

Office of Underground Storage Tanks

# Environmental Fact Sheet

## EPA's Lender Liability Rule for Underground Storage Tanks

### Background

Many underground storage tank (UST) owners and operators, particularly small businesses, need capital to make improvements to their facilities to comply with a broad spectrum of environmental regulations. EPA is particularly concerned about the ability of UST owners and operators to comply with federal UST upgrading and replacement requirements. The uncertainty of the liability of secured creditors (financial institutions and others who extend secured loans) regarding UST properties that they hold as collateral has had a chilling effect on lenders' willingness to make loans to UST owners. This rule should remove a current barrier to the financing of UST facilities and result in greater capital availability for UST owners and operators. In addition, this rule supports the Clinton Administration's Brownfields Economic Redevelopment Initiative, which is intended to demonstrate ways to return abandoned, contaminated urban sites to productive use and to ensure future development is done in a sustainable, environmentally sound manner.

Subtitle I of the Resource Conservation and Recovery Act (RCRA) contains a "security interest exemption" that provides secured creditors ("lenders") an explicit statutory exemption from corrective action (cleanup) liability for releases from petroleum USTs. However, many lenders are unaware of the existence of this exemption, and many others are uncertain about its scope of coverage. Further confusion has resulted from various court cases regarding Superfund lender liability. In 1994, the D.C. Circuit Court of Appeals vacated EPA's Superfund lender liability rule, which attempted to clarify the security interest exemption in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court decision and EPA's Superfund rule were limited to actions taken under CERCLA and do not affect today's UST rule.

### Action Taken

The UST-specific lender liability rule was published in the *Federal Register* on September 7, 1995. This final rule specifies conditions under which certain secured lenders may be exempted from RCRA Subtitle I regulatory requirements for petroleum underground storage tanks. Under the rule, a lender is eligible for an exemption, both prior to and after foreclosure, from compliance with all Subtitle I requirements as an UST "owner" and "operator" if the lender: 1) holds an ownership interest in an UST, or in a property on which the UST is located, in order to protect its security interest (a lender typically holds property as collateral as part of the loan transaction); 2) does not engage in petroleum production, refining, and marketing; and 3) does not participate in the management or operation of

the UST. A lender also must empty its UST(s) within 60 days after foreclosure, and either temporarily or permanently close the UST(s) unless there is a current operator at the site (other than the lender) who can be held responsible for compliance with UST regulatory requirements.

## Discussion

EPA believes that a lender holds only limited ownership rights when it takes possession of an UST property primarily to protect a security interest. These limited ownership rights do not rise to the level of full ownership sufficient to make the lender an "owner" of the UST(s) under RCRA Subtitle I, provided the lender meets the criteria specified in today's rule (i.e., holds indicia of ownership primarily to protect a security interest without participating in management of an UST or engaging in petroleum production, refining, and marketing).

By foreclosing, a lender takes control of and responsibility for the UST, thus potentially subjecting it to all Subtitle I requirements that an "operator" must meet. Under today's rule, however, a lender is exempt from the federal UST regulatory requirements as an operator if: 1) there is a current operator at the site who can be held responsible for compliance with Subtitle I regulatory requirements; or 2) the UST(s) are emptied within 60 days after foreclosure and the lender either temporarily or permanently closes the UST(s).

A lender who chooses to participate in management of or continue operation of its USTs through storage, filling, or dispensing of petroleum is not eligible for the regulatory exemption and faces potential UST regulatory responsibility for corrective action in the event of a release. The lender may also be responsible for compliance with the UST technical standards and financial responsibility requirements under Subtitle I of RCRA.

In contrast to operating an UST system, the rule allows a lender to participate in a wide range of administrative and financial management activities for USTs as well as to undertake activities to protect human health and the environment. Among the activities that a lender may perform without incurring liability under RCRA Subtitle I are loan origination, loan policing and work out, foreclosure on and sale of the UST or UST property, environmental inspections or audits, corrective action for releases from USTs, and emptying and closing USTs.

## Contact

The rule, titled "Underground Storage Tanks—Lender Liability," amends the *Code of Federal Regulations* at 40 CFR Parts 280 and 281. For additional information or for a copy of the *Federal Register* notice, including electronic access on the Internet or EPA's CLU-IN system, contact EPA's RCRA/Superfund Hotline, Monday through Friday, 8:30 a.m. to 7:30 p.m. EST. The national toll-free number for callers outside the Washington, D.C., service area is 1 800 424-9346; callers within the Washington, D.C., area must use 703 412-9810. For the hearing impaired, the number is TDD 1 800 553-7672, or 703 412-3323 (local).