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Ability of Underground Petroleum Storage Tank Owners
to Comply With Federal Financial Responsibility
Requirements

Statement of
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Before the
Subcommittee on Antitrust, Impact of Deregulation,
and Privatization
Committee on Small Business
House of Representatives



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Mr. Chairman and Members of the Subcommittee:

The Superfund Amendments and Reauthorization Act (SARA) of 1986 required that we report to the Congress on whether owners of underground petroleum storage tanks could obtain liability insurance or meet the act's financial responsibility requirements by some other method.¹ These requirements are intended to ensure that tank owners have the resources to clean up any tank leaks and compensate anyone harmed by the leaks.

Our report, issued in January 1988, concluded that insurance for underground petroleum tanks was generally unavailable and that the alternatives to insurance permitted by the law, such as self-insurance, were not practical or available for small businesses.² Since thousands of tank owners might not be able to meet the deadline for demonstrating financial responsibility under consideration at the time, we recommended that the Environmental Protection Agency (EPA) phase the requirements in over a more realistic timetable. We thought that a gradual approach might permit the development of a more active insurance market and other financial assurance methods.

¹These requirements can be satisfied by either the tanks' owners or operators. For convenience, we refer only to tank owners in this statement.

²Superfund: Insuring Underground Petroleum Tanks (GAO/RCED-88-39, Jan. 15, 1988).

Since our report, EPA grouped firms owning underground petroleum storage tanks into four categories and phased in its financial responsibility requirements over 2 years starting from the regulation's issuance in October 1988. Category 1 firms, which are very large petroleum marketing firms, had to comply by January 1989. Category 2 firms, which include large and medium-sized firms, must comply by October 1989. Category 3 firms, which comprise smaller firms, have until April 1990, and category 4 firms--which include very small petroleum marketing firms, most tank facilities that do not produce, refine, or market petroleum, and all local governments--have until October 1990 to comply. We are pleased to be here today to discuss our report and update its findings to the extent we could in the last few weeks.

OVERVIEW

In summary, because the category 1 firms generally can self-insure, they did not have problems complying with EPA regulations. For many of the estimated 500 firms in the second category, insurance--the method this group is most likely to rely on--now appears to be available. In addition, many states have or are now setting up special funds that could help satisfy the financial responsibility requirements by paying for the cleanup of tank leaks. It is far less certain whether a sufficient amount of affordable commercial insurance or state funds will be available to cover the next two categories of tank owners--especially the many

thousands of small businesses and local governments in the last category. Firms that do not meet the financial responsibility requirements are potentially subject to large federal fines. Noncompliance, according to industry representatives, also violates tank owners' contracts with creditors and suppliers, which require them to operate in accordance with all laws and regulations. Additionally, noncompliance creates a risk that damages to the public and the environment from a tank leak may not be adequately compensated. Therefore, whether EPA should delay its financial responsibility requirements or suspend enforcement has again become a pressing issue.

EPA decided not to postpone the regulations or suspend enforcement for category 2 tank owners. EPA will decide what to do about owners with 1990 deadlines as these dates approach. We concur with EPA's decision to hold, for the time being, to its present schedule for demonstrating financial responsibility. However, EPA needs to collect more information on the cost and availability of insurance and the consequences of noncompliance for the business relationships of tank owners, so that it can act quickly to avoid hardships as the 1990 deadlines approach for smaller businesses. At the same time, we think EPA needs to ensure, through a more active enforcement program, that firms that can comply with the financial responsibility rules do so.

BACKGROUND

EPA estimates that nationwide there are up to 2 million petroleum underground storage tanks at three quarters of a million facilities, such as gas stations, utility companies, or car dealerships. EPA believes that hundreds of thousands of these tanks have corroded and are leaking. About 5,700 cleanups have been completed since EPA began making cleanup grants to states in mid-1987 and another 16,000 cleanups are underway. Leaking tanks can contaminate groundwater--a drinking water source for half of our nation--and cause fires or explosions. To protect against such risks, the Hazardous and Solid Waste Amendments of 1984 required EPA to develop regulations to prevent, detect, and correct tank leaks. Issued in September 1988, these regulations set forth spill cleanup procedures and standards for tank construction and operation, effective over a 10-year period.

SARA subsequently directed EPA to issue regulations containing a \$1 million, per occurrence, minimum financial responsibility requirement for owners of underground petroleum tanks.³ Noncompliance could subject tank owners to fines of up to \$10,000 a day. However, SARA allows EPA to suspend enforcement of financial responsibility requirements for 6-month periods for individual classes of owners if EPA determines that insurance and other

³SARA also gave EPA discretion to set lower limits for low-volume tank facilities, referred to as nonmarketers, that do not produce, refine, or market petroleum.

financial assurance methods are generally unavailable and progress is being made toward meeting financial responsibility.

Additionally, the law states that, in developing regulations, EPA may consider the impact of any rules on small businesses.

In October 1988, EPA published final regulations requiring all petroleum tank owners to maintain evidence of financial responsibility of \$1 million or \$2 million, depending on the number of their tanks.⁴ As discussed earlier, these regulations are to be phased in over 2 years by size category of tank owner.

Under the law, states can with EPA approval operate and enforce underground storage tank programs "in lieu of" the federal program. To obtain approval for these programs, states must (1) establish technical and financial responsibility requirements at least as strict as the federal government's and (2) provide for the enforcement of these requirements. While states have not yet submitted plans for approval, EPA expects to receive and approve about 14 over the next 12 months.

GAO'S REPORT TO THE CONGRESS

In January 1988, we reported that uncertainty about potential losses had kept insurance companies out of the underground tank

⁴EPA originally published proposed financial responsibility regulations in April 1987, with implementation to have taken effect about June 1988.

market. Two sources provided virtually all the tank insurance sold in the United States in the 3 years prior to our report, and one of them had withdrawn from the market midway through 1987. The two firms had insured about 14 percent of U.S. tanks, mostly those owned by bulk sellers of petroleum products, known as jobbers. We also found that the alternatives to insurance permitted by the law, such as self-insurance, letters of credit, and surety bonds, were not feasible for most tank owners. Only the largest firms, such as the major oil companies and national bus companies, could use these alternatives because they were (1) more expensive than insurance, (2) did not transfer risk, or (3) required more assets to be pledged than the average tank owner could afford. At the time of our review, relatively few states had established funds to clean up tank leaks, although we said that these funds might be the only hope for small firms to establish financial responsibility.

We related the insurance experience of eight tank owners of various sizes from around the country. Six of these firms had insurance expiring in 1988, and they were having extreme difficulty in replacing it; the other two had no insurance. Some companies with insurance reported increasing rates and declining coverage on their policies.

Our report recommended a phase-in of financial responsibility requirements to allow time for insurers to develop tank programs and tank owners to pursue insurance alternatives. We also

recommended that EPA speed up implementation of the tank construction and operation requirements, which we believed were most important for protecting the public and the environment.

FINANCIAL RESPONSIBILITY NOW EASIER
TO ACHIEVE FOR SOME OWNERS

Since our January 1988 report two developments have made it possible for more tank owners to comply with the financial responsibility requirements. First, more insurance companies have started offering tank coverage. Second, more states have created funds to pay for tank leak damages and are using these funds to help owners meet EPA's financial responsibility regulations.

According to EPA, 18 sources are now offering liability insurance for underground petroleum tanks, including 1 company that specializes in tank owners with 25 or fewer tanks. Over the last few weeks, we have discussed tank owners' insurance prospects with representatives of EPA, the Small Business Administration, insurance companies, state agencies, and industry. These officials generally said that tank insurance was available on some terms to many businesses. According to EPA and industry representatives, the very large firms already required to meet the regulations have complied through self-insurance. In addition, an official of an association representing small gasoline dealers said that insurance was available to these dealers, although he did not know how many

actually had it. However, industry representatives said that available insurance was expensive, did not always meet regulatory requirements, or was sometimes offered by companies with unproven track records.

Despite the availability of tank insurance, representatives of the groups we interviewed said that many small firms, including those not in the business of selling petroleum, such as farmers or operators of delivery vehicles, were not likely to qualify for insurance. A Small Business Administration official told us that these small companies were not insurable at present because they knew little about tank technology or risk management and there was no actuarial history for their tank leaks. According to an EPA official, these firms will need to rely on the state trust funds for financial responsibility.

In January 1988 we reported that 12 states had established funds as of August 1987. The situation has improved. At this time, 37 states have created trust funds to pay for tank cleanups and compensate victims of leaks. EPA expects that almost all states will have funds by October 1990, in time for the financial responsibility deadline for the smallest tank owners. EPA has given final or temporary approval to 10 state trust funds so that tank owners can use them to satisfy, at least in part, the

financial responsibility requirements.⁵ EPA expects many other states to apply for trust fund approval.

Most state funds are financed by gasoline taxes or tank fees. Many states place conditions on the eligibility of tank owners to use the fund to meet financial responsibility requirements, such as requiring owners to be in compliance with technical tank standards. In addition, most state funds will only pay costs above a specified deductible and some limit or exclude third-party coverage. Therefore, tank owners will have to supplement the state fund coverage with insurance or other financial responsibility methods.

WHEN SHOULD THE FINANCIAL RESPONSIBILITY
REGULATIONS BECOME EFFECTIVE?

We discussed with EPA three options it could use to provide relief to businesses that cannot comply with the financial responsibility regulations. First, EPA can revise its regulations to move compliance dates back. Second, it can formally suspend enforcement of the regulations, as permitted by the law. Third, it can exercise its discretion not to use its full enforcement authority to discover and penalize violations.

⁵The 10 states include Alabama, Georgia, and Mississippi, which have formal approval, and Illinois, Louisiana, Minnesota, Montana, North Dakota, Ohio, and Oklahoma, which have temporary approval.

For the time being, EPA has decided to follow this last approach. The Director of the Office of Underground Storage Tanks has advised EPA regional offices by memo that for tank owners who cannot comply with the financial responsibility regulations, "alternative, non-punitive enforcement responses may be the most appropriate initial formal enforcement response--versus assessing penalties." Violation of the financial responsibility requirements are described in the memo as "low priority."

EPA is not willing to formally defer enforcement or postpone by regulation the deadline for category 2 firms that went into effect this month, because it does not have sufficient evidence that insurance is "generally unavailable" to these larger firms. EPA has not decided on suspension or postponement of deadlines for the next two categories of firms required to comply in 1990. But EPA officials told us they would consider petitions for suspension or postponement if any are made. They also said they would consider petitions from category 2 owners to defer their deadline. Under the 1984 amendments, anyone can petition EPA to delay implementation of regulations, and EPA is required to respond to the petition in the Federal Register. EPA officials told us that no one had formally petitioned EPA to delay implementation of the financial requirements.

We agree with EPA that the evidence presented thus far on the availability of insurance does not justify postponing compliance by

larger firms with the October 1989 deadline and that it would be premature to postpone compliance by firms with deadlines next year. In addition to the lack of good information on tank owners' inability to comply with the April and October 1990 deadlines, there are other reasons for not postponing compliance at this time. The deadlines may force faster development of an insurance market and state trust funds and may promote safer tank construction and operation by owners to qualify for insurance. Also, the assessment of applicants by insurance companies during the application process can supplement government compliance inspections with the tank safety rules.

Representatives of petroleum marketers raised a possible problem with the financial responsibility regulations that could not be resolved by flexible enforcement policies or a suspension of enforcement. The representatives said that tank owners who cannot establish financial responsibility will violate contracts with their creditors and suppliers because such agreements commonly require that the owners comply with all laws and regulations to qualify for further credit or supplies. A suspension of enforcement would remove the threat of government penalties but not cure the contractual problem. EPA officials said that this situation may represent a real threat to tank owners but that EPA did not consider this issue when it developed the regulations.

EPA relies mostly on groups representing tank owners for information on the availability of insurance and has little information on the effects of noncompliance on the owners. We think that EPA needs to more actively seek out this information itself so that it can accurately assess the need to postpone the April and October 1990 deadlines or suspend their enforcement. If these deadlines are deferred, it will be especially important for EPA to stress the enforcement of its standards for safe tank construction and operation.

MORE ACTIVE ENFORCEMENT NEEDED

As we have indicated, EPA has assigned a low priority to enforcement of the financial responsibility requirements. According to EPA officials, at this time EPA does not intend to actively check tank owners' compliance and has no tank inspectors in its regional offices. Instead, it plans to rely on state referrals of violations, although it does not know much about state monitoring plans and capabilities. Even if financial responsibility violations are uncovered, EPA does not plan to penalize a firm unless, for example, its tanks are leaking and the firm cannot or will not clean up the leaks.

We believe EPA should modify its enforcement strategy. While it is reasonable to be flexible in penalizing firms that cannot comply with the regulations despite their best efforts, the law

should be enforced when it is willfully disregarded. Tank owners who incur the expense of compliance should not be placed at a disadvantage with competitors who could comply but do not. EPA needs to adopt a more active enforcement strategy. For example, it should monitor and enforce compliance in states where it is possible for categories of owners to obtain insurance or qualify for state trust fund coverage and should encourage states to do the same.

CONCLUSIONS AND RECOMMENDATIONS

In closing, Mr. Chairman, a developing insurance market and the growth of state trust funds are making compliance with the established deadlines for financial responsibility increasingly possible for many tank owners. Postponing the deadlines now could slow this positive momentum. As the deadlines for smaller owners approach, however, EPA will need up-to-date information on insurance availability and cost and on the effects of regulatory violations on the relations of tank owners with creditors and suppliers. This information will enable EPA to promptly adjust the deadlines, if needed, or decide whether enforcement should be formally suspended.

In addition, to promote compliance with the law and more balanced competition among tank owners, reasonable enforcement of the financial responsibility requirements needs to be ensured.

The low priority EPA has assigned to enforcement could lead tank owners to believe that compliance with the requirements is unimportant.

Therefore, we recommend that the Administrator, EPA,

- determine what regulatory course to follow by (1) actively monitoring the cost and availability of tank insurance and other financial responsibility mechanisms as the 1990 deadlines approach and (2) evaluating how noncompliance will affect tank owners' credit and supplies, and
- plan and implement a strategy to more actively enforce the financial responsibility requirements.

Mr. Chairman, this concludes my prepared statement. I will be happy to respond to questions that you or members of the Subcommittee may have.