

## Arkansas Oil Marketers Association Environmental Workshop

### Identifying and Addressing Environmental Issues in Petroleum Marketing Agreements

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The Arkansas petroleum industry utilizes a number of types of facilities. Depending upon the petroleum jobber or marketer, such facilities might include:

- ▶ Bulk Oil Plants
- ▶ Retail convenience stores
- ▶ Fixed Base Operations ("FBOs")
- ▶ Service Stations
- ▶ Lube oil facilities
- ▶ Card/Key lock Operations
- ▶ Terminals
- ▶ Carwashes

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One or more environmental issues may have to be addressed at such facilities. Examples could include:

- ▶ Complying with underground storage tank ("UST") regulations at a convenience store
- ▶ Obtaining a water discharge permit for a carwash
  - Issues may become more complex if the facility is the subject of a commercial transaction.
  - Difficulties arise in allocating responsibilities between the parties and/or ensuring the responsible party fulfills the allocated responsibility in supplying motor fuel or the purchase, sale, lease, etc. of a facility.

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- Value of retail motor fuel or other petroleum marketing facilities magnifies the importance of the lease.
- No prudent jobber fails to clearly document important provisions in a lease such as the term of the occupancy and amount of rental (including how it is calculated).
- Failure to do so risks a misunderstanding of the projected costs (in the case of the lessee) or revenues (in the case of the lessor) associated with a particular facility.

However, by way of example, failing to allocate UST regulatory requirements (inspection, fees, registration, upgrade, etc.) between the lessor and lessee can be equally important.

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Other environmental examples involving a leasing scenario might include:

- ▶ Lessee did not recognize the lease requires it to maintain all property improvements such as upgrading USTs, etc. resulting in unexpected costs in operating the retail motor fuel outlet.
- ▶ FBO/lessee storing/supplying fuels at an airport with multiple tenants is among a number of operators that is the subject of a government request to address historical contamination the source of which is unclear.
- ▶ The lessor allocated the responsibility for Arkansas Petroleum Storage Tank Trust Fund fees for the leasehold's underground storage tanks to the lessee but failed to ensure payments were timely made negating eligibility for coverage of a significant leak.

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A cautious petroleum marketer or jobber will ensure that such issues are clearly addressed and responsibilities explicitly allocated in all written agreements. By way of example, these agreements may also include:

- ▶ Terminating Agreements
- ▶ Motor Fuel Supply Agreements
- ▶ Sub-Jobber Contracts
- ▶ Purchase/Sale of Retail/Bulk Plants/Other Facilities
- ▶ Etc.

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The purpose of this presentation is to briefly identify terms or conditions relating to:

- ▶ Environmental matters when negotiating various types of agreements involving petroleum marketing facilities

A number of terms, conditions or issues relevant to some or all agreements involving petroleum marketing facilities are discussed in this paper. List is not exhaustive.

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The measures a jobber undertakes to address an environmental issue in a transactional context will depend upon:

- ▶ Type of transaction (lease, buy/sell/financing, asset v. stock, etc.)
- ▶ Party represented (buyer, seller, lessor, lessee, secured creditor, investor, etc.)
- ▶ Type and materiality of the environmental issue in the context of the transaction
- ▶ Relative leverage of the party
- ▶ Tools reasonably (cost-effective?) available to allocate responsibility and/or quantify issue

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#### Leases

- ▶ Parties
  - Who are the parties to the agreement?
  - Agreement should clearly specify the parties that are to be bound by its terms.
  - Will include the relevant business entity (i.e., limited liability company, corporation, partnership, etc.) and/or individuals
  - Of particular importance if the jobber is relying on the other party to incur significant costs to address environmental regulatory responsibilities. All jobber entities covered?
  - Is the party a viable entity?

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#### Property/Facility

- ▶ Property Description – Lessee has a strong incentive to ensure it is only leasing the portion of the property that is uncontaminated.
- ▶ Facility/Equipment/Fixtures
  - Access
 

For example, does a lease clearly delineate which (if any) equipment (tanks, pumps, etc.) or parts of the facility to which the lessee does or does not have access? This will be particularly important for terminals, FBOs or other facilities utilized by multiple parties.

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#### Facility/Equipment/Fixtures (cont.)

- Installation/Modification
  1. Does the lessee have the right to install fixtures, equipment (gasoline dispensing equipment, tanks, etc.) and/or make alterations to the facility?
  2. Does the lease determine ownership of installed fixtures/equipment? This is clearly important in the event of a leak or spill in terms of responsibility or liability.

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#### Environmental Maintenance/Compliance Responsibilities

- ▶ Should environmental compliance responsibilities/equipment be specifically identified such as:
  1. Oil/water separator
  2. UST
    - Closure
    - Release reporting
    - Leak detection/prevention
    - Trust fund (fees, registration, etc.)
  3. AST SPCC requirements
  4. Wastewater/stormwater discharge requirements
  5. Bulk plant general air permits

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### Term of the Lease

- ▶ Extensions/Holding Over (Lease)  
What if a lease's term expires and a petroleum spill or release impedes the subsequent rental of the facility or closure of a UST cannot be accomplished by the end of the leasehold term?
  - Does rent continue?
  - Physical presence of lessee required?

Should these be addressed and deemed "Hold Over?"

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### Use of Premises

- ▶ Does the lease prohibit activities that lessee will or may undertake in the future (natural gas, electricity, etc.)?
- ▶ Should the lease prohibit certain activities or uses that could damage the property or subject the lessor to liabilities (i.e., long term storage of hazardous waste, waste tires, etc.)? Does a lessor need a restriction on the types of fuels that can be placed in the facility's tanks?

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### Storage Tanks

- ▶ The importance of storage tanks
  - UST requirements are some of the most costly and complex issues associated with petroleum marketing facilities. Similar concerns may be applicable to the above ground storage tanks ("ASTs"). The various UST and AST regulatory responsibilities should be allocated between the parties to a lease.

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### The importance of storage tanks (cont.)

- The lessor should recognize that allocating liability related to these regulatory requirements to the lessee does not protect it from liability to the government (if it is the owner of the UST or AST). The regulations usually impose responsibility on both the owner (lessor) and operator (lessee).

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### Incentivizing Lessees?

- Because the lessor and lessee may both be liable for violations as owners or operators, lessors often have an incentive to ensure that lessees expediently address UST releases on the leased premises. An important reason for providing incentives to the lessee for strict compliance/responding to UST release is maintaining eligibility with the Arkansas Petroleum Storage Tank Trust Fund  
Example: Lessee fails to report release

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### Lease Language

- ▶ Access/copies leak detection (records, etc.)
- ▶ Lessor notification (inspection reports, releases, etc.)
- ▶ Incentives (deductible paid if lessor/agency timely notified, etc.)
- ▶ Indemnity
- ▶ Inspections (repair right/charge back)
- ▶ Warranties/repairs (compliance, maintenance, etc.)
- ▶ Termination
  - Non-compliance is a specific ground for termination
  - Note Petroleum Marketing Practices Act

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**Allocation of Costs/Expenses**

- ▶ Best interest of both the lessor and lessee to identify and quantify to the extent possible relevant costs and expenses associated with the facility
  - UST/AST Fees
  - Repairs/Maintenance
  - Insurance
  - Sampling/leak prevention/closure/fees

If costs are being passed through to lessee, are there any caps on increases?

Are evolving regulatory costs being considered when valuing facilities and pricing leaseholds?

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**Clean Water Act NPDES Wastewater Permits**

- ▶ Do not overlook this issue when leasing or buying a facility in area city sewer unavailable
- ▶ Package wastewater plants can be expensive (equipment, engineering, chemicals, licensed operator)
- ▶ Non-compliance with permit limits can happen and cause is sometimes difficult to identify
- ▶ Placing these responsibilities in unreliable operator is risky

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**Supply Agreements**

- ▶ Regulatory Compliance (with or without provision of storage tanks, pumps, etc.)
  - That dealer, consignee, commission agent, (responsibilities may be more limited) sub-jobber, etc., comply with all governmental statutes, regulations, etc. (UST, AST, fuels/additives regulations, etc.)
  - Require notification of governmental investigations/inspections, alleged violations, correspondence, product/petroleum releases
  - Authorization to inspect equipment, facilities, leak detection records, etc.
  - Non-compliance with governmental requirements as a basis for termination

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**Indemnification (supply agreements)**

- ▶ Even if tanks, equipment, etc. are not supplied various scenarios could arise where jobber faces lawsuits or actions arising out of operation of supplied facility
  - Example might include retailer UST leak migrating to adjoining property. Lawsuit attempts to include jobber supplier arguing negligence in transferring fuel to leaking USTs
  - Clarify who owns tank (you need to know whether you own it or not - may be important at a later date)

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**Facility/Purchase Sale Agreements**

- ▶ UST Issues
  - Purchaser environmental assessment/due diligence
    - trust fund eligibility determination
    - identification of pre-closing contamination
    - determination of regulatory compliance
    - agency "no further" determinations
    - warranty/indemnity (N.E. example)
    - identifying equipment, fixtures purchased (leased/loaned equipment
    - be wary of broad clauses that convey to you all equipment, fixtures, etc.

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**Seller Environmental Liability Reduction Efforts**

- ▶ Limitation of "as is" clauses
- ▶ Documenting absence of historical contamination
- ▶ Limiting liability
  1. To knowledge of Seller
  2. Time/amount limitation
  3. Scope of coverage
  4. Release
- ▶ Addressing orphan/unknown USTs
- ▶ Properties on which USTs have been removed
  - Pre 1989 (historical releases still might be an issue
  - Post 1989 - Closure report/sampling results

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### Post-closing issues (purchase/sale)

- ▶ Purchase or sale of a retail motor fuel outlet, bulk plant or other petroleum marketing facility sometimes involve the discovery or disclosure of a preexisting environmental condition.
- ▶ Parties may choose to address them through purchase price adjustments, post-closing cleanup obligations, etc.

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### Post-Closing (cont.)

One scenario may involve the seller agreeing to investigate and/or remediate contamination subsequent to closing. Documenting this post-closing obligation will require the parties to address such issues as:

- ▶ At what point is the seller's obligation to remediate completed?
- ▶ Is there a timing requirement as to how quickly the seller must accomplish investigation and/or remediation?
- ▶ May the seller at its own discretion choose the investigative and/or remediation methods?
- ▶ What if a "new contamination" is discovered?

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### Environmental Consultant Agreements

- Limitation of Liability Clauses
- Reliance Issues

Does other party (seller, purchaser), affiliate entity, or lender need to also rely on assessment report, etc.?

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### Environmental Consultant Agreements (cont.)

#### ▶ Arkansas Storage Tank Trust Fund Issues

- Does a consultant's responsibilities include preparing and submitting trust fund reimbursement?
- Is the client or consultant responsible for reimbursement, for costs and expenses disallowed by ADEQ?
- Should the agreement include a confidentiality provision?

#### ▶ Confidentiality Provision

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### Integration Clauses - All Agreements

An "integration" clause is often included in an agreement to make certain that the final document constitutes the final agreement of the parties (to exclusion of oral discussion).

An example might read as follows:

Except as is otherwise provided herein, this lease constitutes the entire agreement among the parties with respect to the subject matter contained herein and supersedes all other agreements, letters, memoranda, or any other prior understanding of any type whatsoever, whether written or oral.

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