

# ENVIRONMENTAL LAWS -- ARE YOU IN VIOLATION?

**R**eleases from underground petroleum storage tank systems are always bad news. A marketer must remediate the impact, may have to pay damages to affected persons, and loses the value of the inventory released. An earlier article (Texas Petroleum and C-Store Journal, April/May/June 1996) discussed the liability a petroleum marketer may have to affected persons for an underground petroleum storage tank release.

Besides the foregoing costs, losses and potential liabilities, a marketer responsible for a release from an underground storage tank system may be prosecuted as a criminal or may face an administrative or civil court action brought by the government. Even where no release occurs, a marketer may face criminal prosecution or be the subject of an administrative or civil court action brought by the government for violation of an environmental law. The purpose of this article is to discuss briefly the enforcement actions the government may bring against a person who violates one of the state environmental laws applicable to underground petroleum storage tank systems.

## The Environmental Laws

A marketer's legal responsibility to the government for a release from an underground storage tank system arises, in part, from laws enacted over the past several decades that were designed to protect the surface water and groundwater of the state by generally prohibiting the discharge of wastes into or adjacent to the surface water or groundwater, and by prohibiting actions that cause pollution of water of the state. Those laws have been construed broadly. For example, the escape of water and acid from one property onto adjoining property where it then flowed into a dry drainage ditch was found to be a violation because it was "into or adjacent to water in the state". Additionally, "waste"

includes, among other things, sewage, substances from recreational areas, substances from the agricultural industry, substances resulting from any process of industry, garbage, oil, chemicals, and any other substance that may impair the quality of water in the state, while "water of the state" has been broadly defined to be "ground water ... and all other bodies of surface water ...". Thus, a discharge of petroleum products, whether into soil or water, can be a violation of this law. Proof of intent to violate the law is not required.

Another part of those laws provides for criminal prosecution in the event of a specified violation. This part of those laws is discussed in the Criminal Enforcement section below.

This legal responsibility also arises from a complex, more recent web of laws governing almost all aspects of underground storage tanks, created again for the purpose of protecting the surface water and groundwater resources of the state by preventing releases from underground petroleum storage tanks. Over a decade ago, Congress enacted legislation regulating most aspects of underground petroleum storage tanks nationwide. The Texas legislature revised state law to conform with the federal law, and enacted legislation creating the well-known Texas Petroleum Storage Tank Remediation Fund and imposing the requirements for tank monitoring and leak detection equipment, inventory records, and filing of information with the TNRCC.

As part of these state laws regulating underground petroleum storage tanks, the TNRCC was granted the broad authority to (1) issue orders necessary to accomplish the purposes of the underground storage tank program, (2) inspect any regulated storage tank and obtain samples of the contents of the tank, (3) conduct testing or monitoring of the tank and contents as well as of the air and surrounding soil and groundwater, and (4) order the owner or operator of the tank to conduct that monitoring and investigation if a release has occurred. The TNRCC has been enacting regulations to implement those laws.

The Texas legislature and the TNRCC now have a voluminous set of laws generally prohibiting the pollution of surface water and groundwater in the state and regulating all aspects of the installation, use, and removal of underground petroleum storage tanks in the state and the remediation of releases from those tanks. These laws are contained in Chapter 26 of the state Water Code. The TNRCC's regulations applicable to underground petroleum storage tanks were enacted under Chapter 26.

Because contamination of the environment continues to occur, the government has the ability to enforce those laws to ensure that everyone complies with the laws. The American public views the nation's environmental laws as a positive step towards protecting our natural resources, and believes that these laws should be strictly enforced. Consistent with that view, the federal, state, and local governments have shown great willingness to enforce the environmental laws, including the underground storage tank laws, with vigor.

## Enforcement of the State Laws

In Texas, there are three different mechanisms for the govern-

ment to ensure petroleum marketers comply with the laws applicable to underground petroleum storage tank systems: administrative enforcement, civil enforcement, and criminal enforcement.

### **Administrative Enforcement**

The TNRCC may bring an administrative action against a person who has violated any provision of Chapter 26 of the Water Code, or who has violated a rule or order adopted or a permit issued by the TNRCC under Chapter 26. The TNRCC commences the administrative proceeding by issuing a preliminary report concluding that a violation has occurred, describing the violation, stating the facts upon which the TNRCC concludes that a violation has occurred, and stating the amount of the administrative penalty the TNRCC recommends be imposed. The owner or operator may then consent to the report, including the penalty, or request a hearing to contest the finding of a violation, the proposed penalty, or both. A hearing in an administrative action serves the same purpose as a traditional court trial. However, the administrative hearing process is considerably shorter and less formal than a court trial, resulting in reduced time to resolution and reduced cost to the TNRCC and the owner or operator.

At the hearing, the TNRCC may find a violation and impose a penalty, find a violation but impose no penalty, or find that no violation has occurred. Within thirty days of the TNRCC's decision being issued, the owner or operator must pay the penalty in full or appeal by filing a civil lawsuit against the TNRCC in Travis County District Court. The court reviews the TNRCC's decision under the "substantial evidence rule" which requires the court to reverse the decision if, among

other things, the TNRCC violated the state constitution or any state laws or exceeded its authority, its decision was based upon any improper procedure or error of law, its decision was not reasonably supported by substantial evidence, or its decision was arbitrary and capricious, an abuse of discretion or an unwarranted exercise of discretion.

Only monetary penalties may be imposed in an administrative action. Those penalties can, however, be significant; the maximum administrative penalty that may be imposed is \$10,000 per day, and each day that a violation continues is a separate violation.

An administrative action is in the alternative to a civil action under the following section, except that the TNRCC may not bring an administrative action when a civil court lawsuit has been filed and is being diligently prosecuted. Likewise, payment of an administrative penalty precludes any other civil or criminal penalty for the same violation.

### **Civil Enforcement**

In the alternative to an administrative action, the TNRCC may bring a civil court suit against a person for violating any of the same laws as are covered by the administrative enforcement provisions discussed above. In this instance, the TNRCC files a civil suit in state district court for an injunction prohibiting the defendant from continuing the violation or threat of violation, for recovery of civil penalties, or for both an injunction and civil penalties.

The Texas Parks and Wildlife Department similarly may file a civil suit based upon a violation of certain of the environmental laws that prohibit discharges into waters of the state as well as any violation of a rule, permit or order of the TNRCC where there is any effect upon

aquatic life or wildlife. A local government may likewise file such a civil suit where the violation has occurred within the local government's jurisdiction, excluding its extraterritorial jurisdiction. The local government and the Parks and Wildlife Department may seek injunctive relief, civil penalties, or both.

The suit may be brought either in the county in which the marketer resides or in the county where the violation occurred. As with any other civil lawsuit, the defendant may appeal any judgment that is entered against it.

The civil penalties recoverable in a lawsuit range from not less than \$50 to not more than \$10,000 for each violation and for each day the violation continues. In addition to these penalties and an injunction against continuing the violation, the Parks and Wildlife Department may recover damages for injuries to any aquatic life and wildlife normally hunted for commercial or sport purposes, plus the actual cost of the investigation, attorney's fees, and expert witness fees.

### **Criminal Enforcement**

Not every violation of the foregoing general environmental laws and underground storage tank laws is a crime in Texas. Rather, the violations which constitute crimes are limited to particular portions of Chapter 26 of the state Water Code, all of which are far too lengthy to include here.

Of great importance is the fact that most of the crimes require intent or knowing conduct before there is a crime. For example, a person commits a crime if, for each of the following, he or she *intentionally or knowingly* :

*discharges or permits the discharge of a waste or pollutant into or adjacent to water in the state that causes or threatens to*

*cause water pollution ...*

*tampers with, modifies, disables, or fails to use pollution control or monitoring devices ... required by Chapter 26 of the state Water Code or a rule, permit or order of the TNRCC.....*

*makes a false material statement in, or omits material information from, any document, including monitoring device data, required under Chapter 26 of the state Water Code.*

One crime does not require any intent or knowing conduct:

*A person commits an offense if the person discharges or permits the discharge of any waste or pollutant into any water in the state that causes or threatens to cause water pollution ...*

This particular law imposes strict criminal liability. There is no need for the government to prove any intent or knowledge by the defendant. This rule is in sharp contrast to at least one federal law that requires proof that the defendant acted knowingly about each element of the crime. In a recent case under this federal law, a petroleum marketer north of Houston suspected a leak in an underground tank. He emptied the tank by pumping the contents into the street and a manhole. The marketer claimed he did not know that he was pumping gasoline out of the tank, rather he thought he was pumping only water. He was convicted of violating the federal Clean Water Act. His conviction was reversed on appeal because the jury was not instructed that he had to know he was discharging gasoline. He may be re-prosecuted under the correct rulings.

The sanctions for these crimes varies significantly. Certain of the crimes are misdemeanors - the sanctions for individuals include fines ranging from \$100 to \$100,000, confinement in jail of not more than one year, or both, while the penalties for non-individuals are fines ranging from \$1,000 to

\$250,000. The punishment for second time offenders is doubled with respect to both the fine and confinement. Other of the crimes are felonies - the sanctions for individuals include fines ranging from \$1,000 to \$500,000, confinement in prison of less than one year to up to 20 years, or both, while the penalties for non-individuals are fines ranging from \$2,500 to \$1,000,000. Each day that a violation of any of these laws occurs is a separate offense.

Employees may assert as a defense that they were carrying out their normal activities and were acting under orders from their employers, unless they engaged in knowing and willful violations. However, a person who is a defendant in a criminal prosecution may be required to furnish evidence or testify about the offense. While the evidence and any information derived from the evidence may not be used against that person in that or any other criminal case, that information and evidence can be used in a separate civil suit brought by an affected person as well as in a criminal, civil or administrative action against anyone else for those

same violations. One such situation would be a joint criminal prosecution against a company and its employee where the employee could be required to provide evidence to convict the company.

#### **The Federal Laws**

This article discusses only the Texas state environmental laws applicable to underground petroleum storage tank systems. The federal government has an entirely separate set of applicable laws, many of which allow for administrative, civil and criminal enforcement for any violations. The marketer mentioned previously was prosecuted under one of the federal laws.

#### **Conclusion**

Governmental liability for releases from underground petroleum storage tank systems should be of serious concern to petroleum marketers in Texas. A release is not something to be ignored. In cost terms, the marketer must remediate the impact, may have to pay damages to affected persons, loses the value of the

inventory released, and may have to defend a governmental enforcement action, including paying any fines or penalties imposed. However, no cost can be allocated to a jail or prison sentence, and as exemplified by recent events, the government will pursue enforcement actions against marketers who violate the environmental laws. ■

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