served as Assistant General Counsel to the Petroleum Marketers Association of America in Washington, D.C. in the mid-80s. Walter has been an Adjunct Professor at University of Arkansas at Little Rock School of Law since 1990.

eligibility for current and future corrective action costs related to the suspected release. ADEQ reviews the UST leak detection records that EMI has generated for the past 12 months. The agency denies eligibility stating that the leak detection records show results (indications of suspected releases) that should have been reported to ADEQ several months ago. It further states that the “failure to report the suspected release in a timely manner resulted in a delay of correction action that contributed to an adverse impact on the environment and is a basis for denial of Trust Fund eligibility.” Wright responds to the denial stating it had no knowledge of the violations and its lease with the UST operator/EMI required compliance with the regulations. ADEQ states that EMI’s violation (failure to report) is a basis for denial of Trust Fund eligibility preventing either party (owner or operator) from accessing the Trust Fund.

This is not a hypothetical scenario. Arkansas Trust Fund eligibility has been denied based on similar facts on more than one occasion over the past several years.

The purpose of this article is twofold. First, the article explains why the issue warrants attention. Second, it suggests methods to reduce (not eliminate) the risk of Trust Fund ineligibility when leasing to independent operators. Ignoring this issue could be costly.

II. Relevant Arkansas Underground Storage Tank Regulatory/Trust Fund Provisions

A. The Parties Legally Responsible for UST Regulation Compliance: Owner or Operator

The Federal and Arkansas UST programs place the responsibility for meeting the regulatory requirements on the UST’s “owner” or “operator.” The term “owner” means any person who “owns” a UST used for the storage, use, or dispensing of petroleum. The term “operator” is similarly broad and means “any person in control of, or having responsibility for, the daily operation of the UST.

The jobber/lessor of the retail motor facility (including USTs) will be an owner. The independent operator/lessee will be a UST operator.

B. UST Leak Detection/Reporting Requirements

Owners and operators generally must report suspected releases to the implementing agency (i.e., ADEQ) within twenty-four hours. Conditions indicative of suspected released include:

- (1) the discovery of regulated substances or vapors in soils, basement, sewer and utility lines, or surface water at or near the UST site;
- (2) unusual operating conditions, such as sudden loss of product or the presence of water in the tank; and
- (3) monitoring results that indicate that a release has occurred.

The failure to timely report is, of course, a violation of the Arkansas UST regulations. However, as will be discussed, it can also be a basis in certain circumstances for denial of Trust fund eligibility.

C. Arkansas Trust Fund

1. Overview

The Arkansas General Assembly created in 1989 a petroleum storage tank trust fund that provides owners and/or operators of eligible USTs and aboveground storage tanks (“AST”) reimbursement of up to a million dollars (subsequently increased to \$1.5 million) for corrective action (i.e., remediation of leaks and spills) and for third party claims for certain damages related to a release of petroleum. In 1999, the Arkansas General Assembly reduced the deductible for reimbursement for both corrective action and third party claims to \$7,500.

The importance of the Trust Fund to Arkansas UST owners cannot be overstated. It provides an affordable mechanism for Arkansas UST owners/operators to meet the federal and Arkansas financial responsibility requirements. Of equal importance, it has provided reimbursement to eligible Arkansas owners/operators for tens of millions of dollars of petroleum release corrective action costs at facilities all over the state.

2. Eligibility Criteria

A UST’s or AST’s eligibility for trust fund reimbursement is predicated on the ADEQ Regulated Storage Tank Division’s determination that certain statutory prerequisites have been met. The owner or operator must demonstrate that all three statutory eligibility criteria have been met. These criteria include:

- (a) the owner or operator cooperated with ADEQ in addressing the release,
- (b) the USTs or ASTs were registered with ADEQ and fees paid, and
- (c) There was not a failure to report a suspected release in a timely manner that contributed to an adverse impact on the environment.

The failure to satisfy any one of these statutory criteria can result in the forfeiture of trust fund eligibility.

The Trust Fund eligibility criteria “Cooperation” and “Registration/payment of fees” are fairly straightforward. “Cooperation” is logical and payment/registration is easily accomplished and/or verifiable. The eligibility criteria addressing “Reporting” is arguably more complex.

The Arkansas Code provides, in regards to the “Reporting” eligibility criteria:

Payment for corrective action may be denied if the storage tank owner or operator fails to report a release as required by regulation promulgated by the Arkansas Pollution Control and Ecology Commission, and the failure to report the release causes a delay in the corrective action that contributes to an adverse impact to the environment.

This language provides for a two part test to determine ineligibility. First, was there a failure to report the release under the relevant regulations? For example, did the owner/operator receive information that indicated a suspected release, therefore, potentially triggering the need to report this event to ADEQ within 24 hours? Second, assuming there was a failure to timely report, did this “contribute to an adverse impact to the environment”?

As opposed to the first two eligibility criteria (i.e., fees/registration and cooperation), whether there was a duty to report and was it timely along with a determination of “adverse impact on the environment” can sometimes be a confusing/debatable issue. The additional problem for an Arkansas jobber/lessor is the fact that he or she is dependent upon an independent/operator to avoid triggering this two part (i.e., a report/adverse impact to the environment) criteria for ineligibility.

In a straight lease (as opposed to a commission agent arrangement) the jobber has ceded control in many instances to the lessee/independent operator to fulfill UST leak detection and related reporting requirements. As previously explained, if the lessee/independent operator does not fulfill those requirements a potential determination of trust fund ineligibility would be imposed upon both the UST operator/lessee and the UST owner (lessor/jobber).

III. The Leasing Issue

The potential significant costs associated with UST releases (Trust Fund eligible or not) warrant special consideration in a lease. In general, a prudent jobber should clearly delineate who is responsible (between lessor and lessee) for any current and future environmental compliance and remediation issues. For example, there are numerous requirements in the UST technical standards for which the owner or operator must assume responsibility. Because both the lessor and lessee may both be liable for violations as owners or operators, lessors often have an incentive to ensure that lessees expediently address UST discharges on the leased premises.

The following Section “A” will review typical relevant lease provisions/deficiencies in regards to this issue. Section “B” will discuss some measures that a jobber/lessor may consider to reduce risks in regards to this issue.

A. Relevant Lease Terms

The jobber/lessor and independent operator/lessee will, of course, typically memorialize the terms of their retail motor fuel facility leasing arrangement in a written lease. The lease will address any number of items such as lease term, rent, responsibility for repairs, allowable activities, taxes, etc. The ability of one party or the other to dictate certain terms will, of course, be driven to a great extent by which party has the greater leverage. Profitable independent operators/dealers are highly valued by jobbers and competition can be keen for purposes of acquiring the ability of providing them a retail motor fuel facility and supplying it with motor fuel. Regardless, a careful jobber should consider the Trust fund eligibility issue in structuring a lease.

Obviously, a key provision in the lease is language that requires that lessee comply with all applicable federal and Arkansas environmental statutes and regulations. Some retail motor fuel facility leases go further and specify various UST or AST related requirements to ensure that the lessee is more specifically informed of the regulatory requirements that have to be addressed. While this is an important provision, it is critical that the jobber recognize that it certainly does not by itself ensure that a Trust Fund ineligibility scenario may not occur.

Consider a scenario in which a lessee violates the regulatory compliance provision in the lease by failing to report a suspected release in a timely manner to ADEQ. The lessor would certainly have some type of contractual claim against the lessee. However, the fact that the lease contractually required the lessee to report would be irrelevant to ADEQ’s review as to whether the UST release is Trust Fund eligible. Therefore, it is critical for Arkansas jobbers to not simply rely on a contractual provision that very well may be violated by the lessee.

In terms of lease language, what other provisions might be added and/or considered to attempt to address this issue? Jobbers sometimes include provisions in the lease requiring that the lessee provide the jobber copies or access to leak detection records on a periodic basis. In other words, the lessee may provide monitoring well measurements, etc. to the jobber on a specified schedule. This might provide the jobber the ability to ensure that leak detection is being undertaken as required by the regulations and that there does not appear to be any data or indication of a suspected release which may need to be reported.

Another basic provision that should be included in the lease is a requirement that the lessee immediately give notification to the lessor of ADEQ inspections, correspondence, reports, demands, etc., along with copies of any associated documents, reports, etc. Correspondence or oral reports from the lessee to ADEQ or other government agencies should also be provided to the jobber/lessor.

Language is sometimes added to the lease that is intended to incentivize the lessee to strictly comply with the rules (including reporting). This might be done by a provision that makes the jobber responsible for the Trust Fund deductible and any required investigation/remediation if the lessee maintains compliant leak detection and fulfills any required reporting. In such a scenario, the lessee would presumably be less hesitant to fulfill these responsibilities or ignore a suspected release. Some jobbers even contractually assume certain repair/leak detection responsibilities to ensure compliance.

None of this discussion is intended to discount the continued importance of requirements that the lessee indemnify the lessor in appropriate circumstances (i.e., non-compliance with the regulations, etc.). Other provisions, such as right to inspect the facility, including relevant leak detection documents, is a key need. In addition, the lease should clearly identify and delineate the various UST regulatory obligations (including registration/payment of fees) and allocate them between the parties. Further, in some instances the jobber may find it prudent to ensure on a regular basis it verifies UST registration/payment and/or undertake these tasks themselves.

B. Non-lease Strategies

1. Commission Agent

Other commercial arrangements may provide opportunities for the jobber to assume more control over UST compliance. For example, some jobbers utilize a commission agent arrangement as opposed to a straight independent operator/lease. The elements of the commission agent arrangement can vary but generally involve the jobber setting the motor fuel prices at the facility and the operator serving as its agent for collecting motor fuel receipts (deducting the agreed upon commission). In such circumstances, the jobber clearly has more involvement with the operation of the USTs and therefore, is in a better position to ensure compliance.

The commission agent arrangement will generally mean that the lessee has an independent inside sales business while serving as an agent for the jobber in regards to motor fuel sales. The written agreement may involve the jobber specifically noting his or her responsibility for maintenance of the USTs including leak detection, etc. Of course, it would be important to nonetheless require that the on-site agent cooperate and provide whatever information is needed to the jobber so that the regulatory responsibilities can be fulfilled.

The economics of this arrangement for a given retail motor fuel facility will usually dictate whether a commission agent or a variation such as a "consignment: agreement is used. Nevertheless, as a jobber considers the structure of an arrangement, it is least worth factoring in the Trust Fund issue.

2. Leak Detection Vendor

Third party vendors are sometimes used for UST leak detection (i.e., sampling monitoring wells, etc.). The availability of such third party vendors may provide an opportunity for the lessor in regards to the Trust Fund issue. The lessor might require that the lessee contract with a third party vendor for such services. If so, the lessor may require that any information generated and/or notifications/reports provided to lessee be simultaneously given to the jobber/lessor. For example, a monthly leak detection report addressing the monitoring wells might be provided to both the lessor and the lessee. This would provide the opportunity for the lessor to ensure that conditions indicative of a suspected release are reported in a timely manner. The lessor will need to ensure that the lessee's written arrangement with a third party vendor addresses this issue (i.e., notification/information is to be provided to both the lessee and lessor). In some instances, the lessor may simply decide to retain the third party vendor itself for purposes of leak detection at the leased facility.

IV. Conclusion

This article discusses an issue that is of some importance from a risk/liability standpoint. Nevertheless, nothing in this article should be construed as an argument for moving away from leasing arrangements if the economics, etc. are favorable. Instead, it simply identifies an issue that has arisen in several instances in the last several years and discusses some possible ways to attempt to mitigate the risk.



Environmental, Engineering and Field Services
Since 1988
 Little Rock - 501.221.7122 / www.pmico.com / Springdale - 479.750.7131




PMI - providing a broad range of engineering and environmental services throughout Arkansas and the surrounding states for over 25 years

- Environmental & Civil Engineering
- Tank Assessments and Closures
- Soil & Groundwater Remediation
- Phase I & Phase II ESAs
- Water & Wastewater System Engineering
- SWPPP & SPCC Plans
- Regulatory Permitting & Compliance