

WHY (YOUR INSURANCE COMPANY THINKS) YOUR TANK INSURANCE POLICY IS WORTHLESS

At a conference of state officials that manage petroleum cleanup funds, a representative of one of the big tank insurance companies said something like this: “Hey, these policies don’t provide much coverage. But they’re cheap. If you want better coverage, we’ll write it and charge for it.” Well, at least his honesty was refreshing.

Does the law require that the policies provide broader coverage for discharges? Do the policies provide broader coverage than the insurance companies are willing to admit? Do EPA and DEP really think that the policies don’t provide broad coverage? Yes. Yes. In the words of a senior official at EPA: “I’m not prepared to answer that question.”

So why the disconnect between what the law requires and what the policies say and mean? The answer lies in two words: site check. Let me explain.

Your tank insurance policy probably covers “Confirmed Releases.” Your policy also probably defines “Confirmed Release,” generally speaking, as a “Release” that is investigated and confirmed by the Insured using a system tightness test, a site check, or other federal and/or state-approved method. I think we all know what a system tightness test is, and the other state-approved method would likely include approved methods of release detection. But what is a “site check?” The insurance policies typically do not define the term, but the policies, of course, are marketed as a means by which Insureds may comply with federal regulations, and the definition of “Confirmed Release” typically references these regulations. But my co-counsel in a case, George Hatch, recently asked an insurance company representative what a “site check” is and hilarity ensued:

Q: What is a site check?

A: You see it, you look at it.

Q: Where do you get your definition of site check is you see it, you look at it?

A: Well, I don’t know. I mean I don’t know any other way to interpret that term. It’s not specifically defined.

Q: Can you explain to me a little more what you mean when you say you see it, you look at it?

A: Well, if I looked at that cup and it had a hole in it and there’s water coming out of it I would see it. I mean I don’t know any other way to describe it than sight.

Q: Well, this is site, s-i-t-e, correct, not s-i-g-h-t?

A: That's correct. That's true.

Q: Were you reading it s-i-g-h-t?

A: No. But the site, I mean, you know, I don't know that we have a definition of that and I don't know how I would describe it.

And this:

Q: Under the policy would you agree with me that...in order to confirm a release one of the methods that you can confirm the release is by conducting a site check?

A: You can conduct a site check, but that doesn't necessarily confirm a release.

And this:

Q: What I'd like to find out here today the best I can from you is, one, what is [the insurance company's] interpretation of what the term site check means, if you know. If you don't know, who would know?

A: I don't---we don't have any company policy as to what site check means. It's not defined in the policy. So it's just going to be like any other undefined term. What would—site check means checking the site. I mean, I don't know how it would—I don't know how I'd define it any better than that.

And finally:

Q: Are you aware of any definition of the phrase site check under federal law?

A: No, I'm not.

Q: If that phrase is defined under federal law would it be [the insurance company's] position that definition would control under the policy?

A: I don't know.

Since the insurers fail to attribute much meaning to the term “site check,” they typically insist that you “pinpoint” (their word) the mechanical cause and date of a release from a system covered under the policy. Good luck with that. According to a DEP study, release detection successfully identifies a release less than 40 percent of the time. In fact, one of the carriers, in its application to the Florida Office of Insurance Regulation for a huge premium increase, (again, with refreshing honesty) wrote “Tank compliance regulations allow for a margin of error in leak detection testing technology. As a result, many tank systems leak without a leak being detected

until the time of removal.” Since release detection often doesn’t work, insureds must rely on “site checks,” a methodology that the insurers typically don’t recognize. The result is like Gomez Addams playing with his toy trains: we’re on a collision course here.

Allow me to answer the questions that the insurance companies couldn’t or wouldn’t. Here is how federal law works: If you suspect a release from your tank system, you are required to do a system tightness test. If the test fails, the law would state that there is a release from the system. But, if the reason you suspected there was a release from the system was the discovery of contamination in the vicinity of the system, you must do a “site check,” even if the system tests “tight.” The federal regulations as part of the “release investigation and confirmation steps” (sound familiar?) define site check as a “measure for the presence of a release where contamination is most likely to be present at the UST site.” The regulations discuss sample types, sample locations, measurement methods, the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of ground water, and other factors appropriate for identifying the presence and source of the release. If the test results for the excavation zone or the UST site indicate that a release has occurred, owners and operators must begin corrective action.

That sounds like a limited site assessment, doesn’t it? The federal regulations say that one investigates and confirms whether a release from the system has occurred by doing a site check, the definition of which amounts to a site assessment. Presumably, then, the expert performing the site assessment will make a professional judgment as to whether the system is the source of the discharge and may further opine as to when the discharge occurred. And yet, despite issuing a policy that specifically allows for a release to be confirmed by means of a “site check,” the insurance companies typically will not accept a claim for a release confirmed by that means.

EPA knows this is a problem. DEP knows it is a problem. The Office of Insurance Regulation knows this is a problem. Finally, finally, DEP has engaged one of the carriers in a court of law to force the carriers to provide the coverage that they agreed to provide. We shall see how this turns out.

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