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Missouri Oil and Gas Update

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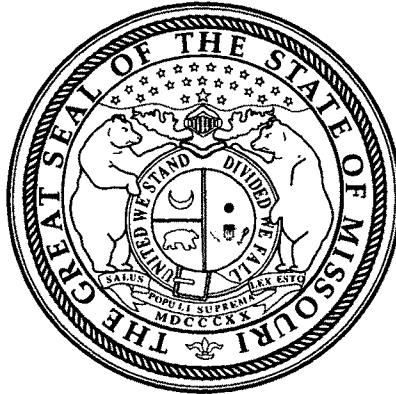
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MISSOURI OIL AND GAS UPDATE



By: Nadia B. Ahmad¹

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I. INTRODUCTION

The State of Missouri has untapped potential for the development of oil and natural gas resources. While the Missouri courts were quiet this past year on interpreting oil and gas rules and regulations, the legislature was active in amending laws governing storage tanks.² The state has experienced a tremendous upsurge in oil and gas production in the past two fiscal years.³ Missouri is poised to ramp up its conventional oil and gas production in the coming years, so increased legisla-

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2. See generally MO. CODE REGS. ANN. tit. 10, §§ 26-1.010 to -5.030 (2012).

3. *Oil and Gas In Missouri*, MO. DEP'T OF NATURAL RES., <http://dnr.mo.gov/geology/geosrv/ogc/index.html> (last visited Sept. 26, 2012). For the fiscal year 2011, figures totaled 112,508 barrels of oil produced. *Id.*

tive actions and court activity will likely occur in the near future. Missouri's energy resources include coal bed methane, oil sand, and oil shale.⁴ Despite the limited supplies of traditional hydrocarbons, considerably large deposits of heavy oil exist, which are of interest to energy producers. According to the Missouri Department of Natural Resources, improving technologies along with efficient, environmentally responsible oil production, will result in increased economic benefit to the state in the form of jobs and revenue.⁵

II. REGULATORY CHANGES TO STORAGE TANK SYSTEMS

The significant legislative change to Missouri oil and gas rules relates to the regulatory regime for underground storage tanks.⁶ The Environmental Protection Agency ("EPA") under the authority of Congress established the Office of Underground Storage Tanks in 1985 to develop and implement a regulatory regime for underground storage tanks ("UST"s) systems.⁷ Per the federal guidelines, an underground storage tank system includes the underground storage tank, connected underground piping, underground ancillary equipment, and containment system.⁸ The federal UST regulations apply to only underground tanks and piping storing either petroleum or certain hazardous substances.⁹ While the EPA provided the framework for the regulatory regime, the onus remained on the states to prevent and clean up releases from UST systems.¹⁰ In 1989, Missouri adopted its own statutes for the UST program. Since that time, no substantial changes had been made to UST rules to reflect improvements to underground storage tanks, piping, release detection methods, and other equipment.¹¹ In the 2011 session, the Missouri state legislature adopted measures to enhance safety procedures for underground storage tanks ahead of the EPA.¹² These changes transported tank regulations from Division 20 of the State Code of State Regulations under the Clean Water Commission¹³ to Division 26 under the Hazardous

4. *Id.*

5. *Id.*

6. *See generally* §§ 26-1.010 to -5.030.

7. *Basic Information About the Underground Storage Tank Program*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oust/aboutust.htm> (last updated Aug. 15, 2012).

8. EPA Solid Wastes Rule, 40 C.F.R. § 280.12 (2012).

9. U.S. ENVTL. PROT. AGENCY, *supra* note 7.

10. *See generally* EPA Solid Wastes Rules, 40 C.F.R. §§ 280, 281, 282.50–282.150 (2012).

11. Heather Peters, *Underground Storage Tanks: How Will the New Regulations Affect Me?*, MO. DEP'T OF NATURAL RES. (Oct. 17, 2011), http://www.dnr.mo.gov/env/hwp/docs/1111webinar_ust_regs.pdf.

12. *See generally Proposal Revises Underground Storage Tank Regulations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oust/fedlaws/proposedregs.html> (last visited Nov. 11, 2012).

13. MO. CODE REGS. ANN. tit. 10, § 20-10.040 (2011).

Waste Management Commission.¹⁴ The Missouri Department of Natural Resources sought to clarify existing regulations; account for equipment changes since 1989; ensure the safety of older storage tanks; prevent abandonment of tanks; and ensure proper installation of tanks, piping, and equipment.¹⁵ While these changes are of a technical nature, practitioners would be well served to understand the statutory amendments because of compliance regulations.

A. Updated Terminology

The statute redefined terms and specified the language for the updated terminology. “In use” referred to tanks that contained products, whereas “out of use” referred to empty product.¹⁶ The terms “in-service” and “in-use” are equivalent and mean that the tank system contains more than one inch (1”) of a regulated substance or residue or 0.3% by weight of the total capacity of the UST system of regulated substance.¹⁷ A tank is considered to be “in-service” and “in-use” beginning with the first input of a regulated substance into the tank system.¹⁸ “Routinely contains regulated substance” means that a regulated substance regularly passes through the piping, but it does not necessarily mean that the piping must continuously hold a regulated substance.¹⁹ Satellite lines, gravity piping, and remote fill lines, including lines from aboveground storage tank(s) to underground storage tank(s), all routinely contain a regulated substance.²⁰ Vapor lines, including vent lines and vapor recovery lines, are not included.²¹ Distinctions were also made to establish what constitutes an “above ground” versus “underground” storage tank. For purposes of the amendment, the legislature incorporated the UST definition from the Missouri Revised Statutes instead of 40 C.F.R. § 280.12 so that an “underground storage tank” is “any one or combination of tanks, including pipes connected thereto, used to contain an accumulation of regulated substances, and the volume of which, including the volume of the underground pipes connected thereto, is ten percent or more beneath the surface of the ground.”²² Yet as a caveat, the Missouri Department of Natural Resources included language to adopt, delete, or modify exemptions based on any modifications, additions, or deletions made by the Environmental Protection Agency.²³

14. *Id.* § 26-2.040.

15. *See* MO. DEP’T OF NATURAL RES, *supra* note 3.

16. MO. CODE REGS. ANN. tit. 10, § 26-2.012(1)(I)(3), (O)(2) (2012).

17. *Id.* § 26-2.012(1)(I)(3).

18. *Id.*

19. *Id.* § 26-2.012(1)(R)(3).

20. *Id.*

21. *Id.*

22. MO. ANN. STAT. § 319.100(16) (West 2011).

23. *Id.*

B. *Installation Requirements and Performance Standards*

The statute provides that any installer who intends to install an UST system for storage of a regulated substance must notify the department thirty days prior to installing the tank²⁴ and must document compliance with all manufacturer certification or training requirements for tank, piping, release detection equipment, and spill and overfill equipment installed.²⁵ Installers and manufacturers must be properly registered with the Missouri Department of Agriculture and have a current financial responsibility mechanism that complies with the requirements of title 2, section 90-30.085 of the Missouri Code of State Regulations.²⁶ Prior to installation of an UST, the tank and associated piping must be tested, inspected, and measured in accordance with the manufacturer's requirements and in accordance with the pre-installation inspection, testing, and backfilling sections of either the American Petroleum Institute's Recommended Practice 1615, *Installation of Underground Petroleum Storage Systems*, fifth edition, 2011 or Petroleum Equipment Institute's Recommended Practice 100-2011, *Installation of Underground Liquid Storage Systems*, 2011 edition.²⁷ Tanks, piping, and equipment must also comply with the same.²⁸

Upon non-compliance with the rule, an authorized representative of the Missouri Department of Natural Resources may require that the installation remain open and uncovered, or that no additional UST system work be conducted, until the manufacturer approves the installation that deviates from their written guidelines, specifications, and instructions; the owner approves the installation; and the Missouri Department of Natural Resources approves the installation.²⁹ The legislature adopted specific performance standards for new UST systems to prevent releases due to structural failure, corrosion, or spills and overfills.³⁰ The tank is to be constructed of steel and cathodically protected material.³¹ The tank must be coated with a suitable dielectric material, field-installed cathodic protection systems designed by a corrosion expert, impressed current systems that are designed to allow determination of current operating status as required in title 10, section 26-2.031(1)(C) of the Missouri Code of State Regulations, and cathodic protection systems which are operated and maintained according to title 10, section 26-2.031 of the Missouri Code of State Regulations.³²

24. MO. CODE REGS. ANN. tit. 10, § 26-2.019(1) (2011).

25. *Id.* § 26-2.019(2).

26. *Id.* § 26-2.019(3).

27. *Id.* § 26-2.019(4).

28. *Id.* § 26-2.019(5).

29. *Id.* § 26-2.019(9).

30. MO. CODE REGS. ANN. tit. 10, § 26-2.020(1) (2011).

31. *Id.* § 26-2.020(1)(A).

32. *Id.* § 26-2.020(1)(A)(2).

C. *Prevention and Detection Equipment Methodology*

Owners and operators cannot bring a tank in use that is not in compliance with requirements for spill and overfill prevention.³³ Spill prevention equipment must prevent release of product to the environment when the transfer hose is detached from the fill pipe.³⁴ All delivery hose-fill pipe connections must be tight, lock-on connections. The overfill prevention equipment should do the following: (1) automatically shut off flow into the tank when the tank is no more than 95% full; (2) alert the operator with a high level alarm at least one minute before overfilling with an alarm audible in the delivery area; or (3) alert the transfer operator when the tank is no more than 90% full by restricting flow into the tank.³⁵ Ball float valves are not compatible with safe suction systems, single point vapor recovery systems (co-axial drop tubes), or pressurized deliveries.³⁶ Ball float valves will not be permitted for overfill prevention on new systems.³⁷ In spite of these changes, petitioners may submit a written request for an alternate system.³⁸

The general requirements for release detection apply to all UST systems. The release detection method must be able to detect a release from any portion of the tank and the connected underground piping that routinely contains the regulated substance.³⁹ Second, the release detection method must be “installed, calibrated, operated, and maintained in accordance with manufacturer’s instructions.”⁴⁰ Third, the tanks and associated piping must comply with state detection guidelines⁴¹ and the applicable National Work Group on Leak Detection Evaluations (“NWGLDE”) certification.⁴² For operators of high-throughput facilities, additional regulations apply. High-throughput facilities are defined as any owner of a tank or multi-tank connected or manifold system that dispenses more than 800,000 gallons of any regulated substance in a month.⁴³ Approved devices include the continuous, electronic interstitial monitoring, vapor monitoring, continuous in-tank release detection, or a method specifically approved by the Missouri Department of Natural Resources.⁴⁴

33. Peters, *supra* note 11.

34. § 26-2.020(1)(C)(1).

35. *Id.*

36. Peters, *supra* note 11.

37. *Id.*; § 26-2.020(1)(C)(1).

38. Peters, *supra* note 11.

39. MO. CODE REGS. ANN. tit. 10, § 26-2.040(1)(A) (2011).

40. *Id.* § 26-2.040(1)(B).

41. *Id.* § 26-2.040(1)(C).

42. *Id.* § 26-2.040(1)(D).

43. MO. CODE REGS. ANN. tit. 10, § 26-2.041(2) (2011).

44. *Id.*

D. Maintenance and Repairs

For existing underground storage tanks, operators must upgrade the interior lining if it is not already in compliance depending on the type of material, such as steel or fiberglass-reinforced plastic.⁴⁵ Tanks are to be inspected every ten years and every five years thereafter.⁴⁶ The operators must reassess the steel shell before repairING or re-lining any systems.⁴⁷ In addition, a tank may be upgraded by cathodic protection testing that is certified by NACE International, American Petroleum Institute, American Society for Testing and Materials, and National Leak Prevention Association.⁴⁸ Meanwhile, for out-of-use tanks, operators do not need to maintain the lining or cathodic protection, but they will be required to reassess the tank and conform the lining and cathodic protection as being functional prior to reopening the tank.⁴⁹

E. Recommendations and Best Practices

Any Missouri oil and gas operator should pay keen attention to these regulatory changes regarding storage tank systems. The new wave of environmental and safety rules are nuanced and require specific attention to detail. Oil and gas operators should learn of these changes, which are in line with the later-enacted federal guidelines for UST systems. It is also important to provide adequate support and supervision to employees of oil and gas operations in order that they may be aware of these nuanced changes to the rule.

Changes to the storage tank regulation also have implications to brownfields restoration in Missouri. Following the Brownfields Revitalization and Environmental Restoration Act of 2001, petroleum contaminated sites became eligible for federal brownfields funding and incentives.⁵⁰ These petroleum brownfields funds can be combined with Missouri's UST cleanup funds.⁵¹ Expect communities to allocate resources on low risk petroleum sites, which have no viable responsible parties.⁵² The Brownfields Revitalization Act encourages state UST officials to integrate UST cleanups with brownfields voluntary

45. MO. CODE REGS. ANN. tit. 10, § 26-2.021(3)(A)(1) (2011).

46. *Id.* § 26-2.021(3)(A)(2).

47. *Id.* § 26-2.021(3)(A)(3).

48. *Id.* §§ 26-2.021(3)(B), -2.021(6).

49. Peters, *supra* note 11.

50. Brownfields Revitalization and Environmental Restoration Act of 2001, Pub. L. No. 107-118, § 211, 115 Stat. 2356 (2002) (amending 42 U.S.C. §§ 9601, 9604-05, 9607 and adding 42 U.S.C. § 9628). The original Senate bill was introduced by Senator Lincoln Chafee (R-RI) along with Senators Bob Smith (R-NH), Harry Reid (D-NV), and Barbara Boxer (D-CA) on February 15, 2001.

51. *A Primer for Petroleum Brownfields: What Can Your Community Do to Revitalize UST Sites?*, NE.-MIDWEST INST., 1 (2003), <http://www.resourcesaver.com/file/toolmanager/CustomO93C337F51727.pdf>.

52. *Id.*

cleanup programs based on remediation and reuse.⁵³ Successful contaminated site redevelopment varies from location to location, but each community has its own unique opportunities and revitalization goals.⁵⁴ The Association of State and Territorial Solid Waste Management Officials in its report, *Toolbox for Cleanup and Redevelopment of Contaminated Sites in Small Cities and Rural Communities*, emphasizes that “[r]egardless of a community’s size, history, and number of contaminated properties, planning ahead is extremely important.”⁵⁵ In Missouri, efforts at restoring brownfield sites will lead to further changes in regulatory regimes impacting oil and gas exploration and development.

III. COMMON LAW UPDATES

While the Missouri courts did not give considerable attention to oil and gas law issues, the courts did expand upon the matter of eminent domain and gas utility lines. The most significant decision during 2011 and 2012 is *St. Charles County v. Laclede Gas Co.*, where the issue was whether St. Charles County (“county”) or Laclede Gas Company (“Laclede”) had to assume costs for the relocation of Laclede’s lines due to the county’s plans to widen a public road.⁵⁶ The county had brought the action seeking declaration that the gas utility company must bear the costs of relocation.⁵⁷ Laclede argued that its gas lines were located in utility easements created by the five recorded subdivision plats, which demonstrated the location of the public road and associated utility lines.⁵⁸ Laclede argued that “[b]ecause easements are ‘constitutionally cognizable property interests,’ . . . requiring it to relocate its gas lines without compensation” was a taking.⁵⁹ The Court agreed. In citing *State ex rel. Missouri Highway and Transportation Commission v. London*,⁶⁰ the court ruled that “[w]hen a subdivision plat establishes an easement in favor of a utility, ‘the interest acquired is held by the city, town, village, or county in trust for the public uses set forth.’”⁶¹ In *St. Charles County*, the Court noted that “the subdivision plats unequivocally established an easement in favor

53. *Id.* at 5.

54. *Toolbox for Cleanup and Redevelopment of Contaminated Sites in Small Cities and Rural Communities*, ASS’N OF STATE & TERRITORIAL SOLID WASTE MGMT. OFFICIALS, 2 (Mar. 2007), http://www.astswmo.org/Files/Policies_and_Publications/CERCLA_and_Brownfields/Toolboxfinal.pdf.

55. *Id.*

56. *St. Charles Cnty. v. Laclede Gas Co.*, 356 S.W.3d 137, 138 (Mo. 2011) (en banc).

57. *Id.*

58. *Id.* at 139.

59. *Id.*

60. *State ex rel. Mo. Highway & Transp. Comm’n v. London*, 824 S.W.2d 55 (Mo. Ct. App. 1991).

61. *St. Charles Cnty.*, 356 S.W.3d at 139.

of Laclede[,] and Laclede accepted the easement by installing and maintaining gas lines within the easement.”⁶²

The county objected to Laclede’s claim for relocation costs first on the basis of inherent police power over public roads. The Missouri Supreme Court stated that the law was “clear” as to municipalities having “exclusive authority to control and regulate public roads”⁶³ The Court further noted public policy grounds and the grant language as instructive in that “any condition or limitation on the government’s authority to ‘devote the street to the wants and conveniences is void, as against public policy or as inconsistent with the grant.’”⁶⁴ The Court delineated that Laclede’s reimbursement for relocation costs did not limit the county’s police power over public roads.⁶⁵ Laclede’s claim, the Court pointed out, specifically challenged “the county’s effort to displace Laclede from its easement by requiring relocation of Laclede’s gas lines.”⁶⁶ However, the Court analogized the instant case to the scenario where the county would seek to build a road across a homeowner’s yard.⁶⁷

The county also asserted the doctrine of merger and statutory language related to the law of easements. The Missouri Supreme Court stated that “[t]he very nature of an easement is that it grants the easement owner the right to a limited use of real property owned by another.”⁶⁸ Yet for the doctrine of merger to apply, the county had to demonstrate unity of title and unity of possession.⁶⁹ Then the county argued that even if Laclede had an easement, it was not entitled to relocation costs because “its easement did not predate establishment of the public road right of way.”⁷⁰ The Court disregarded this argument and ruled that “[a]n easement is a compensable property right irrespective of whether it was acquired prior to or contemporaneously with the creation of the public right-of-way.”⁷¹ Finally, the county asserted that “the primary objective of the subdivision plats was to create a public roadway because the language establishing the roadway preceded the language establishing the utility easements.”⁷² The Court reasoned that non-exclusive easements allowed for a public roadway and the provision of utility service to the subdivisions:

62. *Id.*

63. *See id.* (citing *City of Camdenton v. Sho-Me Power Corp.*, 237 S.W.2d 94, 98 (1951)); 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 235 (1964).

64. *See St. Charles Cnty.*, 356 S.W.3d at 139–40 (citing *Sho-Me Power Corp.*, 237 S.W.2d at 98).

65. *Id.* at 140.

66. *Id.*

67. *Id.*

68. *Id.* at 141.

69. *See Morgan v. York*, 91 S.W.2d 244, 248 (Mo. Ct. App. 1936).

70. *St. Charles Cnty.*, 356 S.W.3d at 139.

71. *Id.*

72. *Id.*

The county is correct to note that the language establishing the public roadway appears before the language establishing the utility easements. No case is cited for the proposition that the paragraph order in which matters are mentioned in a subdivision plat creates priorities of interest, and no principle of land or contract law so establishes. While it is undoubtedly true that a primary objective of the subdivision plats was to establish a public road, it is also true that the subdivision required utility service. The primary purpose of the subdivision plats was to establish both a public roadway and the utility easements. As such, the most reasonable way to view the plats is to conclude that the plats established non-exclusive easements permitting both a public roadway and the provision of utility service to the subdivisions.⁷³

The Court decided that requiring the utility company to pay relocation costs due to road construction would have been an unconstitutional taking.⁷⁴ In ordering the county to reimburse Laclede for relocation costs, the Court noted that this action did not limit the county's police power over public roads.⁷⁵ *St. Charles County* is also important for oil and gas operators because even though language establishing the public roadway appeared before the language establishing the utility easements in subdivision plats, no priority of interest was created in the public roadway.

73. *Id.* at 142.

74. *Id.* at 139.

75. *Id.* at 140.