

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

Arkansas Environmental, Energy, and Water Law Blog



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The fourth quarter edition of the Arkansas Oil Marketers Association publication *The Canopy* recently published an article I authored that identifies certain environmental lessor liability issues associated with providing a leasehold property to lessees with petroleum underground storage tanks ("USTs").

The article is titled *Leasing Retail Motor Fuel Facilities to Independent Operators: Arkansas Storage Tank Trust Fund Eligibility Risks?* ("Article").

The Article addresses the need to assess and manage certain petroleum UST environmental regulatory risks that can arise when a lessor provides a facility with USTs to an independent operator/lessee.

The Article explains that the federal and Arkansas UST statutes and regulations place responsibility for compliance with the federal and state petroleum UST regulations on both the owner and operator of the system. It expresses concern that there may not be a recognition in the lessor/lessee context that this dual responsibility can result in a lessee's jeopardizing lessor eligibility for reimbursement from the Arkansas Petroleum Trust Fund ("trust fund").

The trust fund is a critical environmental risk management tool for anyone that owns or operates a UST aboveground storage tank in Arkansas.

The Arkansas trust fund provides owners and/or operators of eligible Arkansas USTs and aboveground storage tanks reimbursement of up to \$1.5 million for corrective action (i.e., remediation of leaks and spills) and \$1 million for third party claims for certain damages related to a release of petroleum.

However, the failure of either the owner or operator to comply with certain release reporting requirements can potentially result in forfeiture of trust fund coverage. In other words, a lessee's failure to comply (regardless of strict lease language) could eliminate coverage.

The Article describes the eligibility criteria for Arkansas trust fund reimbursement including the reporting requirements. As to reporting releases, the owner or operator cannot be found to have failed to:

... report a suspected release in a timely manner that contributed to an adverse impact on the environment.

The fact that a lessor of a facility with USTs has strict contractual requirements that the lessee comply with the applicable regulations (including UST reporting requirements) is likely irrelevant to trust fund coverage. Therefore, the lessee's failure to report could jeopardize trust fund eligibility for both the lessor owner and lessee. The Article describes the following hypothetical:

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 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.

To assist lessors in addressing this issue, the Article discusses:

- Relevant Arkansas underground storage tank regulatory/trust fund provisions
- Parties legally responsible for UST regulation compliance:owner/operator
- UST leak detection/reporting requirements
- Arkansas trust fund
- Eligibility criteria
- The leasing issue
- Relevant lease terms
- Non-lease strategies
- Commission agent
- Leak detection vendor

[Click here to download a copy of the Article.](#)