

Association of State and Territorial

ASTSWMO

Solid Waste Management Officials

Guide to Tank Insurance

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Guide to Tank Insurance

If you own or operate an underground storage tank (UST) you must show that you have the financial resources to clean up a site if a release from your tank occurs and to pay compensation to third parties for damage to their property or for personal injury. These requirements form the basis of the financial responsibility Regulations. If the owner and operator of an UST are separate entities, only one party is required to demonstrate compliance with the financial responsibility requirements. However, both parties may be fined if financial responsibility requirements are not met.

The UST Regulations allow you to choose from a variety of methods to comply with the financial responsibility requirements. One of the most frequently used methods is to purchase UST pollution liability insurance. While all policies must meet certain basic requirements to comply with the applicable State or federal regulations, there are differences in the policies offered. All policies must provide coverage in specified amounts for cleaning up a release and paying for property damage and bodily injury, and the policy must provide a separate limit for defense. After meeting these basic requirements, you will have to make choices on what type of policy you want to purchase. Differences in policy terms will affect what premium you pay and most importantly what costs the insurance will and will not pay.

While there are specific items that must be included in your policy to satisfy the UST Regulations, there are still many differences in UST insurance policies. Read your policy carefully and discuss it with your insurance agent or broker to make sure you fully understand what you are purchasing and what your responsibilities are should you have a leak from your UST. All policies will require you to report the release to the insurance company within a specified time period or the claim will likely be denied; some may require prior notice of tank activities such as tank removal; and most will only cover claims if the tank was in full compliance with the UST Regulations.

Financial responsibility must be kept active until an UST is considered “closed” by the State regulatory agency. Tanks that are not in use but have not been properly closed must maintain active financial responsibility.

1. Definition of a Covered Storage Tank

Under federal requirements, owners and operators must demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. This includes releases that may occur from other components associated with the tank (e.g., piping, spill containment devices and dispensing equipment).

However, policies may differ on what portions of the tank system are or are not covered by the policy. Some policies may cover only the tank itself, while others may cover the system including piping, spill containment devices and dispensing equipment. Policies that cover only the tank do not meet federal requirements. You should make sure that the policy you are purchasing covers releases that may arise from any component of the tank system.

The word “**storage tank**” or “**storage tank system**” is always defined in the Definitions Section. However, while one would think definition of the name sake coverage would be consistent among all available policies, nothing could be further from the truth. Note the two example definitions:

Example:

Storage Tank System means a stationary tank or tanks owned or operated by the Insured and shown in Item 5 of the Declarations. Storage Tank System *includes any on site integral piping or dispensing equipment, ancillary equipment and containment system* associated with the tanks.

In this first example, the policy defines the covered underground storage tank/system in a way that encompasses all equipment from the actual underground tank to the dispenser hose/nozzle. This definition would include any sump pumps, oil water separator, blending tank, etc. that is associated with the tank listed in the policy declarations.

Example:

“Underground Storage Tank” means any UST on the Scheduled Storage Tank & Location Endorsement (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, the volume of which is 10 percent or more beneath the ground.

In contrast, this second example definition includes only the tank and piping connected thereto, and does not specifically include the “dispensing equipment,” other equipment and containment systems. Additionally, the actual policy form which includes this definition goes on to state: “this term does not include any”

1. Farm or residential tank; or,
2. Tank used for storing heating oil for consumptive use on the premises where stored; or,
3. Flow-through process tank; or,
4. ‘A variety of other specific tanks/equipment’

2. Insurance Policy Construction

- *Declarations Page:* Coverage Summary (Insured name, Address, Locations, Limits, Deductibles, Term, etc.)
- *Insuring Agreement:* What is intended to be covered
- *Exclusions:* What is not to be covered
- *Limits of Insurance:* How incident limits apply (relative to the aggregate, the deductible, defense costs, etc.)
- *Policy Conditions:* Insured’s duties in event of a claim, cancellation, other insurance, state funds, warranties.
- *Extended Reporting Period:* time period during which the insured can report a release that occurred during the time the policy was in effect, but after the policy end date.

3. Required Amounts of Financial Responsibility:

- *Per Occurrence*- amount of insurance coverage you need for each time an UST leaks.
- *Annual Aggregate*- maximum amount of coverage you need to cover on an annual basis no matter how many releases occur.

Type of owner or operator	Per Occurrence Amount	Annual Aggregate Amount
Petroleum producers, refiners or marketers	\$1 million	\$1 million for 100 or fewer USTs Or \$2 million for more than 100 USTs
Non-marketers	\$500,000 if throughput is 10,000 gallons/month or less \$1 million if throughput is more than 10,000 gallons/month	

Federal FR Requirements from 40 CFR 280 (State requirements may be different)

4. Insurance Policy Terminology

To make sure that you purchase the correct UST insurance policy you must carefully read your policy. General liability policies do not cover damages that result from a release of pollutants. You must purchase either an endorsement to your policy or purchase a separate pollution liability policy. UST insurance differs in many ways from the common Commercial General Liability or auto policies. The following are terms you will find in an UST insurance policy:

Insurance Company: The insurance company writes insurance policies and assumes the financial risk and pays claims.

Broker: An Insurance Broker is a licensed insurance producer/agent who represents the insured, not the insurance company. The Broker is not restricted to placing business with any one insurer although he or she must place business through another licensed insurance agent/producer.

Agent/Insurance Producer: A person required to be licensed under the laws of a State to sell, solicit or negotiate insurance. There are two types of insurance producers – the independent agent and the direct writer. The independent agent may place business with any insurance company with which he or she holds a contract. The direct writer is the representative of only one insurance company and sells the policies of that company.

Claims-Made Policy: Virtually all UST pollution insurance policies are “claims-made” policies. A claims-made policy only pays for claims made or reported during the period covered by the policy. The policy will not cover incidents that occur during the policy period but are reported to the insurance company *after* the policy period expiration date.

Retroactive Date: Only releases that occur after the retroactive date in the insurance policy are covered. If a release from an UST occurred before the retroactive date, the claim will not be

paid. If a claims-made policy is renewed or replaced, the insured should require that the retroactive date is the same as, or earlier than, the retroactive date on the expired or terminated policy. Some insurance companies will agree to provide an earlier retroactive date for a fee.

Extended Reporting Period (Tail coverage): An extended reporting period does not extend the policy period; it does extend the time in which claims may be reported to the insurance company. The release from the UST system must still have occurred during the policy period, but it will be covered if reported before the end of the extended reporting period. For UST insurance an extended reporting period is important because a release from an UST that occurred during the policy period may not be discovered until after the policy period is over. The UST Regulations require that UST insurance policies include a minimum 6-month extended reporting period.

Exclusions: Describes specific circumstances in which no coverage will be provided. (See Exclusions section for more information)

First Dollar Coverage: The UST Regulations require that an UST pollution liability policy provide “first dollar” coverage. First dollar coverage requires that if the insurance policy has a deductible, the insurance company does not wait for you to pay the deductible amount, but begins remediation and then collects the deductible amount from you.

5. Types of Policies – Confirmed Release Policy vs. Suspected Release Policy

Confirmed Release Policy

Confirmed release policies do not cover the costs of investigating potential releases, such as tank testing, soil sampling and other expenses to confirm if an insured tank is leaking.

While all tank pollution policies must provide coverage for cleanup of covered storage tank releases, many do not cover the costs of investigating potential releases, such as tank testing, soil sampling and other expenses to confirm the insured tank is leaking. The expenses necessary to confirm a release can add up to tens of thousands of dollars, and are expressly excluded in some policies.

Confirmed release policies will contain exclusionary language such as:

- *"Any costs, charges or expenses incurred by the insured to confirm the existence of a release shall not be considered cleanup costs"*
- *"This insurance applies to pay for Corrective Action due to Confirmed Releases"*
- *"This insurance does not apply to claims for any costs, charges or expenses incurred to investigate or verify that a Confirmed Release has taken place"*

Example:

Coverage A – Corrective Action – the Company agrees to pay Loss on behalf of the Insured reasonable and necessary cost that the Insured is legally obligated to pay for Corrective Action due to Confirmed Releases resulting from Pollution Conditions from an Underground Storage Tank System.

Exclusions: This insurance does not apply to:

g. “Corrective Actions” or any other expenses:

(1) Taken to report, investigate or confirm a "release"...

Suspected Release Policy

Suspected Release Policies do not have any language that excludes the costs to investigate and confirm whether a release has occurred and will cover the costs to investigate if you have a covered release, thereby potentially saving the insured thousands of dollars in the event of a release.

Example:

The Insurer agrees to pay on behalf of the Insured for: “*Corrective action costs*” in excess of the Deductible amount shown in Item 5. of the Declarations resulting from pollution conditions arising from a storage tank incident, ...

“*Corrective action costs*” means expenses necessarily incurred by the Insured to investigate, quantify, assess, monitor, abate, remove, dispose, treat, neutralize or immobilize pollution conditions to the extent required by 40 CFR Sections 280.60-280.67 and 40 CFR Section 280.72 promulgated by the Federal Environmental Protection Agency, or other environmental law.

6. Coverage Period – Retroactive Dates and Extended Reporting Period

Tank insurance is a “claims-made” policy. This means that the policy *only provides coverage for claims made during the dates that the policy is in effect.*

Retroactive Date: Tank insurance policies also include a “retroactive date.” A retroactive date is the date that the coverage begins. *Any loss that occurs before this date will not be covered by the insurance policy.* You can purchase a retroactive date (date that coverage begins) *prior* to the actual date you are purchasing the policy. While you may pay more to purchase a retroactive date that is several years back, it may be wise to do so. Tank releases are often not discovered immediately but can be shown to have occurred in the past. If your retroactive date is a month ago, and the release can be proven to have happened a year ago, your release is not covered.

- When you put together the ‘claims made’ language with the ‘retroactive date,’ it means only releases that occur after the retroactive date and the claim is made while the policy is in effect will be covered.

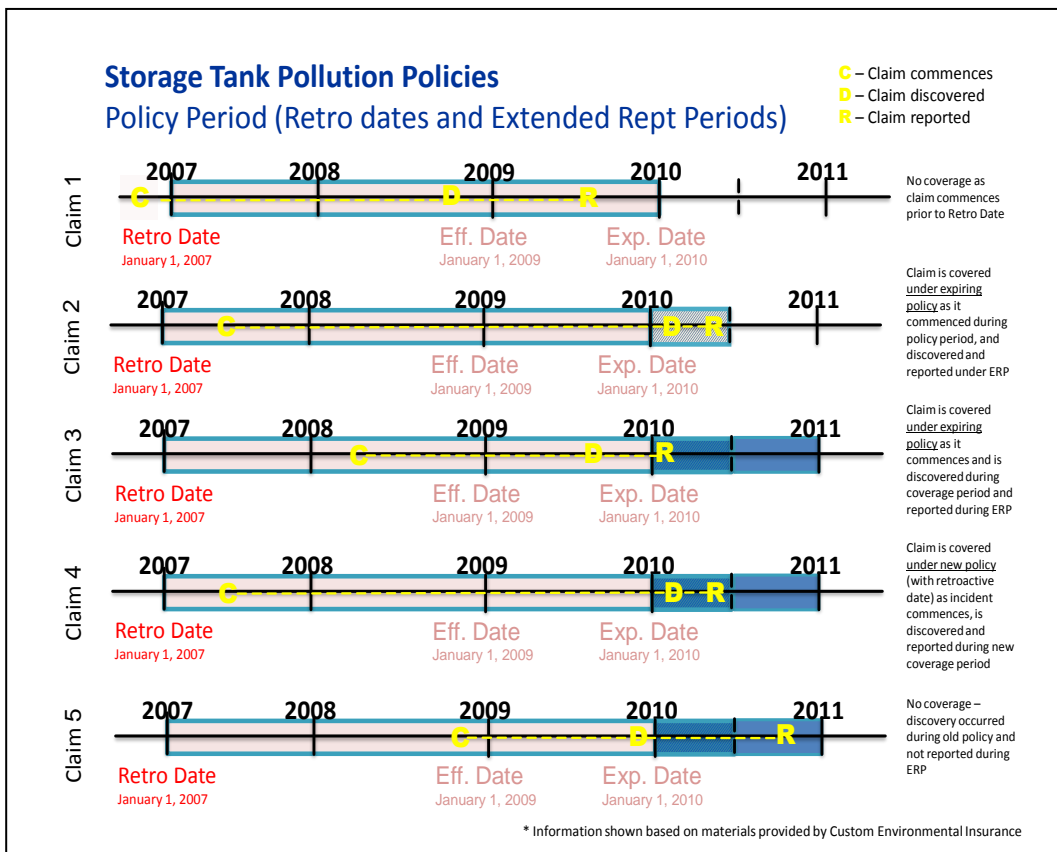
Extended Reporting Period (Tail): Tank insurance policies must by regulation include a six (6) month “extended reporting period,” commonly called a “tail.” This gives the policy holder 6 months after the policy end date to report any release that occurred during the time the policy was in effect and after the retroactive date. This can be especially important as you may not have identified a release as of the date the policy ends.

Example:

A. You shall be entitled to an automatic extended reporting period without additional charge upon termination of coverage as defined in this section. The automatic extended reporting period starts at the end of the "policy period" and lasts for six (6) months, except if the new or renewed policy following this policy has the same "retroactive date" or a "retroactive date" earlier than that of this policy then an automatic extended reporting period of thirty (30) days shall apply.

Example:

B. The "Named Insured" shall be entitled to a basic "extended reporting period, " and may purchase an optional supplemental "extended reporting period, " following cancellation, as described in Paragraph A. of Section VIII.



7. Claims Reporting Requirements

All insurance policies list the insured's responsibilities in the event of a claim, including when a claim should/must be reported. While most policies will say that claims must be reported "as soon as possible" or "as soon as practical," others will be more specific, and less forgiving in the event of late reporting.

Late claims reporting is a leading reason for releases not being covered. The insured must understand the reporting requirements in their policy.

The bottom line: Report all claims as soon as possible.

Example:

Duties In The Event Of An Underground Storage Tank Incident

You must see to it that we are notified promptly of an "underground storage tank incident" which may result in a claim, request, demand or proceeding to impose an obligation on the insured for damages because of "bodily injury" or "property damage" or for "corrective action costs." Notice should include:

- (1) How, when and where the "tank incident" took place;
- (2) The names and addresses of any injured persons, witnesses; and
- (3) The nature and location of any injury, damage or "release."

Example:

Reporting and Cooperation

The "insured" must provide the Insurer with immediate notice in the event of a "storage tank incident." Such notice shall be provided as soon as reasonably possible, but in any event, not less than seven (7) days after a "responsible insured" first became aware of, or should have become aware of a "storage tank incident."

Such notification, if not provided in writing, must subsequently be provided in writing to the Insurer at the address

Some policies also require that the insurance company be notified in advance of the removal of a tank that is covered by the policy:

Example:

Notice of voluntary scheduled storage tank system removal or replacement.

You shall provide notice to us of your intention to perform a voluntary "scheduled storage tank system" removal or replacement at least forty eight (48) hours prior to the voluntary "scheduled storage tank system" removal or replacement. Notice shall be provided consistent with claim provisions (Section VI.), Notice of Potential Claim.

8. Exclusions

All insurance policies contain some type of exclusions. Read the exclusions in your policy very carefully – these are the conditions under which the insurance company will not cover the costs of cleanup.

Non-Compliance Exclusion

Many (but not all) UST policies contain language that may allow an insurer to deny claims for not complying with environmental regulations. The exclusion may or may not address contribution of the non-compliance to the release.

Example:

This insurance does not apply to claims, corrective action costs, or legal defense expenses arising out of or related to:

Regulatory Compliance - Based upon, arising out of, or attributable, whether directly or indirectly, to intentional disregard of or knowing, willful or deliberate non-compliance with any statute, regulation, administrative complaint, notice of violation, notice letter, instruction of any governmental agency or body, or executive, judicial or administrative order by any responsible insured.

Example:

This insurance does not apply to claims, corrective action costs, or legal defense expenses, arising out of or related to:

Regulatory Compliance - A storage tank incident involving a covered underground storage tank that was not in compliance with all applicable laws and regulations prior to a storage tank incident.

Intention (willful or deliberate) can be debated, as can a release arising out of, or being attributable to, the specific issue of non-compliance. However, the wording in the second example above is broad enough where intention or causation does not need to be established. Some policies do not contain “non compliance” language. In such cases, the grounds for denying a claim based on “non-compliance” simply isn't present. The insurer may however decide not to renew the policy based on poor risk management.

Tanks Over 20 Years of Age

Some Insurers have made a blanket decision not to sell insurance for tanks over 20 years of age, and even more importantly, not to renew any policies with tanks in excess of 26 years of age. Other insurers may not expressly prohibit placing or renewing coverage on these older tanks, but will price the insurance so as not to be competitive.

These coverage parameters pose the greatest problem when a policy holder has been insured with the insurance carrier for several years and has maintained the retroactive date from the original policy. If a policy on an older tank is cancelled, the only options are to acquire coverage with a new carrier willing to provide the original retroactive date, for which there will be, a significant charge, or issue a policy with a current retro date, thereby creating a gap in coverage. When first considering coverage for your storage tank operation inquire about the insurance company's policy regarding excluding tanks over certain ages.

NOTE: If a policy is cancelled or not renewed, the owner/operator may want to do a site assessment before the extended reporting period ends to ensure coverage for any existing contamination.

Natural Resource Damages (NRD) Exclusions

Natural Resource Damages has been defined as damage to, destruction and restoration of, including the resulting loss of use or value of, land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources managed or held in trust by United States, any State or local government, or Indian tribe.

The restoration and compensatory costs for NRD can be significant, and is critical coverage that should be included in any storage tank policy. However, some UST pollution policies will have a *NRD Exclusion* expressly eliminating coverage for such damages, resulting in significantly less coverage. Policy holders should check their policy for a NRD exclusion.

Example:

This insurance does not apply to any damages resulting from the reasonable direct costs, including costs of assessment, associated with action necessary to restore (including replacement) the natural resources to its baseline condition prior to the "release," and the "use value" of injury to or destruction of natural resources, including the land, surface water, groundwater, subsurface strata, air, fish, wildlife, or biota between the time of a "release" and restoration of the natural resources injured by the "release." "Use value" means the value of the natural resources to the public attributable to the direct use of the services provided by the natural resources.

Marina Exclusion

This insurance does not apply to "claims" for "bodily injury," "property damage" and "corrective action costs" caused by a "release" from a "storage tank system" at a "scheduled facility" from any piping, dispensers or nozzles located over any body of water.

Divested Storage Tank Systems or Sites Exclusion

Arising from Pollution Conditions or Confirmed Releases which commence after the date that a covered Storage Tank System (STS), or the site at which the STS is located, is sold, given away, abandoned, or subleased, unless the sublease has been approved in writing by the underwriter prior to the commencement of the sublease.

9. Tanks in Temporary Closure

Tanks in temporary closure present a variety of issues with regard to insurance, including:

- Tank Integrity – Empty tanks are more susceptible to damage from the environment (rising water tables, shifting, etc.)
- Performance of Leak Detection – Is there enough fuel left in the tank to perform leak detection? Is the site being monitored?
- Viability of the Insured – Is the insured in bankruptcy? Who pays the deductible or premium at renewal?
- Need – If the tanks are empty, what is the possibility of a release? Why insure empty tanks?
- Releases occurring prior to policy inception would be excluded.
- Majority of all insurers will not write new accounts with empty tanks
- Age of tanks and site history
- State and Regulatory Climate
- Financial viability insured/prospective insured
- New Insured will only be written with a “retro inception date”

To meet the letter of the financial responsibility regulations, tank owners may be able to purchase insurance for out of service tanks, however typically the policy will include language that makes it clear that the policy is intended only to comply with FR regulations, and since a release cannot occur from an empty, out of service tank there is no actual coverage for cleanup of a release.

Example:

Out of Service/Temporarily Closed Tank

The proposed storage tank pollution insurance coverage is being purchased solely to meet financial responsibility being imposed by State/Federal regulations. The policy "effective date" and "retroactive date" will be the same. It is further understood that the storage tank(s) being insured under this policy are empty and are "not in service" at this time, and thus; any "storage tank incident" or release will be considered to have commenced prior to the "effective date" and "retroactive date" of the policy.

As such, I understand that all claims for pollution conditions that are the result of a "storage tank incident" or release that commenced prior to the retroactive date will not be covered by this policy.

10. Questions to Ask When Purchasing Tank Insurance

Some questions to ask when choosing insurance:

- What is the insurance company's financial rating with A.M. Best, Standard & Poor's or Moody's?
<http://www.ambest.com>; <http://www.standardandpoors.com>; <http://www.moodys.com>
- Are they experienced in this type of coverage?
- Does the agent or broker know your state UST Regulations?
- For whom have they provided this type of policy and can names of satisfied clients be provided?
- Is this a "confirmed release" or "suspected release" policy?
- What are the exclusions in this policy?
- What are your reporting responsibilities should a release occur?
- What is the insurance company's policy regarding excluding tanks over certain ages?

Additional Resources

EPA List of Known Insurance Providers for Underground Storage Tank Owners and Operators
http://www.epa.gov/oust/pubs/list_of_known_insurance_providers_1-11.pdf

Financial Responsibility for Owners and Operators
<http://www.epa.gov/swerust1/ustsystem/finresp.htm>

Financial Responsibility for Underground Storage Tanks: A Reference Manual
<http://www.epa.gov/swerust1/pubs/frustman.htm>

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