

Financial Responsibility Requirements for Underground Storage Tanks in Montana

“Companies still thinking about the environment as a social responsibility rather than a business imperative are living in the dark ages.”

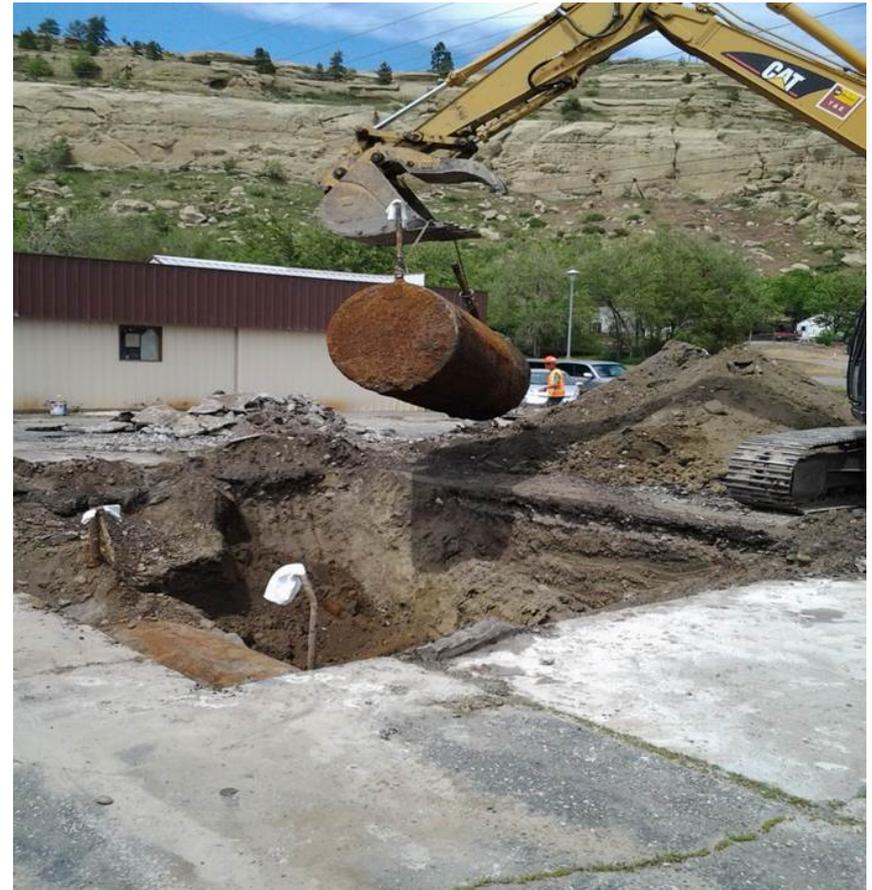
*Carter Roberts, President and CEO, World Wildlife Fund
(2007)*

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Where Do Financial Responsibility Requirements Come From?

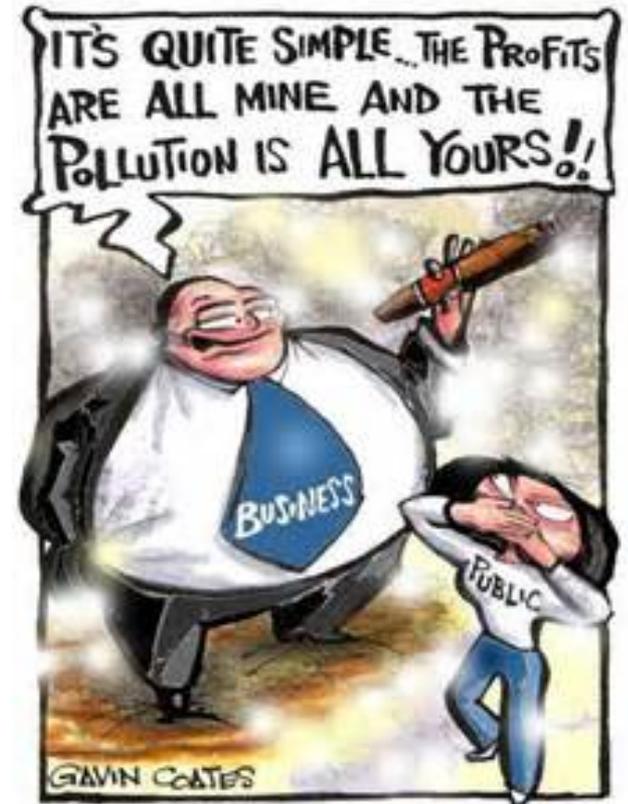
- 1986 amendments to Subtitle I of the Resource Conservation and Recovery Act (RCRA) required the U.S. Environmental Protection Agency (EPA) to develop financial responsibility (FR) regulations for owners and operators of petroleum underground storage tanks (USTs).
- Federal regulations regarding FR can be found at 40 CFR Part 280.
- State regulations regarding FR can be found at Administrative Rules of Montana (ARM) 17.56.801, et. seq.
- FR requirements are designed to make sure that UST **owners** and **operators** can pay for cleanup of petroleum releases and can compensate third-parties for damages that result from the leaking USTs.



Why Are Owners and Operators Required to Show Proof of FR?



Responsibility



How Do FR Requirements Benefit Owners and Operators?

- If your UST leaks, you could be faced with high cleanup costs or lawsuits brought by injured third parties.
- Protects **owners** and **operators**, by ensuring funding is available to address contamination caused by a release from their USTs.
- **Owners** and **operators** who maintain adequate FR should be able to cover the costs associated with a release from their USTs.



Agency sues over 2007 gasoline leak

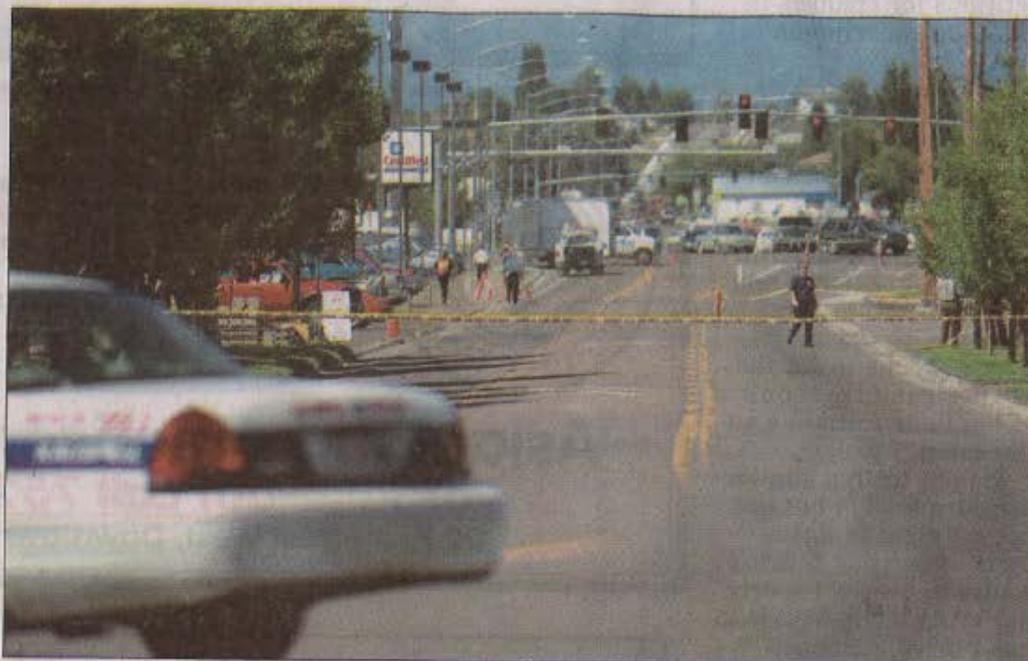
By SAM WILSON
Daily Inter Lake

The U.S. Environmental Protection Agency on Feb. 9 sued Michael's Convenience Stores Inc., seeking damages for an alleged 10,000 gallons of gasoline that leaked from a Kalispell gas station in 2007.

The civil suit, filed in U.S. District Court in Missoula, alleges the Michael's West Exxon at West Idaho Street and Meridian Road violated the Clean Water Act when gasoline leaked from its underground piping system into the surrounding soil from May to July 2007.

The gasoline spread through the soil and groundwater, entering Kalispell's storm-water drainage system before it eventually reached Spring Creek, a tributary to Ashley Creek.

For days, authorities worked to identify the source of the contamina-



POLICE TAPE crisscrosses Meridian Road in July 2007 while a gasoline leak into the Kalispell storm-sewer system is investigated. The Environmental Protection Agency has filed a lawsuit against a convenience store over the gasoline leak. (Daily Inter Lake file photo)

tion as gasoline concentrations in the sewer system reached levels high enough to cause worries about an underground explosion.

At the time, the smell of gasoline was detectable from Center Street to Three Mile Drive, and the section of Meridian Road south of West Idaho

Street was closed to traffic for several days.

Remedial crews removed at least 30,000 gallons of contaminated groundwater and city

officials at the time estimated between 2,000 and 2,500 gallons of gasoline had spilled.

Crews used pumps, dry wells and petroleum-absorbing booms to collect contaminated groundwater. To stop the flow of gasoline into the sewer system, the city dumped concrete around a leaky sewer pipe.

According to court documents, water samples taken at the time established the presence of gasoline in Ashley and Spring creeks — both federally regulated bodies of water.

The lawsuit alleges the contamination reached levels "harmful to the public health or welfare or the environment of the United States."

For oil pollution, a Clean Water Act violation occurs if the discharge exceeds water quality standards or if it is sufficient to cause discolor-

See LEAK, A8

LEAK

from A1

In 2006 the gas station had passed its inspection by the Montana Division of Environmental Quality

barrel.

For 10,000 gallons, that would come out to more than \$260,000. For a previ-

owner, declined to comment Monday on the litigation.

Who Needs to Demonstrate Financial Responsibility?

- Either the **Owner** or **Operator** of all petroleum USTs.
- If the **owner** and **operator** are two different entities, one or the other, but not both must demonstrate proof of FR. However, **both** parties are liable in the event of noncompliance.
- Federal and state governments and their agencies are **exempt** from FR requirements.
- **Local governments** must comply with FR requirements.



How Much Financial Responsibility Coverage Is Required?

- **Per Occurrence** – the amount of \$ that must be available to pay the costs from a single release.
- **Annual Aggregate** - The total amount of \$ that must be available to pay the costs from all leaks that might occur in a single year.
- **Owners** or **operators** of USTs located at petroleum marketing facilities or that handle > 10,000 gallons per month = **\$1 million per occurrence**
- **Owners** or **operators** of ≥ 100 USTs = **\$1 million annual aggregate**.



What Method(s) of Financial Responsibility Can You Rely On?

Owners or **Operators** may rely on any one or a combination of the following methods to demonstrate FR:

1. Financial Test of Self-Insurance; or
2. Guarantee; or
3. Insurance & Risk Retention Group Coverage; or
4. Surety Bond; or
5. Letter of Credit; or
6. Trust Fund; or
7. **Montana Petroleum Tank Release Cleanup Fund (Petro Fund).**



Least Commonly Used Methods in Montana

1. Financial Test of Self-Insurance

- **Owner** or **operator**, and/or **guarantor** must prove a **tangible net worth** of at least **\$10,000,000.00** based on year-end financial statements certified by Chief Financial Officer.

2. Guarantee

- Guarantor must be a firm that possesses a **controlling interest** in the **owner** or **operator**, or a firm engaged in a **substantial business relationship** with the **owner** or **operator** that meets the requirements of the **financial test of self-insurance** as certified in a letter of guarantee.
- Requires owner or operator to establish a **standby trust fund** to be funded by guarantor in the event of a release.

3. Surety Bond

- Surety bond must be issued by a surety company listed in the latest U.S. Dept. of the Treasury Circular 570 as a surety on federal bonds.
- Surety bond must be worded as specified in ARM 17.56.810.

4. Letter of Credit

- Must be issued by a state or federally regulated entity that has authority to issue such letters in the State of Montana and must be worded as specified in ARM 17.56.811.
- **Owner** or **operator** must establish a **standby trust fund** to be funded by issuing entity in the event of a release.

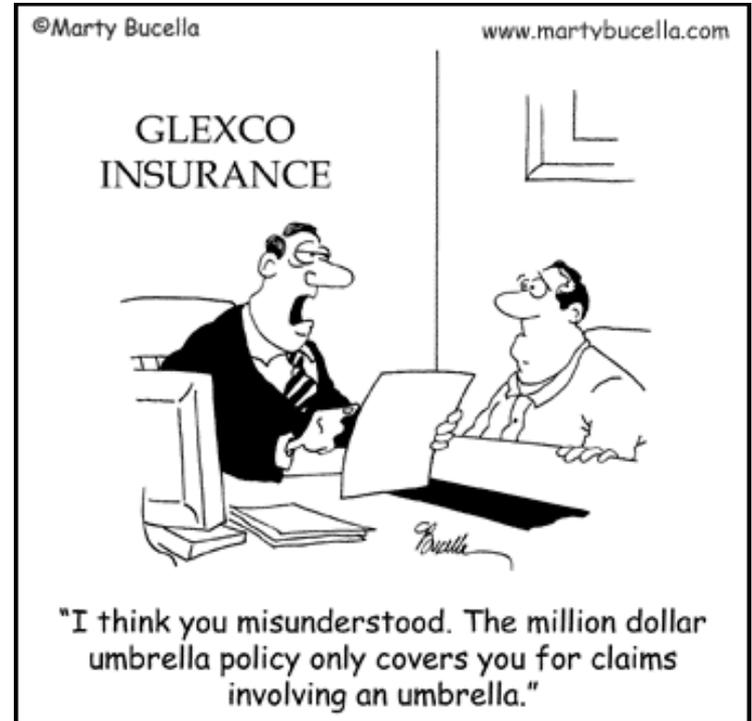
5. Trust Fund

- Trustee must be an entity regulated by the state or federal government that has authority to act as trustee in the State of Montana.
- Trust fund must be **fully funded** by owner or operator at the time it is established.

Does My Insurance Cover a Release From My UST?

Does my policy contain a “**pollution exclusion**”?

- Standard exclusion clause found most often in Commercial General Liability (“CGL”) policies.
- **Excludes** coverage for losses arising out of the discharge or escape of pollutants into the environment.
- 1970s insurance policies contained an **exception to the exclusion** for losses which were “**sudden and accidental.**”
 - ❖ What constitutes “sudden and accidental?”
- 1980s insurance policies contained the “**absolute pollution exclusion.**”
 - ❖ What is the definition of “pollutant.”



Does the Insurance Policy Provide Liability Coverage for USTs?

An **owner** or **operator** may satisfy the FR requirements by obtaining liability insurance that conforms to the requirements of ARM 17.56.809.

- May be a **separate insurance policy** or an **endorsement** to an existing policy.
- The insurance policy must contain either an **endorsement** or a **certificate of insurance** certifying that the policy provides liability insurance coverage for the specified USTs.

Insurance may be used to supplement the coverage provided by the **Montana Petroleum Tank Release Cleanup Fund (Petro Fund)**, or in lieu of the **Petro Fund**.



“Your insurance provides coverage for catastrophic events — but a bad haircut doesn’t qualify.”

Montana Petroleum Tank Release Cleanup Fund (Petro Fund)

- An **owner** or **operator** may satisfy **any part** the FR requirements by use of the **Petro Fund**.
- The burden of proof is upon the **owner** or **operator** to prove **compliance with all necessary laws and rules** to be eligible for coverage from the Petro Fund.
- **Owners** or **operators** who rely on the Petro Fund as **partial satisfaction** of the FR requirements may demonstrate the remaining coverage requirements are met by certifying a **tangible net worth** equal to that amount, or by providing proof of any of the **other methods** of coverage.

How Much Coverage Does the Petro Fund Provide?

1. For eligible releases from **heating oil tanks** or from **farm or residential** tanks with capacity of $\leq 1,100$ gallons:
 - 100% of eligible costs up to \$500,000.00 for properly designed and installed double-walled tank system releases discovered after 10/01/1993 and before 10/1/2009; or
 - **50% of first \$10,000.00** of eligible costs and **100% of subsequent eligible costs up to \$495,000.00**.
2. For **all other eligible releases** discovered on or after **4/13/1989**:
 - 100% of eligible costs up to \$1,000,000.00 for properly designed and installed double-walled tank system releases discovered after 10/01/1993 and before 10/1/2009; or
 - **50% of first \$35,000.00** of eligible costs and **100% of subsequent eligible costs up to \$982,500.00**.

What Happens When the Owner or Operator Fails to Remain in Compliance?

1. Upon a determination by the Montana Petroleum Tank Release Compensation Board (Board) that the **owner** or **operator** has **NOT** complied with all applicable laws and rules, all reimbursement of pending and future claims must be suspended.
2. Suspended or future claims may only be reimbursed upon the **owner** or **operator's** return to compliance.
3. The amount of the eligible costs that will be reimbursed upon return to compliance is determined based on the length of the period of non-compliance.

Schedule of Reimbursement Based on Period of Non-Compliance

Period of Non-Compliance	% Reimbursed Allowed
1 to 30 days	90%
31 to 60 days	75%
61 to 90 days	50%
91 to 180 days	25%
Greater than 180 days	No reimbursement

What If You Have a Release that Exceeds Your \$1 Million Coverage or If You are Denied Reimbursement For Non-Compliance?

- “The required per-occurrence and annual aggregate coverage amounts do **NOT** in any way limit the liability of the owner or operator.” **ARM 17.56.805(8)**
- **Owners** or **operators** who fail to operate their USTs in compliance with state law risk losing coverage under the **Petro Fund**.
- **Owners** or **operators** who lose coverage under the **Petro Fund** are still liable for all costs associated with cleaning up a release from their USTs.



What Happens If My FR Mechanism is Canceled or Not Renewed?

1. Providers of financial assurance may cancel or fail to renew an assurance mechanism by sending **notice of termination** by certified mail to the **owner** or **operator**.
 - Termination of a **guarantee, surety bond, or letter of credit** requires **120 days** notice;
 - Termination of **insurance, risk retention group coverage, or state funded assurance** requires **60 days** notice;
2. If a provider of financial assurance cancels or fails to renew your FR mechanism, the **owner** or **operator** must obtain alternative coverage within **60 days** after receipt of notice of termination.
3. If the **owner** or **operator** fails to obtain alternative coverage within 60 days of receipt of notice of cancellation, the **owner** or **operator** must notify the department (DEQ) of the name and address of the provider, the effective date of termination and a copy of the financial assurance mechanism.
4. **CAUTION:** Failure to comply with state laws in operating your UST could result in a loss of coverage **without notice** to the **owner** or **operator**!

Can the Owner or Operator Substitute FR Mechanisms?



YES!

An **owner** or **operator** may substitute their financial assurance mechanism provided that the **owner** or **operator** maintains, **AT ALL TIMES**, an effective financial assurance mechanism or combination of mechanisms that satisfy the requirements of ARM 17.56.805.

FR Reporting Requirements

1. **Owners** and **Operators** must submit proof of current FR to the department (DEQ) on the appropriate forms:
 - a) Within 30 days of a release;
 - b) Within 30 days of receipt of notice of bankruptcy from the financial assurance provider and the owner or operator has not obtained alternative coverage;
 - c) Within 30 days of receipt of notice of failure of a guarantor to meet the financial test of self-insurance and the owner or operator has not obtained alternative coverage;
 - d) Within 30 days of receipt of notice of incapacity of the financial assurance provider and the owner or operator has not obtained alternative coverage;
 - e) Within 150 days of discovery that the owner or operator no longer meets the financial test of self-insurance, or 30 days from receipt of notice from the department (DEQ) that they no longer meet the test;
 - f) Within 60 days of failure to obtain alternative coverage after receiving notice of cancelation or non-renewal from the provider.

FR Reporting Requirements Con't.

- 2. Owners and Operators** must submit proof of current FR to the department (DEQ) when giving notice of the installation of a new UST.
3. The department (DEQ) may require an **owner** or **operator** to submit evidence of financial assurance or other information relevant to compliance with these rules **at any time**.
4. If the Petro Fund is the mechanism of FR selected by the **owner** or **operator**, first dollar coverage in the amount of **\$17,500.00** must be documented using one of the other acceptable FR mechanisms, in addition to the Certificate of Financial Responsibility.

What Records Are Owners and Operators Required to Keep to Prove FR?

1. **Owners** or **operators** must maintain evidence of **ALL** mechanisms used to demonstrate FR at the UST site or the **owner's** or **operator's** place of business.
2. Records maintained off-site must be made available upon request of the department (DEQ) or the department's representative.

MONTANA CERTIFICATE OF FINANCIAL RESPONSIBILITY

The Certificate of Financial Responsibility below is required to be on file at your facility or place of business. Your compliance inspector is required to inspect it for proper record keeping.

Arm 17.56.823(2) (F) RECORDKEEPING – An owner or operator using an assurance mechanism specified in ARM17.56.807 through 17.56.816 must maintain an updated copy of a certificate of financial responsibility (complete additional certificates if more than one facility is under the same ownership).

I, _____, hereby certify that facility name _____, Facility ID# _____ is in compliance with the requirements of sub-chapter 8, ARM 17.56 by claiming the financial assurance coverage below.

The financial assurance mechanism(s) used to demonstrate under sub-chapter 8, ARM 17.56 is (are) as follows:

Type of Mechanism: (Check one or more)

PTRCB Fund Valid Operating Permit YES NO

NOTE: If PTRCB is checked, you must choose an additional mechanism to cover \$17,500.00 Co-payment requirement of the PTRCB fund.

Insurance Letter of Credit Trust Fund Stand-by Trust Fund
Self Insurance Corporate Guarantee Surety Bond

Name of Issuer: _____

Mechanism number: _____

Amount of coverage: _____

Period of coverage: _____

Does the mechanism cover?

- Taking corrective action Yes No
- Compensating 3rd parties for bodily injury and property damage caused by:
 - ✓ sudden accidental releases Yes No
 - ✓ non-sudden accidental releases Yes No
 - ✓ accidental releases Yes No

_____ signature of owner

_____ name of owner or operator

_____ title _____ date

_____ signature of witness or notary

_____ name of witness or notary

_____ date

_____ title (and rank)

_____ date commission expires (seal, if any)

If the mechanism selected by the owner/operator is the PTRCF Fund, then regulations require certification of tangible net worth equal to the required remaining amount of coverage (currently \$17,500). This certification must be on this form that is approved by the department.

Personal Financial Statement for Sole Proprietorship
As of _____, 20__

Name: _____ Business Phone: _____

Address: _____

City, State and Zip Code: _____

Business Name of Owner/Operator: _____

Facility Number _____

ASSETS	LIABILITIES
Cash on Hand	Accounts Payable
Savings Accounts	Notes Payable
Accounts and Notes Receivable	Installment Account(s)
Life Insurance – Cash Surrender Value Only	Loan on life insurance
Stocks and Bonds	Mortgages on Real Estate
Real Estate	Unpaid taxes
Automobile (present value)	Other Liabilities
Other Personal Property	
Other Assets	
TOTAL	TOTAL

TOTAL ASSETS	
TOTAL LIABILITIES	
NET WORTH	

The undersigned certifies that all information is true and accurate and was taken from the books and records of the above named business as of the date below.

Signature of authorized official: _____

Date: _____

If the mechanism selected by the owner/operator is the PTRCF Fund and business ownership is OTHER THAN sole proprietorship, then regulations require certification of tangible net worth equal to the required remaining amount of coverage (currently \$17,500). This certification must be on this form that is approved by the department.

Business Financial Statement
(For other than Sole Proprietorship)

As of _____, 20__

Name: _____ Business Phone: _____

Address: _____

City, State and Zip Code: _____

Business Name of Owner/Operator: _____

Facility Number _____

ASSETS	LIABILITIES
Cash in Banks	Accounts Payable
Cash on Hand	Notes Payable
Accounts Receivable	Other liabilities, Accruals or Mortgages on Real Estate (Describe below)
Note Receivable	
Land	Other Mortgages, Liens, Security Interest or Encumbrances on Real Estate
Supplies	
Buildings and Real Estate	
TOTAL ASSETS	TOTAL LIABILITIES

TOTAL ASSETS	
TOTAL LIABILITIES	
NET WORTH	

The undersigned certifies that all information is true and accurate and was taken from the books and records of the above named business as of the date below.

Signature of authorized official: _____

Date: _____

FR Mechanisms for Local Governments

1. **Local governments** may rely on the same FR mechanisms available to other **owners** or **operators**.
2. **Local governments** may also rely on four additional mechanisms tailored to meet their needs:
 - a. Bond Rating Test;
 - b. Guarantee from the state or other local government;
 - c. Financial Test of Self-Insurance; and
 - d. Dedicated Fund for the amount of required coverage.

How Long Are Owners and Operators Required to Maintain FR?

Owners or **operators** are no longer required to maintain FR for an UST after the tank has been **properly closed** or, if **corrective action** is required, after **corrective action has been completed** and the tank has been **properly closed** in accordance with state law.

Q & A

