

# THE COMPLEX PROBLEM OF SPILL REPORTING

By Gregory P. Crinion



**R**eporting of spills of petroleum products, chemicals and other substances into the environment is a complex problem. There are at least three state agencies in Texas that have separate spill reporting rules. Added to that are the various federal agencies with their individual reporting rules, and local governments that may have additional reporting requirements. Further complicating the situation is that many of the Texas spill reporting rules have different reporting requirements depending upon source and location of the release, as well as upon the substance and quantity released.

This article discusses Texas' spill reporting law and certain of the spill reporting rules adopted by the Texas Natural Resource Conservation Commission that are applicable to gas stations and convenience stores. The rules discussed are not, and should not under any circumstance be considered, all of the spill reporting rules applicable to a gas station or convenience store in

Texas. Upon discovering any spill into the environment and after contacting emergency crews and abating any ongoing release, a petroleum marketer should contact his or her attorney immediately to get specific legal advice.

## **Texas' Spill Reporting Law**

Over 30 years ago, the Texas Legislature enacted Texas' spill reporting law. Under that law:

Whenever an accidental discharge or spill occurs at or from any activity or facility which causes or may cause pollution, the individual operating, in charge of, or responsible for the activity or facility shall notify the commission as soon as possible and not later than 24 hours after the occurrence.

This statute covers the spill of any substance that causes or can cause water pollution. Certainly, gasoline, lubricants, waste oil and engine coolants can cause water pollution, and spills of these substances are subject to this law. Other products, including food products

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such as flour and molasses, and food processing waste such as dishwashing water, can also cause water pollution and are also subject to this law. There is no minimum quantity of substance spilled necessary to invoke this law except that the substance spilled must "cause or may cause pollution."

This law applies to circumstances where substances are discharged into, or where they will enter into, water in the state. "Water in the state" is defined to include groundwater as well as surface water. Thus, this law

applies to spills directly into water and to spills into soil where there is a possibility of impact to the underlying groundwater. Consequently, virtually every spill that may be encountered at a gas station or convenience store is subject to this law.

Spill notification can be made to the Texas State Emergency Response Center at 1-800-832-8224. The law does not identify the contents of the report; those details must be obtained from rules enacted by the TNRCC or from any orders or requirements that

the TNRCC may impose on a case-by-case basis.

Failure to make a timely report of a spill can expose a responsible party to serious fines, penalties, even jail — an administrative penalty of up to \$10,000 per day for each violation, a civil penalty of up to \$25,000 per day for each violation, or criminal prosecution with the penalty for individuals of a fine up to \$100,000 per day for each violation, one year in jail, or both, and for business entities a criminal fine of up to \$250,000 per day for each violation.



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**Petroleum Storage  
Tank Systems**

Pursuant to authority granted under the Texas spill reporting law, the TNRCC has adopted spill reporting rules applying the law to regulated underground and aboveground petroleum storage tank systems.

Under these rules, a petroleum marketer using a regulated storage tank, whether aboveground or underground, must report to the TNRCC any of the following within 24 hours:

1. Discovery by the marketer, or upon written notification from others to the marketer, of released regulated substances at the site or in the surrounding area;
2. Unusual operating conditions observed by a marketer, such as erratic behavior of dispensing equipment, sudden loss of product from the system or an unexplained presence of water in the tank, unless the tank system equipment is defective but not leaking;
3. Monitoring results from a release detection method that indicate a release may have occurred, unless the monitoring device is defective, is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial results, or, in the case of inventory control, a second month of data does not confirm the initial result; and
4. Monitoring or observation that indicates a breach in the primary wall or secondary barrier of a double wall system where interstitial monitoring is being used, unless the

primary or secondary barrier is determined to be intact, the monitoring equipment is defective and is immediately repaired, recalibrated, or replaced, and additional monitoring does not confirm the initial result.

"Regulated substances" under this rule include motor fuel, aviation gasoline, number 1 and number 2 diesel fuel, gasohol, aviation jet fuel, automotive lubricants, and new and used engine oil, transmission fluid, and brake fluid. The report can be made to the Texas State Emergency Response Center at 1-800-832-8224, the TNRCC office in Austin, or the applicable TNRCC regional office.

Unless corrective action is begun, a marketer must then immediately undertake a two-step initial investigation to confirm all suspected releases within 30 days. First, the marketer must conduct a system test to determine whether a leak exists in the tank, the dispensing line, or both. If the system test does not indicate that a leak exists and environmental contamination is not the basis for suspecting a release, no further investigation is required. If the system test does not indicate that a leak exists, but environmental contamination is the basis for suspecting a release, the marketer must then undertake the second step and conduct a further investigation to identify the presence and source of any release at the site.

If both the system test and the investigation results do not indicate that a release has occurred, further investigation is not required, but the marketer must file a report with the TNRCC providing a detailed description of the investigation undertaken, including the results of all tests or monitoring performed. This report must be filed with the TNRCC office in Austin within 45 days of first discovery of the suspected release.

If at any time the marketer confirms that a leak of any quantity exists, he or she must (1) repair, replace or upgrade the storage tank system and (2) undertake corrective action, including reporting the release to the TNRCC office in Austin within 24 hours, taking immediate action to prevent any further release such as shut-

ting down the storage tank system as necessary, and identifying and mitigating any fire, explosion and vapor hazards. Within 20 days after release confirmation, the marketer must also submit a report to the TNRCC summarizing the following additional initial abatement measures taken: (1) removal of as much of the regulated substance from the storage tank system as necessary to prevent further release, (2) visual inspection of any aboveground release or exposed below ground release and prevention

of further migration into the surrounding soils and groundwater, (3) continued monitoring and mitigation of any additional fire and safety hazards, (4) remediation of hazards posed by contaminated soils that have been excavated or exposed, (5) measurement of the presence of a release, and (6) determination of the possible presence of free product and initiation of free product removal as soon as practical. Further investigation and reporting will be required for purposes of assessing the site and remediat-

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ing contamination found.

Marketers must also report to the TNRCC in Austin within 24 hours any surface spill or overflow of petroleum that results in a release to the environment of more than 25 gallons, or that causes a sheen on nearby surface water. The marketer must also contain and immediately clean up any surface spill or overflow of any quantity, immediately notify the TNRCC office in Austin if the clean up cannot be completed within 24 hours, and undertake the corrective action steps described above.

Marketers should remember that these rules apply only to surface spills, overfills, and releases from storage tank systems. Other spills of other substances at gas stations and convenience stores may be governed either by the Texas spill reporting law or by other regulations.

### **OTHER SPILLS**

To the extent the storage tank rules do not apply to other spills at gas stations and convenience stores, the TNRCC has adopted a general spill reporting rule. This rule was likewise adopted pursuant to authority granted the TNRCC under the Texas spill reporting law.

Under this rule, a marketer must notify the TNRCC of any spill of oil, petroleum product, used oil, hazardous substance, industrial solid waste or other substance that may cause pollution in an amount equal to or greater than the listed reportable quantity in any 24 hour period. Upon determination that a reportable spill has occurred, the marketer must notify the TNRCC as soon as possible but not later than 24 hours after discovery of the spill. Notification can be made by calling the State Emergency Response Center at 1-800-832-8224 or by calling or visiting the TNRCC central or applicable regional office during normal business hours.

The information to be reported includes (1) the name, address and telephone number of the person making the report and of the responsible party, if different, (2) the date, time and location of the spill or discharge, (3) a specific description of the sub-

stance spilled, (4) an estimate of the quantity spilled, (5) the duration of the release, (6) a description of the waters in the state affected or threatened, (7) the source of the spill, (8) a description of the extent of water pollution or harmful impacts to the environment and any environmentally sensitive areas at risk, (9) a description of any actions taken, being taken and that will be taken to contain and respond to the spill, (10) any known or anticipated health risks, and (11) the identity of any governmental representatives responding to the spill. Updates of information that would require a change in the response to the spill must be provided as soon as possible.

If the spill creates an imminent health threat, the marketer must also immediately notify local emergency authorities, such as the fire department, health authority, or local emergency planning committee. As soon as possible, but not later than two days after discovery of the spill, the marketer must also attempt to notify the owner or occupant of the property upon which the discharge occurred as well as the occupants of any property that the marketer believes is adversely affected.

The reportable quantities for certain substances under this rule are as follows:

#### **Oil (such as motor oil, but not used oil)**

Directly into water — quantity sufficient to create a sheen

Onto land — 210 gallons (five barrels)

#### **Petroleum product (such as gasoline) and used oil**

Directly into water — quantity sufficient to create a sheen

Onto land at refineries and bulk loading facilities — 210 gallons (five barrels)

Onto land elsewhere — 25 gallons

#### **Industrial solid waste and other substances**

Directly into water — 100 pounds

Onto land — governed by the Texas spill reporting law

Once the initial report has been made, the marketer must immediately abate and contain the spill. The mar-

marketer must also begin response actions, including stopping further releases, minimizing any impact to public health and the environment, neutralizing the effects of the spill, and removing the substance spilled. The marketer must file a report describing the details of the spill and supporting the adequacy of the response action taken, and must include one of the following statements: (1) that the spill response action has been completed and provide a description of how it was conducted; (2) a request for an extension of time to complete the response action along with reasons for the request and a projected work schedule; or (3) a statement that the spill response action has not been completed and is not expected to be completed within the next six months, an explanation of why completion is not feasible, and a projected work schedule. The report must be filed with the applicable TNRCC regional office within 30 working days of discovery of the spill.

Spills of substances in amounts less than the designated reportable quantities are still regulated by the Texas spill reporting law discussed above, and marketers should remember that the fact that a spill may not be reportable under these rules does not mean that the spill is not subject to response action.

This rule also applies to intrastate and, in part, interstate motor carriers delivering product to gas stations and convenience stores. Interstate motor carriers must comply with the initial reporting rule, but are required to provide the follow up 30 day report only if a Form F 5800.1 report is not filed with the U.S. Department of Transportation.

### **HISTORICAL CONTAMINATION**

Finally, a common issue is whether historical contamination discovered during an environmental assessment must be reported to the TNRCC.

One possible scenario is where a petroleum marketer discovers contamination on property he or she is considering acquiring. If regulated petroleum storage tanks were previously in place on the property, the

current owner or operator of that storage tank system must report the contamination to the TNRCC pursuant to the petroleum storage tank rules.

If no regulated petroleum storage tanks were previously on the property, a different situation is presented. There is no rule requiring reporting of historical contamination except as may fall within the storage tank reporting requirements since the TNRCC's general spill reporting rules do not apply, although that information is noted only in the TNRCC's commentary to those rules. There is serious debate, both within and outside the TNRCC, whether the Texas spill reporting law requires reporting of historical contamination. There are no court rulings deciding whether there is any obligation to report historical contamination to the TNRCC, and even the TNRCC's personnel do not agree whether it applies. The TNRCC did not resolve the question when it enacted its own general spill reporting rule. Instead, it stated that "persons who discover historical contamination are guided by the Texas Water Code, § 26.039, as they were before this rulemaking."

Marketers who discover historical contamination that they did not cause on property they do not own should carefully consider whether to assume any reporting obligation. There are serious penalties for failure to report spills. However, no instances are known where the TNRCC has attempted to assert penalties against a potential purchaser for failure to report historical contamination.

The TNRCC has stated that it "recommends reporting spills of unknown quantities, and notes that reporting spills is an admission of an accidental discharge or spill which exempts [the person reporting the spill] from penalties under the Texas Water Code." While reporting the spill may eliminate any liability for penalties for failure to report the spill, reporting could subject the person to a TNRCC directive to investigate and remediate the contamination. Thus, being overly cautious and reporting historical contamination may subject a potential purchaser to fending off a TNRCC direc-

tive to investigate and remediate something he or she did not cause.

### CONCLUSION

Petroleum marketers and convenience store owners need to understand the breadth of the various spill reporting obligations in Texas and be familiar with the spill reporting law and rules. That stated, spill reporting is a complex issue for which there are no easy answers. A marketer faced with a spill would be well advised to obtain specific legal advice on any

reporting obligations. ■

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