

ARKANSAS UNDERGROUND STORAGE TANKS:

LESSONS LEARNED AT YEAR 25

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I. Background	37
A. Development of the Federal/State Programs.....	37
B. The 2008 Arkansas Tank Population	38
II. Arkansas UST Technical Standards Issues	38
A. Access to Adjacent/Off-Site properties for Investigation/Corrective Action.....	38
(1) Relationship with Corrective Action Plan/Trust Fund Reimbursement	38
(2) Access Agreement Issues	39
B. Obligations Related to USTs Taken Out of Service Prior to 1988.....	39
C. The Timing and Extent of Corrective Action	39
(1) Free Product Removal	39
(2) Approval of Corrective Actions Plans/Third Party Claims.....	39
D. Enforcement	39
(1) A Level Playing Field?	39
(2) Federal EPA's Continuing Enforcement Role in Arkansas	40
(3) Arkansas UST Enforcement Issues.....	40
E. Alternative Fuels	41
III. Arkansas Petroleum Storage Tank Trust Fund	41
A. Tanks and/or Petroleum Products Potentially Excluded from Participation in the Trust Fund	41
(1) Farm Tanks	41
(2) Non-Motor Fuels?	41
B. Corrective Action Reimbursement.....	42
(1) Multiple Release Issues	42
(2) What Costs are Reimbursable Under the Trust Fund?	42
(3) Eligibility Issues	44
C. Third Party Liability Claim Reimbursement	44
(1) Required Notifications	44
(2) Defense of Third Party Claims.....	45
IV. The Role of Tanks in Petroleum Marketing Agreements/Transactions	45
A. Addressing Lender Concerns	45
B. Are USTs Real Property (Fixtures) or Personal Property?.....	45
C. Contracting for Corrective Action Costs	45
(1) Licensing Requirements.....	45
(2) Retention of Tank Remediation Contractors/Consultants	45
(3) Jobber/Marketer Tank Services.....	46
D. Allocation of Tank Compliance/Liability	46
(1) Refiner/Jobber Supply Agreements.....	46
(2) Tanks That Have Been Previously Removed.....	47
(3) Lessor/Lessee	47
(4) Termination of Wholesaler/Retailer Supply/Lease Relationships.....	48
(5) Acquisition of Jobberships	48
(6) Exiting a Leasehold	49
(7) Compliance with the UST Technical Standards.....	49
(8) Sale of Properties with Tanks from the Jobber/Seller Perspective.....	49
(9) Access to Undertake Investigation/Remediation.....	49
E. New Petroleum Marketing Practice Act Infrastructure Franchise Agreement Restrictions	50
V. Tank Related Litigation	50
A. Third Party Bodily Injury/Property Damage Litigation.....	50
(1) Third Party Damages/Costs Excluded from the Trust Fund	50
(2) Measure of Damages.....	50
B. State/ADEQ Cost Recovery Litigation.....	50
C. Corporate Dissolution	51
VI. Conclusion	51

The Arkansas petroleum marketer or jobber must address a number of difficult issues in operating a wholesale or retail facility. The challenges may range from interpreting complex motor fuel tax regulations to avoiding violations of confusing federal/state employment laws. Equally difficult may be the acquisition of capital and/or the return on investment necessary to obtain or successfully operate high-traffic count retail motor fuel properties. Nevertheless, the issue that has arguably posed the greatest combination of complexity, risk, and cost for the Arkansas petroleum marketer or jobber for the last 25 years has been the operation of underground storage tanks (“USTs”).

The United States Congress and federal Environmental Protection Agency (“EPA”) initiated the focus on USTs in the 1980’s. However, it has been up to states such as Arkansas to operate these programs. As a result, the Arkansas Oil Marketers Association (“AOMA”) has been working on Arkansas UST issues for almost a quarter of a century. AOMA’s efforts have included both the creation and periodic fine-tuning of the State’s UST programs. The association’s goal has been to ensure, to the extent possible, the availability of USTs and other tanks² to store and distribute petroleum products.

We now have 25 years of experience in operating tank programs in Arkansas. Many issues have arisen over this period of time. The resolution of these issues provides a valuable base of experience for Arkansas petroleum marketers. The purpose of this article is to convey a number of the lessons that have been gained from this experience.

I. Background

Development of the Federal/Arkansas Tank Programs

USTs are key components of most Arkansas petroleum marketing operations/infrastructure. They are used individually or collectively to store hundreds or thousands of gallons of various motor fuels and other petroleum products below ground. The subsurface placement of this equipment better ensures the safe storage of these products prior to being transferred or dispensed. USTs will therefore continue to be installed and operated by petroleum marketers and their customers and constitute a part of the industry’s infrastructure for the foreseeable future.

USTs are clearly important to the sale and distribution of petroleum products. Unfortunately, the equipment poses a challenge for

both its owners and operators. In the mid 1980’s the United States Congress concluded that a significant percentage of the UST population had or would suffer leaks or spills (often called “releases”). Congress also decided some releases had or would cause significant subsurface and/or groundwater contamination. A related concern was the possibility that releases in certain areas or settings might infiltrate structures or drinking water supplies.³

The federal response was the promulgation of regulations in the late 1980’s requiring that petroleum USTs meet various registration, installation, design, leak detection, record keeping, and closure requirements. The leak prevention/detection requirements have necessitated significant capital, operation and maintenance expenditures. Petroleum marketers have been required to budget significant funds for the replacement and/or upgrading of USTs and installation of monitoring equipment. More recently, federal legislation has forced Arkansas (and most states) to mandate that new UST installations (within a certain distance of a drinking water supply) utilize secondary containment.⁴ Funding such expenditures in a thin margin industry such as motor fuels retailing has been and will continue to be a challenge.

Most states decided to play a role in the regulation of USTs after the promulgation of the initial federal regulations. Arkansas was no exception. AOMA and other organizations assisted Arkansas in developing the legislation necessary for the state to assume the primary UST regulatory role.⁵ The 77th Arkansas General Assembly was fortunate that its membership at the time included oil jobbers such as Representative John Lipton and Senator Knox Nelson. These lawmakers were instrumental in helping explain the potential adverse impact of this issue on the availability of motor fuel in rural areas of Arkansas. Arkansas enacted UST legislation in 1989.

The Arkansas legislation included the adoption of the federal UST technical standards, creation of a petroleum storage tank trust fund (“trust fund”) and initiation of a contractor licensing program. The Arkansas Department of Environmental Quality (“ADEQ”) was assigned responsibility for operating these programs.⁶ The state agency subsequently promulgated Regulation 12 to implement the UST legislation. This regulation incorporates by reference the federal UST technical standards, establishes the trust fund reimbursement program, and sets up the contractor licensing program.

² Above ground storage tanks (“ASTs”) are also used to store various petroleum products. The term “tank” is used in this article when the discussion is applicable to both USTs and ASTs.

³ Over half the people in the United States obtain their drinking water from groundwater.

⁴ The federal Energy Policy Act of 2005 required states to choose either to mandate that new USTs within 1000 feet of an existing community water system or portable drinking water well utilize secondary containment or in the alternative impose financial responsibility requirements on UST manufacturers and installers. Most states selected the secondary containment requirement. Arkansas was one of those states.

⁵ The federal UST regulations provide if a state adopts standards no less than the federal program it can receive delegated authority to administer and enforce the UST program. The Arkansas UST legislation provides that the state regulations cannot be less stringent nor more stringent than federal requirements.

⁶ The ADEQ’s Regulated Storage Tank Division (“RSTD”) has been assigned responsibility for regulation of USTs. The initial RSTD staff had three employees: Lynda Perry, Jane Marsh and Jim Shell.

The Arkansas tank programs have not remained static. AOMA and ADEQ, together or on their own, have crafted amendments to the Arkansas tank statutes in almost every subsequent session of the Arkansas General Assembly. These amendments have included:

- * Reducing the trust fund deductible to \$7,500.
- * To eliminate the deductible for owner/operators required by ADEQ to test for a release and not found to be a source of a release.
- * Increasing the maximum reimbursement for corrective action from \$1 million to \$1.5 million.
- * Substituting a requirement for a “storage tank self inspection audit” instead of “substantial compliance” to maintain trust fund eligibility.
- * Establishment of a delivery prohibition requirement for USTs that do not meet the designer monitoring requirements.
- * A requirement that the tank owner or operator cooperate with the Attorney General in defending a third party claim alleging damages due to a petroleum release.
- * Providing that certain “unknown USTs” subsequently discovered are potentially eligible to participate in the trust fund.
- * Replacing the phrase “bodily injury and property damage” with “compensatory damages” to ensure reimbursable third party claims include all damages except punitive damages and attorney fees.
- * Providing the trust fund the right to file an action for damages against party other than the tank owner or operator that causes a release.⁷
- * Implementing the UST provisions of the federal Energy Act of 2005.
- * Requiring that new USTs or piping be secondarily contained and monitored for leaks if the new tank or piping is within 1000 feet of any existing community water system or portable drinking water well (including defining “replace”, as to piping, as the repair or removal and placing back in of more than 5 feet of piping associated with a single UST).
- * Providing that operators of USTs with varying degrees of responsibility undergo training in the operation and maintenance of this equipment.

B. The 2008 Arkansas Tank Population

Mr. Joe Hoover, Chief of the ADEQ RSTD provided he following

information about Arkansas’ current tank population in a May 2008 presentation:

Regulated Storage Tank (“RST”) Statistics

4,875 Active RST Facilities
 4,694 Active Petroleum AST Systems
 8,555 Active Petroleum UST Systems
 72 Active Hazardous Material USTs
 13,321 Total Active RST Systems
 20,420 Permanently Out-Of-Use RST Systems

II. Arkansas UST Technical Standards Issues

A. Access to Adjacent/Off-Site properties for Investigation/Corrective Action

(1) Relationship with Corrective Action Plan/Trust Fund Reimbursement

The UST regulations require that, in some instances, a corrective action plan (“CAP”) be drafted and implemented to address a release. The owner or operator or their consultants submit the CAP to ADEQ RSTD for its approval. ADEQ will not approve a CAP that includes off-site sampling and/or remediation until permission is obtained from the owner of the property or properties on which these activities will be conducted. As a result, the failure to obtain access to the off-site property will delay the proposed work.

The UST owner or operator’s inability to obtain prompt access to an adjacent or off-site property may have negative financial consequences. Specifically, ADEQ has taken the position that the costs incurred in preparing a CAP will not be reimbursed, under the trust fund, until that document is approved. As previously noted, the CAP will not be approved until access to the adjacent or off-site property is obtained. The statutory or regulatory basis for this position is unclear.

The Arkansas UST statute provides the ADEQ the authority to file a court action to obtain access to a property potentially affected by a release for investigative/corrective action purposes. However, obtaining access pursuant to a court action can take weeks or months. The use of this statutory authority should therefore be seen as a last resort.

As a practical matter, most potentially impacted adjacent property owners are unlikely to impede an investigation by denying access. These off-site property owners (or their attorneys) often use the data generated by the investigation/remediation activities to pursue a third party property damage and/or bodily injury claim. In fact, the reports are often the key documents that the

⁷ Actions of this nature are often referred to as subrogation claims. An example might be a suit by the trust fund for recovery of expenditures used to address a release caused by a motorist hitting an AST.

attorneys representing the property owners use to try to support third party claims.

(2) Access Agreement Issues

A written agreement is utilized to document the off-site property owners willingness to allow the investigation and/or remediation of a petroleum release. The agreement usually provides that owner/operator and/or consultant will be responsible for any damages caused by the work. However, some off-site property owners with high traffic businesses may have special concerns. They may object to work that could adversely affect some aspect of their business for an unknown period of time.

A recent example from southwest Arkansas provides an illustration. A petroleum marketer spent almost a year attempting to obtain access to an adjacent fast food restaurant to perform required sampling. The owner of the business requested a provision in the access agreement that would provide an indemnification for lost sales due to drilling or related activity. A potential problem in agreeing to such a provision was that an argument might be made that a claim based on the violation of the access agreement is not reimbursable under the trust fund. The petroleum marketer argued that this access agreement provision was not needed since such claims (if valid) could be recovered pursuant to a third party claim for compensatory damages reimbursable under the trust fund.

B. Obligations Related to USTs Taken Out of Service Prior to 1988

Since the establishment of UST regulations in 1988, owners and operators have been required to undertake closure of active USTs when they are permanently taken out of service. However, property and facility owners have occasionally discovered USTs that were taken out of service prior to 1988. The closure obligation related to these “pre-1988” USTs was discussed by EPA when it promulgated the new federal technical regulations:

EPA now believes that for tanks closed or abandoned before the effective date of today's regulations, the closure provisions should only be applied selectively under the discretionary authority of the implementing agency. These agencies are in the best position to identify abandoned tanks that may have been improperly closed, and to gauge the nature and extent of the threat posed by those tanks. They are also better able to identify the responsible owners and define the appropriate site assessment techniques. This approach is intended to enable the implementing agencies to effectively allocate their resources

and only focus upon abandoned tanks that are suspected of posing potentially significant problems. This revised approach also reduces the unnecessary burden upon owners and operators of the discovered abandoned tanks by eliminating the requirement for them to revisit and conduct a site assessment at all tanks that have been previously closed, and removes the uncertainty associated with the “improper closure” standard.⁸

The term “implementing agency” refers to a state agency such as ADEQ.

C. The Timing and Extent of Corrective Action

(1) Free Product Removal

The corrective action provisions of the UST regulations have historically required, at a minimum, the cleanup of free product. The regulations require that the UST owner or operator remove free product to the maximum extent practicable. “Free product” is defined as a regulated substance that is present as a non-aqueous phase liquid (e.g. liquid not dissolved in water). Members of the regulated community and their consultants have expressed concern that ADEQ, in some instances, has been too restrictive in authorizing or requiring the removal of free product. The basis for ADEQ's position has apparently been the petroleum's absence of mobility.

Defining free product based on mobility arguably contradicts the literal definition of free product. This position would arguably result in the failure to address some contamination. The retention of such contamination will affect the value and marketability of such properties. In addition, if such contamination extends across a property line third party claims are more likely.

(2) Approval of Corrective Actions Plans/Third Party Claims

The contamination of an off-site parcel of property can diminish its value or affect its use. The removal of such contamination will logically be a key step toward minimizing the scope or amount of a likely third party property damage claim. Therefore, the expeditious approval and implementation of a CAP involving a release that has crossed onto adjacent properties is especially important from a third party claim standpoint.

D. Enforcement

(1) A Level Playing Field?

Thousands of petroleum marketers have spent hundreds of millions of dollars to comply with the UST standards or close

⁸ 53 Fed. Reg. 37, 821 (Sept. 23, 1988).

their tanks. However, compliance by UST owners and operators has not been universal. A significant percentage have failed to comply with the various technical requirements such as tank upgrading, leak detection, etc. Non-compliance can arguably impact competition among petroleum marketers.

The motor fuels retailing consumer market place is obviously extremely competitive. Profit margins are often razor thin or non-existent in some geographic markets. A petroleum marketer that foregoes expending the capital necessary to comply with the UST requirements enjoys a competitive advantage over competitors that made the required expenditures. UST non-compliance by some petroleum marketing industry members therefore arguably constitutes unfair competition.

The competitive advantage enjoyed by UST owners and operators who neglected to make these investments has been an issue for both the government and the petroleum marketers that spent the money to meet the standards. In fact, federal and state petroleum marketer associations have supported vigorous enforcement to ensure both a level playing field and protection of the environment. Petroleum marketing groups expressed concern about federal EPA and some states' inefficient and incomplete enforcement of regulations. They stressed that weak enforcement allows noncompliant tanks to remain in operation, increases the potential for petroleum releases and undermines the ability of the tank programs to reduce the incidence of releases. Such arguments helped spur recent federal legislation that requires states to regularly inspect USTs and increase the number of state inspectors.

(2) Federal EPA's Continuing Enforcement Role in Arkansas

Arkansas' adoption of both the federal standards and the authority to enforce them has enabled the state to become the primary UST regulatory authority. However, federal EPA retains the authority to undertake inspections and enforcement actions against Arkansas UST owners and operators for violations.⁹ Personnel from EPA's regional office in Dallas, Texas (Region VI) have periodically conducted UST compliance inspections in Arkansas over the last 20 years.

Federal enforcement has had serious financial ramifications for a number of Arkansas UST owners and operators. The penalties assessed by federal EPA against Arkansas UST owners and operators have often been several times higher than those imposed by Arkansas for similar violations. In fact, EPA has, on occasion, imposed five and six figure penalties on Arkansas operations. Avoiding federal enforcement is therefore important.

(3) Arkansas UST Enforcement Issues

(a) ADEQ Enforcement Resources

ADEQ has an experienced and active enforcement staff. The ADEQ's goal is now believed to be the inspection of every UST each year. Several additional inspector positions have been added to the existing enforcement staff. A total of fourteen inspector positions are now authorized.

(b) Penalty Assessment/Resolution

The ADEQ RSTD has been active in enforcing the UST requirements over the history of the program. The agency's enforcement tools include the ability to assess significant penalties. However, unlike other environmental regulatory programs administered by ADEQ, compliance is also driven by the tank owner/operator's desire to preserve trust fund ineligibility. Certain instances of non-compliance can potentially jeopardize trust fund eligibility.¹⁰

ADEQ UST enforcement actions are usually settled without proceeding to a hearing or court. The settlement with ADEQ is memorialized in a document known as a Consent Administrative Order ("CAO"). The owner/operator and/or their attorney should review the draft CAO proposed by the agency to ensure there are no facts or language in the document that may be used in a future third party action by a plaintiff allegedly affected by a tank release. Further, it is important that the CAO contain language stating that the document does not constitute an admission of any fact and cannot be used in any other court proceeding.

(c) Individual Liability?

A key reason for forming business entities such as corporations and limited liability companies ("LLCs") is to segregate an individual or affiliated business from another businesses liabilities.¹¹ The corporation or LLC should, in most instances, be responsible or liable for any damages or penalties associated with a lawsuit or governmental action. However, the ADEQ has, on occasion, named both a business entity (i.e., corporation or LLC) and an individual in enforcement actions involving USTs. The ADEQ's rationale or basis for naming both the individual and the business entity in the enforcement action has not been clear.

By way of example, note ADEQ's enforcement action against Johnson Oil Company for alleged UST violations. On September

⁹ EPA retains this authority pursuant to Sections 9005 and 9006 of the federal Resource Conservation and Recovery Act.

¹⁰ An example may be the failure to notify ADEQ when the owner/operator becomes aware of a release. If this failure to notify worsens the release, this may be a basis for denying trust fund eligibility.

¹¹ A common example in the petroleum industry is the spin-off of rolling stock or a transportation unit into a separate LLC or corporation. Another example might be jobbers placing individual retail units in separate corporations or LLC's.

26, 2005, the ADEQ issued a Notice of Violation (“NOV”)¹² that named both an employee of Johnson Oil along with the business entity in the document. The agency alleged there were UST violations at Hamilton’s Grocery (formerly Murray’s Grocery) in Huttug, Arkansas. The NOV was titled:

In The Matter Of:
 Gil Johnson
 Johnson Oil Company
 P.O. Box 726
 Strong, AR 71765-0726

The NOV named both the company and a company employee.

The employee named in the action (Gil Johnson) filed a Motion to Dismiss the NOV arguing that there was no proof that Johnson Oil or Gil Johnson had abused the corporate form to the detriment of a third party. The Motion to Dismiss argued that the NOV failed to state facts upon which relief should be granted against Gil Johnson in his individual capacity and should therefore be dismissed as a party.

An individual that is named personally in an enforcement action involving tanks owned or operated by a business entity should consider whether this is appropriate and /or correct. The failure to address the issue could set a precedent if there is a subsequent third party claim

E. Alternative Fuels

The Energy Policy Act of 2005 requires gasoline refiners to increase the amount of alternative fuels that are produced. For example, the national gasoline supply must include a 4.66% alternative fuel content in 2008. The status of future alternative fuels may need to be clarified, at some point for purposes of both the UST technical regulations and trust fund. However, note that in 2007 EPA stated that USTs containing ethanol-gasoline blends are subject to the UST regulations. Further, EPA stated that a UST storing E85 is a regulated UST. EPA also predicted that state UST agencies will conclude USTs storing B-99¹³ are covered by the regulations.¹⁴

III. Arkansas Petroleum Storage Tank Trust Fund

In the 1980s, the United States Congress enacted a financial responsibility program to supplement the UST technical standards. EPA subsequently promulgated federal UST financial responsibility regulations to implement these requirements. The purpose of these regulations is to oblige owners and operators of USTs to demonstrate that they can cover the cost of corrective action and compensation to third-parties if there is a petroleum release.

The private capital markets failed to respond to the need for financial responsibility mechanisms because of concerns about liability. Worry about whether small owners and operators would be able to comply with the strict federal requirements led Arkansas to develop the trust fund. Without access to the trust fund, many Arkansas owners and operators of USTs would probably not have been able to meet the federal requirements on financial responsibility. In short, the Arkansas General Assembly created the trust fund to serve as an insurance policy for owners and operators in case of a petroleum release. It was a public response to a private market failure.

The key aspects of the trust fund (including the reimbursement process) are outlined in Arkansas Pollution Control & Ecology Commission Regulation 12. Of particular importance, Regulation 12 limits reimbursement to allowable, reasonable and necessary¹⁵ corrective action costs above a \$7,500 deductible. The policy documents ADEQ has developed that outline the agency’s position on various trust fund issues are also relevant.

A. Tanks and/or Petroleum Products Potentially Excluded from Participation in the Trust Fund

(1) Farm Tanks

The federal and Arkansas statutes exempt farm tanks from complying with the UST requirements. This exemption also means some farm tanks are not eligible to access the Arkansas trust fund. A jobber supplying USTs to an agricultural operation that are subject to this exemption should recognize the potential absence of the trust fund for some farm tanks.

(2) Non-Motor Fuels?

The ADEQ, in 2008, denied trust fund eligibility for a release from an AST that contained hydraulic oil. The denial letter stated in part:

The Arkansas Pollution Control and Ecology Commission Regulation Chapter Three “Petroleum Storage Tank Trust Fund Corrective Action Reimbursement Procedures” 12.302(c) states “The trust fund shall not be accessed for storage tank systems storing substances for which payment of the environmental fee is not required.”

The Motor Fuel Section of the Department of Finance and Administration has confirmed that they do not collect the environmental fee on

¹² An NOV is an administrative complaint or enforcement document that the ADEQ files against an alleged violator.

¹³ B-99 is 1 percent diesel and 99 percent biodiesel.

¹⁴ BNA Environmental Reporter, Dec. 7, 2007.

¹⁵ Which reimbursements are “allowable,” “reasonable” or “necessary” are described in Regulation 12. The tank owner or operator can appeal a trust fund denial to the Petroleum Storage Tank Advisory Committee. The Committee’s decision is then deemed a recommendation to the ADEQ Director.

hydraulic oil because it is not a motor fuel or distillate special fuel as specified by A.C.A. § 8-7-906.

This ADEQ position would potentially affect other tanks such as those holding used oil.¹⁶

AOMA and other groups likely disagree with this reading of the law. In order to be eligible for reimbursement for corrective action expense, the owner or operator must, among other things, show that he has paid all *required* fees. The trust fund statute says:

All payment for corrective action expenses of the owner or operator shall be made only following proof that:

(1) At the time of discovery of the release, the owner or operator had paid all fees required under state law or regulations applicable to petroleum storage tanks.¹⁷ (emphasis added).

The use of the word “required” in this context indicates that reimbursement will be denied for noncompliance with this requirement only when a fee which is “required” has not been paid at the time of the discovery of the release. The absence of fee payments in the case of hydraulic oil, used oil, etc. should not be an issue since they are not required fee payments.

B. Corrective Action Reimbursement

(1) Multiple Release Issues

(a) Separate Releases

Each release from a facility’s eligible tank or tanks constitutes a separate occurrence for the purpose of the trust fund. Each occurrence is eligible for \$1.5 million (less a \$7,500.00 deductible) in corrective action reimbursement and \$1 million (less a \$7,500.00 deductible) for third party claim reimbursement for compensatory damages. Consequently, the discovery of multiple tank releases at a facility may double, triple, etc. the amount of trust fund corrective action and third party liability coverage.

(b) Overlapping Releases

The presence of two releases has, on occasion, had a positive

impact on an Arkansas facility’s ability to access the trust fund. A facility may have a release that, for whatever reason, is not eligible to be addressed by the trust fund. In a few instances, a separate trust fund eligible release has also been present. The overlapping of such releases may enable both releases to be remediated pursuant to the trust fund. In other words, ADEQ has previously been willing, to some extent, to allow the non-eligible release to “free ride” on the eligible release if the remediation of the eligible release also addresses the non-eligible release.

An example occurred in the context of the settlement of an Arkansas trust fund eligibility appeal by Johnson Oil Company, Inc. (“Johnson”). Johnson withdrew its appeal of a trust fund reimbursement denial for one UST release with the understanding that the remediation of a second eligible release would address some aspects of both. Johnson noted in its Motion to Dismiss its appeal:

ADEQ has further determined that it is impossible to distinguish costs incurred due to the second release from those incurred as a result of the original release that is the subject of this action. Accordingly, ADEQ has made the determination to allow Johnson Oil trust fund reimbursement for eligible corrective action expenses at the Hamilton’s Grocery site.¹⁸

(c) Multiple Deductibles

The identification of separate releases at a facility can, in some instances, have negative financial consequences for a tank owner or operator. An example might be the discovery of both diesel and gasoline releases.¹⁹ Corrective action may be necessary to address the separate releases and a deductible will be required for each. Of course, as previously noted, available trust fund coverage for corrective action and third party liability would be doubled if there have been two releases. This additional coverage may be important if a facility will require extensive corrective action or is facing multiple or sizeable third party claims.

(2) What Costs are Reimbursable Under the Trust Fund?

(a) What is a “Corrective Action” Cost?

The trust fund will provide reimbursement to eligible owners or operators of storage tanks for “corrective action” costs required to address accidental releases. The trust fund defines “corrective

¹⁶ In other words, ADEQ is stating that petroleum products that are not subject to the gallonage fee are not eligible for trust fund reimbursement.

¹⁷ Ark. Code Ann § 8-7-907(c)(1) (2008).

¹⁸ Johnson Oil Company Motion to Dismiss, Arkansas Pollution Control & Ecology Commission (Docket No. 05-0001-Misc) (Oct. 24, 2006)

¹⁹ Arguments have been made as to why the discovery of both diesel and gasoline constituents may still justify one deductible. An Eastern Arkansas jobber in 2004 stated:

Because the potential exists for mixing of gasoline constituents with diesel constituents in both transportation and storage of motor fuels, the potential for both types of fuel to be discovered during a site assessment exists. Additionally, usage of any fueling/storage facility may result in historic hydrocarbon contamination below reportable/detectable levels that could commingle with hydrocarbons from a leak or spill. Consequently, the two (2) could not be differentiated, and therefore, two (2) deductibles should not apply.

action” as “those actions which may be necessary to protect human health and the environment as a result of an accidental release, sudden or non sudden.” Therefore, the expense for which reimbursement is requested must be an activity that is a part of corrective action.

(i) Repairs/Reinstallations, etc.

AOMA and ADEQ have, on occasion, disagreed as to whether certain repairs or reinstallation activities constitute reimbursable corrective action. AOMA has argued that ADEQ previously approved requests for restoring surface and subsurface features disturbed by the corrective action. The association has noted that ADEQ has in the past interpreted the term corrective action to include:

- (A) paving new curbs and sidewalks;
- (B) paving new driveways after monitoring wells have been drilled; and
- (C) replacing fences removed to allow trucks to enter and exit the cleanup site.

Whether the replacement or repair of these items constitutes corrective action has been the source of some conflicts with ADEQ. For example, the removal of contaminated soil will sometimes require the removal or repair of certain structures, equipment, signings, pavement, etc. The contractor may, in some instances, be unable to dig around or under the canopy or pump islands without removing them.

A key industry concern has been whether the cost of reinstallation of these items are allowable costs. The owner/operator and consultant should carefully consider the reimbursability of repair, etc. activities as a CAP is prepared.

Preparation of the Trust Fund Reimbursement Application

The time a consultant spends preparing the trust fund application may not be trust fund reimbursable.

(b) Corrective Action Cost Timing Issues

(i) Costs Incurred Prior to ADEQ RSTD Approval

A few costs related to investigating or remediating a suspected petroleum release may be trust fund reimbursable without a RSTD approval of the work. Two examples include costs for initial work performed for emergency abatement and initial release response.²⁰ Otherwise, Regulation 12 provides that corrective action costs are not allowable unless they are approved in advance by ADEQ RSTD. This may, on occasion, pose a dilemma. The requirement to undertake corrective action

is overseen by ADEQ RSTD personnel other than those operating the trust fund.

Consider the following example. A petroleum marketer submits a CAP to ADEQ. The CAP has been prepared to meet the requirements of the UST technical regulations. The required sampling or clean-up activities usually must be accomplished in accordance within certain timelines. The failure to meet such timelines can lead to ADEQ enforcement. However, the UST owner or operator may face a dilemma if the RSTD trust fund section refuses to approve some portion of the CAP. For example, there may be a disagreement as to whether a particular activity constitutes corrective action or the cost is reasonable.

The UST owner has the option to appeal an ADEQ staff trust fund denial of a particular proposed cost to the Arkansas Petroleum Storage Tank Advisory Committee (“Advisory Committee”). However, the appeal process takes some time and in the meantime, implementation of sampling and/or remediation could be delayed. The willingness of the ADEQ RSTD technical staff to extend deadlines can be uncertain. In addition, the delay of such work could increase the chances of a third party claim for damages if an off-site or adjacent property has been impacted. As a result, the owner or operator may feel it is in his or her best interest to undertake this work prior to resolution of the trust fund issue. However, if the owner or operator begins work prior to approval, the ability to appeal this disagreement may be forfeited.

(ii) Costs Incurred Prior to the Discovery of a Release

Regulation 12 provides that corrective actions costs are not allowable if they are incurred prior to the discovery of a tank release.

(c) Corrective Action Expenditures

(i) Cost Estimates

The ADEQ RSTD reviews the CAP to determine whether it will adequately address a release. If trust fund reimbursement will be sought for the costs of implementing the CAP a budget outlining the expected costs is submitted to a different RSTD section. The RSTD will determine whether the proposed expenditures are allowable and reasonable.²¹

Some members of the UST community have expressed concern that ADEQ has, in certain instances, refused to reimburse previously approved corrective action costs for activities or equipment that had increased by the time of their implementation.

²⁰ The document that is prepared for approval is often called the “work plan.”

²¹ Regulation 12 provides that corrective action costs must be “reasonable.” ADEQ has a detailed policy document called the “Cost Control Guidelines” that discusses cost and expenses. Tank owner/operators (and their consultants) should be familiar with the document.

In other words, ADEQ has disallowed that portion of the cost that had increased since the prior agency approval.²² This can be a problem since these costs are often estimates and variances can occur. The UST owner or operator is therefore at risk for not being reimbursed for any post approval increase in corrective action costs.²³

(ii) Attorney Fees

The ADEQ has in the past, and will likely in the future, take the position that attorney fees incurred by the owner or operator in addressing legal issues associated with a UST release are not reimbursable. An example might be a UST owner that suffers a release and asks an attorney to interpret some aspect of the UST regulations. ADEQ would likely take the position that such fees do not constitute corrective actions costs and therefore are not reimbursable. The position would probably be the same if an attorney asked to provide an interpretation of some aspect of the trust fund or the reimbursement application.²⁴

(3) Eligibility Issues

(a) What Standards Apply to Above Ground Storage Tanks?

Arkansas bulk plant and other AST owners and operators are fortunate to be located in one of the few states whose trust fund includes tanks other than USTs. However, ASTs have posed certain challenges from a trust fund standpoint. ASTs differ from USTs in a key respect. A comprehensive set of regulations addressing design, construction, leak detection, corrective action, and closure are applicable to USTs.

A similar set of comprehensive standards has never been developed for ASTs. Instead, different aspects of petroleum ASTs are subject the Arkansas Fire Prevention Code Rules²⁵ and the federal Clean Water Act Spill, Prevention, Control and Countermeasure (“SPCC”) regulations. Consequently, the assessment of AST compliance, including applicable leak detection requirements, is not as straightforward for trust fund purposes.

(b) Releases from Previously Closed USTs

The regulations require that USTs permanently taken out of service go through a “closure” process. Sampling is undertaken when the UST is removed to determine if there has been a release that will require additional investigation or remediation.

In the absence of a release or upon completion of remediation the ADEQ RSTD will issue a letter to the UST owner or operator stating that no further action is necessary. The ADEQ RSTD usually reserves the right to require additional work despite the previously approved closure if unknown or additional contamination is discovered.

The previously described scenario involves a properly conducted closure. However, there have been a few instances in which additional or unknown contamination has been discovered at a later date. The question has arisen as to whether the subsequent corrective action would be eligible for trust fund reimbursement. Stated differently, would trust fund eligibility be eliminated because the UST had been previously removed? AOMA and others have argued that trust fund coverage should still be available since the UST was eligible at the time of removal and the closure had been approved by ADEQ.

(c) Transfer of Trust Fund Eligibility

The trust fund has arguably played a beneficial role over the years in maintaining the marketability of properties with tanks. A potential buyer of such properties may view prior tank releases as a less significant issue if trust fund coverage is available. For example, a potential sale may involve a facility with known releases or ongoing investigation/corrective action. The buyer’s willingness to proceed may be dependent on the availability of trust fund coverage and ADEQ’s willingness to transfer it to the purchaser. The ADEQ provides a specific procedure that must be followed to accomplish such a transfer. It may be important for the buyer and seller to ensure that any relevant provisions in the purchase agreement do not inadvertently jeopardize the ability to transfer eligibility.

(d) Temporarily Closed/Empty Tanks

The responsibility for addressing a release remains despite the fact a UST is temporarily out of service or empty. Consequently, it is imperative that the owner/operator continue to fulfill the trust fund eligibility requirements such as self-audits, fees, registration, etc, despite this inactive status.

C. Third Party Liability Claim Reimbursement

(1) Required Notifications

The trust fund obligation to reimburse a third party claim is only

²² Work plans and CAPS are “task based” and approved as line item costs.

²³ The consultant or contractor may be responsible for these disallowed increased costs if the consulting contract shifts the risk of trust fund reimbursement denial to them.

²⁴ ADEQ has also disallowed reimbursement for time a consultant spent assisting the owner or operator in addressing trust fund eligibility issues.

²⁵ A 2007 Edition was issued in May 2008 by the State Fire Marshall’s office. Each Arkansas municipality, county, etc. must at a minimum adopt and enforce this state code.

triggered if the tank owner or operator provides notices required by both Regulation 12 and the trust fund statute. Section 12.4.5 of Regulation 12 requires that certain information be provided to ADEQ related to a potential third party claim within thirty days of the owner or operator's knowledge of the potential third party claim. Equally important, the tank owner or operator against whom a third party claim is filed in court or Arkansas State Claims Commission must provide a copy of the complaint to ADEQ within 20 days of the service of the summons.

(2) Defense of Third Party Claims

The trust fund potentially provides up to one million dollars reimbursement²⁶ for compensatory damages. As with any civil court action, the tank owner or operator will retain an attorney to defend such a claim. However, the Arkansas Attorney General has the right to intervene on behalf of the trust fund and participate in such action. As a practical matter, the Attorney General's office has played a key role in the defense of such actions for many years. Mr. Charlie Moulton, an Arkansas Assistant Attorney General wrote an excellent article on defending third party claims in an earlier edition of *The Canopy*.

A key concern for the tank owner or operator will be actions involving multiple plaintiffs and/or large claims. The trust fund limit of one million dollars could be exceeded in some scenarios. Therefore, it will usually be in the tank owner or operator's best interest to actively ensure that frivolous claims are eliminated and/or legitimate claims are reimbursed on an equitable basis.

IV. The Role of Tanks in Petroleum Marketing Agreements/Transactions

A. Addressing Lender Concerns

The trust fund has arguably provided lenders some comfort that there may be a source of funds to address potential contamination on mortgaged properties with USTs. The lender's interest is two fold. They want to ensure the value of the mortgaged property is maintained. In addition, they do not want to incur liability upon foreclosure.

Lenders are becoming more sophisticated in considering/assessing trust fund eligibility issues. The jobber that fails to demonstrate trust fund eligibility for a facility to the satisfaction of the lender may have a problem. Also relevant has been the EPA and Arkansas' statutory/regulatory efforts to clarify when a lender may be exempt from UST liability.

B. Are USTs Real Property (Fixtures) or Personal Property?

The petroleum marketer or jobber will often furnish USTs,

pumps, canopies, and other equipment to wholesale customers. The USTs are installed or affixed to real property. Depending on the circumstances, the petroleum marketer may have an interest in the ownership status of the UST in relation to the real property.

It is not unusual for a dispute to arise as to the ownership of the USTs or other equipment. Resolution of such UST issues may depend upon whether they are attached to the realty or chattel and treated as personal property or whether the USTs are deemed fixtures and thereby treated as part of the real property. In the absence of an express or implied agreement to the contrary, USTs, due to their nature, are often deemed fixtures and thereby pass with title to the real property.

The best way to ensure USTs are treated as fixtures or personalty is to have an unambiguous written agreement. The agreement should be executed by the installer or annexor and the landowner and establish the ownership of USTs, treatment of equipment as fixture or personalty, and rights and obligations to sever or abandon the fixture/personalty from or to the real property upon the occurrence of certain events.

As a practical matter, the jobber will usually have limited interest in actually removing the UST from a customer's property. The jobber will be concerned about triggering the UST closure requirements unless the responsibility for this work is allocated by agreement to the retailer. The removal of the UST will trigger the closure process requiring sampling around the UST. Sampling could trigger the need for significant investigative and remediation costs.

C. Contracting for Corrective Action Costs

(1) Licensing Requirements

The Arkansas tank statute included a mandate that ADEQ promulgate a program that licenses persons who install, repair, close, etc. USTs. Regulation 12 outlines the various licensing requirements. UST owners and operators have sometimes unknowingly used unlicensed contractors. Consequently, it is important that the owner/operator verify that the contractor retained to undertake UST work has the relevant license.

(2) Retention of Tank Remediation Contractors/Consultants

The investigative and remediation activities required to address a release from a UST or AST can be costly. The ability of the owner or operator to be reimbursed from the Arkansas trust fund for such expenditures can be critical. In the absence of trust fund reimbursement, some tank leaks could potentially cost the owner or operator hundreds of thousands of dollars

²⁶ Once a \$7,500 deductible is satisfied.

to investigate/remediate. Expenditures of this magnitude can threaten the financial viability of many jobbers.

The trust fund operates on a “reimbursement” basis. In other words, the tank owner or operator is required to make the expenditures and seek reimbursement from the trust fund. The trust fund statute and regulation limit investigative/remediation reimbursement to activities falling within the scope of the term “corrective action.” Further, the trust fund regulations outline specific procedures and timelines that must be met to qualify for reimbursement of the requested expenditures.

Not all UST owners or operators are familiar with the trust fund reimbursement policies and rules. The failure to comply with these regulations or the trust fund policies can result in the denial of all or a portion of a request for reimbursement. The Arkansas owner or operator responding to a suspected or confirmed tank release will usually retain a contractor or consultant to perform the investigation and/or remediation activities required by the regulations.²⁷

The consultant or contractor retained to perform the corrective action must be knowledgeable about the trust fund reimbursement regulations and policies.²⁸ A tank owner or operator should have a clear understanding with the contractor as to who bears the risk of disallowed costs. Specifically, the contract should allocate between the tank owner/operator and the contractor the ultimate responsibility for denial of all or part of the trust fund reimbursement request. The agreement with the contractor addressing the proposed work should also require that the consultant/contractor acknowledge its responsibility for filing and overseeing the reimbursement requests.

(3) Jobber/Marketer Tank Services

The competition for wholesale motor fuel or industrial lube oil customers can be intense. Arkansas petroleum marketers or jobbers often strengthen their customer relationships by providing something of value in addition to motor fuels or other petroleum products. Specifically, they may provide knowledge or services in addition to petroleum products. Such knowledge or services sometimes include tank construction, operation or maintenance and/or advice regarding regulatory compliance.

A jobber that offers knowledge or services related to USTs may

incur some risk. For example, some jobbers provide tank repair, compliance and/or maintenance services. A customer suffering a tank release, trust fund denial, etc. may claim that it is due to an error or mistake in the services the jobber provided. A prudent jobber providing such services should obtain insurance coverage for alleged errors or mistakes.²⁹ A jobber may also wish to consider whether the customer goodwill/resources gained by providing certain services is outweighed by certain risks such as legal liability, etc.

In the alternative, a jobber may wish to ensure it is not actually or perceived to be providing certain knowledge or services (i.e., environmental compliance, etc.). At a minimum, the motor fuel supply or lease agreements should disclaim any responsibility for the services not being provided. Otherwise, a customer suffering a release or other mishap may be tempted to claim it was due to errors related to services the jobber agreed to furnish. Equally important, such services should never be provided unless jobbership personnel have the necessary expertise and proper service agreement are drafted.

D. Allocation of Tank Compliance/Liability

(1) Refiner/Jobber Supply Agreements

A detailed supply agreement is used to dictate the terms of the refiner’s sale of branded motor fuel to the jobber. These agreements always have terms and conditions greatly favoring the refiner/supplier. The ability of a jobber to seek an alternative supplier has become difficult since the number of refiners has been reduced through major oil company mergers. These supply agreements are often non-negotiable.

The jobber should pay particular attention to how responsibility for environmental compliance is allocated in the refiner/jobber agreement. The environmental provisions will address the allocation of tank responsibilities/liabilities. An example involving UST liability is instructive.

A few years ago, an Arkansas jobber suffered a UST release at a retail facility it owned in the western portion of the State.³⁰ Both the refiner supplier and the jobber were named in a third party action by property owners adjacent to the jobber’s retail facility. The jobber was sued because of its status as the owner of the UST. The refiner was neither an owner or operator of the

²⁷ The UST regulations do not apply to above ground storage tank (“AST”) releases. Further, there is not a comprehensive set of AST investigative/corrective action regulations similar to these applicable to UST. Instead, ADEQ has a greater general authority to dictate, to some extent, the investigative and/or remediation activities. However, note that since the 1970’s, Section 311 of the federal Clean Water Act has required notification to the Coast Guard and other actions in the event of a spill. of oil into a water body that results in a “spill.” In addition, many ASTs are required to comply with the CWA Spill Prevention Control an counter measure regulations.

²⁸ The contractor or consultant’s expertise in implementing the technical aspects of implementing corrective action is also of course critical. A competent professional can readily define the scope of the cleanup while an inexperienced one may spend a great deal of money without obtaining the necessary results (i.e., delineating the contamination plus obtaining closure, etc.).

²⁹ Note that the needed insurance will be different from the policy the jobber typically carries for its petroleum marketing operations or facilities.

³⁰ The facility was operated by a commission agent.

UST. Instead, the third party action against the refiner was a product liability claim alleging that the addition of the additive methyl tertiary butyl ether (“MTBE”) to the motor fuel rendered it defective.³¹

The refiner demanded that the Arkansas jobber provide a defense³² and indemnify³³ the refiner for the product liability claim. The refiner relied on the following language in the supply agreement:³⁴

Indemnity: To the fullest extent permitted by law (but no further) and without in any way limiting any of buyer’s obligations under Article 12 of this contract, buyer shall defend, indemnify and hold harmless _____, its parent, affiliate and subsidiary companies, and their respective directors, employees and agents, against all claims, suits, liabilities, judgments, losses and expenses (including, without limitation, attorneys’ fees and costs of litigation, whether incurred for _____ primary defense or for _____ enforcement of its indemnification rights hereunder), and any fines, penalties and assessments, arising out of any bodily/personal injury, disease or death of any persons or damage to or loss of any property, caused by or happening in connection with (A) the operation of buyer’s marketing premises or buyer’s outlets or (B) buyer’s receipt, loading, transportation, unloading, storage, handling, sale, use or other disposition of the products sold hereunder, or other activity of buyer relating to the products, even though caused by the concurrent or contributory negligence or fault of a party indemnified; but excepting any such injury, disease, death, damage or loss caused by (A) the sole negligence or fault of a party otherwise indemnified or (B) defects in the products not caused or contributed to by any negligence or fault of buyer or the operators of buyer’s outlets or their employees, agents, or contractors, without regard to the extent of negligence or fault, if any, of an indemnified party, buyer, at its expense shall defend any such claim or suit against an indemnified party and shall pay any judgment resulting therefrom. If, after buyer has both defended any such suit and paid any resulting judgment, it is judicially determined that the injury, disease, death, damage or loss was caused by the sole negligence or fault of a party indemnified, then _____ shall reimburse buyer for the judgment and the reasonable defense costs incurred. Within a reasonable time after any occurrence which may result

in injury, disease, death, damage or loss, or fine, penalty or assessment hereunder, buyer shall report the same to _____ by telephone and shall promptly thereafter confirm the same by notice, including all circumstances thereof known to buyer or the operators of buyer’s outlets or their employees. _____ shall have the right, but not the duty, to participate in the defense and settlement of any claim or litigation with attorneys or _____ selection without relieving buyer of any obligations hereunder. Buyer shall cooperate with _____ in _____ investigation and defense of any claim or suit. Buyer’s obligations hereunder shall survive any termination or expiration of this contract.

The refiner took the position that despite the fact that the third party claim against it was based on a defect in a product the refiner manufactured that the jobber was required to provide a defense and indemnity.³⁵ The language in the agreement only released the jobber from this responsibility if the refiner was *solely* responsible for the release. As a practical matter, such language means the jobber will usually be saddled with defending and indemnifying the supplier. The jobber, as the tank owner, will usually be named as partially responsible in the lawsuit along with the refiner/supplier.

(2) Tanks That Have Been Previously Removed

Existing tanks at a facility should not be the sole concern when acquiring facilities. The potential purchaser must ensure that any due diligence and contract language addresses tanks³⁶ previously taken out of service. This is especially important for USTs that were removed prior to the effective date of the UST regulations. Prior releases from such USTs may not have been addressed at the time of removal. The subsequent discovery of contamination will likely have to be remediated despite the absence of the UST. This could be a significant concern since the contamination may not be covered by the trust fund.

(3) Lessor/Lessee

Over the next several years, the experience level of independent retailers/lessees operating retail motor fuel units is likely to decrease. The retail motor fuel market has seen the entrance of participants that have had limited experience in the industry. Many of these lessees will therefore have had little exposure to the UST regulatory requirements. The jobber/lessor may need to help address this knowledge gap. A failure to do so risks a

³¹ In the early 1990’s, refiners began adding significant amounts of MTBE to gasoline to satisfy a mandate under the federal Clean Air Act. MTBE increases the oxygen content of the gasoline and is a source of octane. Third party plaintiffs have claimed that compared to other components of gasoline, MTBE is extremely soluble in water, slow to degrade into other compounds, and more difficult to remove from groundwater.

³² “Providing a defense” means paying the refiner attorney’s fees in contesting the third party claim.

³³ “Indemnify” means paying any damage awards imposed upon the refiner.

³⁴ The name of the refiner is left blank and the term “buyer” refers to the jobber.

³⁵ An “indemnity” means the jobber is required to pay the third party damage claim if it is successful.

³⁶ The word “tanks” is used because the area where ASTs were formerly used could be affected by prior spills.

contaminated facility that is not trust fund eligible.

The lessee's efforts will be critical in ensuring the maintenance of trust fund eligibility. In reality, the lessee will often be counted on to undertake various periodic leak detection and maintenance requirements. Certainly, the lessor can and often will allocate various tank compliance responsibilities to the lessee. However, it is critical that the lessor recognize that such lease provisions do not guarantee the lessee will consistently undertake the required activities. In view of the serious problems non-compliance poses for fund eligibility the jobber/lessor should consider methods for ensuring compliance such as inspections or incentives for the lessee to comply. It is especially critical that the lessee be encouraged to meet reporting requirements since the deadlines are short (usually 24 hours). The lessee may be the only party that can accomplish the required action in the necessary time frame. The lessee's efforts will be critical in ensuring the maintenance of trust fund eligibility.

(4) Termination of Wholesaler/Retailer Supply/Lease Relationships.

Some jobbers have furnished USTs to retail facilities or industrial accounts as an element of the motor fuel supply arrangement. In addition, a retail motor fuel property provided by a jobber to a retailer pursuant to a lease will usually include USTs. The disposition of the USTs when supply or lease relationships end may raise a number of issues that should be considered. These issues may include:

- (a) If USTs were installed as a part of a supply agreement, will they remain with the customer or be removed?
- (b) Is the jobber or customer responsible for undertaking closure of the USTs when they are taken out of service?
- (c) Is the allocation of responsibility for tank closure documented in a written supply agreement or lease?

(5) Acquisition of Jobberships

Most Arkansas petroleum marketers recognize the need to consider tank issues when buying or selling jobberships principally consisting of retail motor fuel facilities, bulk plants, and similar properties. The current or former presence of a tank at these facilities will usually be identified and addressed in the transaction.³⁷ However, the same diligence is not always exercised when the jobbership being acquired principally consists

of supplying independent dealer/commercial accounts. The potential purchaser may not consider tank liability a significant risk if the jobbership does not own multiple retail properties using USTs. This assumption can be a mistake.

Many jobberships do not own or operate any USTs. Instead, the business may primarily involve supplying motor fuel to facilities they do not own. Nevertheless, both USTs and ASTs may have been or are currently furnished to these customers. The situation may be further complicated if multiple jobbers have supplied the retail or wholesale customer over a number of years. The ownership of the tanks located on the customers' facilities may be uncertain in the absence of written agreements.

The Arkansas statute makes it clear that the owner of the real estate is not necessarily the owner of the UST. Specifically, the statute states:

The term "owner" shall apply only to the owner of the tank and may be a different person than the person holding fee simple title to the real property on which the tank is located.

A jobber cannot therefore assume it will not be identified as an owner for regulatory purposes because it is not the owner of the real property on which they are located.

The potential purchaser of the assets³⁸ of a jobbership should carefully review all supply agreements to determine if the ownership of the tanks on the customers' facility is addressed. If such documents do not exist, they may need to be drafted and executed.³⁹ For example, a purchasing jobber may discover years later that a commercial account (school district, car dealership, truck terminal etc.) claims it does not own a leaking tank (and that the jobber does).

The jobbership acquisition agreement should specifically identify the tanks and other equipment being acquired. For the previously described reasons, the problem of confusion regarding tank ownership should be addressed. It may be prudent for the jobbership purchase agreement to contain language referencing the personal property, rolling stock, real property equipment, etc., being purchased. This identification of specific equipment or assets may be preferable to language referencing the purchase of "all equipment" (known or unknown). This will ensure that unidentified tanks are not inadvertently acquired. Otherwise, one can assume that a commercial customer with a leaking UST will argue the tank actually belongs to the motor fuel supplier (i.e., past or present jobber). This argument will be made to

³⁷ These issues may be addressed through contract language addressing sampling, tank testing, verification of trust fund eligibility, etc. and

³⁸ Note if the jobbership is being acquired through the purchase of stock (as opposed to assets) all liabilities are automatically assumed.

³⁹ The needed documents (depending on the circumstances) may be an equipment sale/purchase agreement, supply agreement, etc. The objective may not always be to divest ownership of the tanks. In some instances, it may be helpful to confirm the jobber's ownership of the tank. This ownership may, in some instances, be used as leverage to retain the customer. In other words, the jobber may threaten to remove the tank in the event of a disagreement.

support the customer's inevitable attempt to place responsibility for addressing the UST release on the jobber.

(6) Exiting a Leasehold

A jobber operating a bulk plant or retail motor fuel outlet pursuant to a lease should recognize that certain issues may arise when the agreement terminates. The lessor may object to the condition of the property when it re-enters it. For example, a few years ago, a lessor in eastern Arkansas filed suit against a chain motor fuel retailer/lessee arguing that minor petroleum tank spillage at the leased facility violated lease language which stated:

“Lessor is entitled to have the property restored to its original condition as near as possible.”

The chain motor fuel retailer had proposed a risk-based⁴⁰ corrective action plan which, because of the likely future use of the property, meant some contamination would remain in place. ADEQ accepted this corrective action plan. However, the lessor argued that leaving this contamination in place regardless of ADEQ approval, would violate the previously cited lease language causing a diminution in the property's value.

This is a scenario that is likely to arise more frequently in the future. ADEQ has the discretion to approve corrective action plans that do not remove all soil or groundwater contamination if they meet certain risk based considerations. The agency has in fact been willing, over the past several years, to approve CAP's that allow some contamination to remain in place. Such a plan might be approved in the absence of potentially affected water supplies, buildings, etc. Further, even if the jobber/lessee is willing to attempt to remove a higher percentage of contamination, the ADEQ RSTD may not be willing to approve the reimbursement of this additional work under the trust fund.

It will be increasingly important for jobbers to consider this issue in negotiating the lease of properties or facilities. The jobber/lessee should request that the lessor acknowledge in the lease the proposed use of the property as a bulk plant, retail motor fuel outlet, etc. In addition, the jobber could attempt to obtain a provision requiring that “lessee maintain compliance with the federal and state environmental laws” as an alternative to the previously described “restoration” language. If successful, the “compliance” language would not be violated if ADEQ approved the corrective action plan. It might also be beneficial to clarify that the lessee need not undertake work that involves remediation more stringent than what the trust fund will reimburse.

(7) Compliance with the UST Technical Standards

The federal and state UST regulations provide that either the owner or operator⁴¹ of the tank can be responsible for violations or implementing corrective action. In other words, although only one party (i.e., either the owner or operator) need comply in any given instance, the federal EPA or Arkansas ADEQ can enforce against either or both. Consequently, UST owners or operators cannot avoid regulatory liability by allocating to the other party responsibility for compliance through a lease or supply agreement provision. Instead, one party can attempt to obtain an indemnity and other rights against the other party. This indemnity will only have value if the party providing it has the financial means to fund it.

Joint liability has transactional ramifications. For example, a jobber/lessor leasing a retail motor fuel outlet to an independent retailer/lessee has UST related regulatory risks as an owner. The jobber/lessor will have limited ability to ensure the lessee carries out any UST requirement it has been assigned. In other words, the jobber/lessor is dependent upon the lessee undertaking the UST requirements.

(8) Sale of Properties with Tanks from the Jobber/Seller Perspective

The jobber seller would like to minimize, to the extent possible, his or her responsibility to address either corrective action or third party liabilities that arise subsequent to the sale of the facility. As a result, the jobber/seller will seek language in the sale agreement disclaiming any contractual warranties regarding the tanks and a waiver from the seller of any potential common law/statutory claims. Of course, the seller's ability to obtain such language will depend upon who has the leverage in the transaction.

(9) Access to Undertake Investigation/Remediation

A UST owner or operator that has agreed through a lease or sale agreement to address a confirmed or suspected release may not have access to the property after it has been vacated or sold. If so, the sale/lease agreements should provide for future access for any required investigative/remedial activities. However, the purchaser will (and should) be wary of language that enables the seller to disrupt the buyers use of the property for some unlimited or excessive period of time. Equally important, is the need to recognize that various remediation methods have different impacts on the use of the property. For example, the removal of large amounts of soil over a period of time may

⁴⁰ Risk-based corrective action is a process ADEQ and many other states use which takes into account the relative risks a UST release may pose to human health and the environment. It uses site exposure assessment to assess a site's current and potential risk and then applies this knowledge to develop a CAP.

⁴¹ An “operator” under the UST regulations generally includes any person in control of, or having responsibility for the daily operation of the UST.

damage infrastructure and/or impair facility traffic. Other remediation methods may not have as significant an impact.

E. New Petroleum Marketing Practice Act Infrastructure Franchise Agreement Restrictions

The 2007 Energy Independence and Security Act amends the Petroleum Marketing Practices Act to restrict what refiners, jobbers, and retailers can do regarding the installation and conversion of tanks for biofuel use. The Petroleum Marketers Association of America has noted that the law:

- * Prohibits franchise agreement restrictions on installation of renewable fuel pumps, but allows the franchisor to restrict installation of a tank on leased marketing premises.
- * Permits conversion of a tank under any circumstances as long as the infrastructure is warranted or certified by a recognized standards setting organization to be suitable for use with renewable fuel.
- * Permits advertising the sale of renewable fuels and permits selling in any area on the premises.

V. Tank Related Litigation

A. Third Party Bodily Injury/Property Damage Litigation

Private party lawsuits often seek damages for corrective action, property value diminution, and adverse health effects due to a tank release.

(1) Third Party Damages/Costs Excluded from the Trust Fund

The trust fund potentially reimburses the owner or operator for third party claims related to a tank release. AOMA obtained amendments to the trust fund statute a few years ago that inserted the broader phrase “compensatory” to describe the damages that the third party provision covers.⁴² However, it is important to recognize that punitive damages are specifically excluded. In addition, attorney fees incurred defending a third party claim are not reimbursable.

(2) Measure of Damages

(a) Diamond Lakes Oil Company

Third party damage claims will usually include alleged injuries to real property.⁴³ How such damages are calculated has been

the subject of two significant Arkansas Supreme Court decisions. In the *Diamond States Oil Company* case, the Arkansas Attorney General and AOMA argued that both the amount of temporary damages that a plaintiff adjacent landowner who had been affected by a UST release had sought and the amount the jury awarded were grossly disproportionate to the fair market value of the property. The jury’s award of \$200,000 in temporary damages was four times the pre-injury fair market value of the property. Such an award was argued to be grossly disproportionate to the fair market value of the property and an inappropriate measure of damages. Nevertheless, the court concluded that because ADEQ had ordered the remediation and Diamond Lakes had no discretion in undertaking the remediation work, the amount of damages was not unreasonable since Diamond Lakes had no choice but to make the repairs even if they did exceed the diminution in fair market value.

(b) Felton Oil Company

The measure of damages was also addressed in *Felton Oil Company L.L.C. v. Gee*.⁴⁴ The State of Arkansas argued that the affected adjacent property owner (“Gee”) suffered a total destruction of the value of her property and that the property damages should have been limited to the diminution in fair market value occasioned by the migrating fuel. Instead, the property owner successfully argued that the measure of damages was the cost of remediation. The argument was also made that Gee was under no legal requirement to spend any of her \$180,000 damage award on the actual restoration of her land. Thus, the potential for the adjacent property owner to receive a windfall was argued to be great.

(c) Significance of Diamond Lakes/Felton Decisions

The concern about these decisions is that they have the potential to result in significant damage claims. The possibility of a third party claim exceeding per occurrence trust fund limits⁴⁵ could be more likely. This would be a particular concern in the event a facility release has affected multiple property owners.

B. State/ADEQ Cost Recovery Litigation

The Arkansas UST statutes include language providing the state the ability to recover costs it expends addressing a petroleum release. Ark. Code Ann. § 8-7-807(d)(1) of the Arkansas UST statute provides that any party found liable for any costs or expenditures shall be responsible for that portion of the costs or expenditures which are attributable to his or her actions.

⁴² The third party provision previously covered “bodily injury” and “property damage.” There was concern that some claimed damages might not be covered by these two terms. For example, several years ago an Arkansas jobber had to convince ADEQ a third party judgment that included damages for “inconvenience” was covered as a property damage. The broad term “compensatory damages” which was placed in the trust fund by AOMA eliminates this problem.

⁴³ Third party claims for bodily injury are not as frequent as those for property damage.

⁴⁴ 182 S.W.2d 72 (2004).

⁴⁵ The per occurrence limit for third party claims is \$1,000,000.00.

Ark. Code Ann. § 8-7-807-(d)(2) allows the trier of fact to establish each party's portion of the costs or expenditures. Ark. Code Ann. § 8-7-807(d)(2) refines the preceding provision by expressly stating that the costs should be apportioned among the responsible parties according to equitable principles. Subsection (d)(3) limits the statute even further, stating that "No responsible party shall be liable for more than that party's apportioned share of the amount of costs or expenditures recoverable for the site," Ark. Code Ann. § 8-7-807(d)(3).

An example of the application of this language might involve a UST that is owned successively by multiple owners. The responsibility for a UST release that begins during a particular owner's period of operation is clear. However, a subsequent owner that operated the UST for a brief period of time could argue under this language that it should be apportioned less responsibility for a release.

C. Corporate Dissolution

A jobber will sometimes exit the industry by selling the stock of the corporation to a purchaser. The seller usually accepts cash or other consideration and the purchaser steps into the shoes of the jobbership assuming all liabilities including those related to the tanks. In the alternative, the jobber will sometimes simply sell some or all of the assets. If so, the corporate entity may continue to exist.

Some jobbers will dissolve the entity or entities encompassing the jobbership upon the sale of assets. The jobber should recognize that there is a specific procedure in Arkansas for dissolving an Arkansas corporation. The elimination of liability for subsequent claims may not always be clear.

One Arkansas jobber was named personally in a third party UST leak lawsuit after his corporation was dissolved. The plaintiff argued that in the circumstances of that case the liability could be collected out of the corporate assets in the hands of the shareholder. In Arkansas, a dissolved corporation may be sued. Ark. Code Ann. §4-26-1104(b)(4) provides:

The corporation may sue or be sued in its corporate name in all courts and participate in actions and proceedings, whether judicial, administrative, or otherwise, in its corporate name. Process may be served upon it or upon its behalf in the same manner *as if there had been no dissolution*.

Ark. Code Ann. §4-26-1104(b)(5) states:

The dissolution of a corporation shall not affect any remedy available to or against the corporation, its directors, officers, or shareholders, for any right or claim existing or any liability which is incurred before the dissolution except as provided in §4-26-1105 (notice given to creditors and claimants) or §4-26-1106 (jurisdiction of the court to supervise liquidation).

Arkansas does allow dissolved corporations to bar the claims of creditors and claimants after 120 days of the dissolved corporation first publishing notice. Ark. Code Ann. §4-26-1105(a)(1) states:

At any time after dissolution, the corporation may, at its option, give notice requiring all creditors and claimants, including any with unliquidated or contingent claims and any with whom the corporation has unfulfilled contracts, to present their claims in writing and in detail at a specified place and in a specified manner within one hundred twenty (120) days after the first publication of the notice.

Absent a dissolved corporation providing published notice as set forth in Ark. Code Ann. §4-26-1105(a)(1), there may not be any other legal provisions time barring claims against a dissolved corporation.

VI. Conclusion

USTs and ASTs will be part of the petroleum marketer or jobber's infrastructure for the foreseeable future. The risk associated with the operation of this equipment is significant. Nevertheless, there are tools in place such as the trust fund that provide risk management mechanisms to address all but the worse case scenarios. In addition, the jobber or marketer that devotes a reasonable amount of time to training and/or compliance is unlikely to face a significant enforcement action. The marketers or jobbers that ignore risk management/compliance/training face a much greater chance of leaving the industry over the next 25 years.