

Underground (Buried) Fuel Oil Tanks

What is an underground fuel oil tank?

The Technical Standards Safety Authority (TSSA - www.tssa.org - phone number 1-877-682-8772 or 416-325-2000) defines underground fuel oil tanks as those that are buried and in direct contact with earth or backfill. They contain fuel oil to be used in appliances, such as furnaces and boilers. The TSSA does not consider fuel oil tanks in basements to be underground tanks unless they are in direct contact with backfill material. Free-standing fuel oil tanks in basements that not in direct contact with backfill material are defined, by the TSSA, as “above ground” tanks.

Why has this become an issue?

Property owners have a legal responsibility to maintain fuel oil tanks and to clean up any spills from fuel oil tanks, whether they are underground, basement or above ground. Oil that has leaked from an underground tank will contaminate the soil and groundwater. The resulting environmental clean-up costs are very expensive.

Underground fuel oil tanks present a particular concern because of the inability to determine their condition (they are difficult to inspect) combined with the probability that they will leak (the older the tank; the stronger the likelihood that it will leak) and the high costs of cleaning up contaminated soil and groundwater. This legal responsibility and potential for legal liability has resulted in increased insurance claims made by property owners with underground fuel oil tanks. This has caused an increase in homeowners’ insurance concerns, including the potential for denial of coverage.

All of this has resulted in new regulations for underground fuel oil tanks, which were issued by the TSSA effective May 1st, 2002.

What is the effect of the new regulations?

The most practical and immediate effect is that fuel oil distributors cannot supply fuel oil to an underground (buried) tank unless it is registered with the TSSA (April 2002 Advisory – Fuel Oil Distributors – Underground Tank Registrations at www.tssa.org/fuels/pdf/fuel_underground_tank_reg.pdf).

How does a homeowner register a buried fuel tank?

An Underground Fuel Oil Application Form must be completed and filed with the TSSA. The application forms are available from the TSSA, at either www.tssa.org/fuels/pdf/fs09143_03_02.pdf, 1-877-682-8772 or 416-325-2000.

Upon receipt of the application form, a registration number will be assigned by the TSSA. The homeowner can then provide the fuel oil distributor with this registration number, to ensure an uninterrupted supply of fuel.

When do underground fuel oil tanks need to be removed or upgraded?

There are specific dates when underground fuel oil tanks are required to be either removed or upgraded. Some underground fuel oil systems may require an entirely new system in order to conform to the Installation Code for Oil Burning Equipment B139-00 (the “Code”); others may only need specific upgrades to the overfill protection, secondary containments, etc. The following underground fuel tank age/requirement chart has been provided by the TSSA and is based on the Code.

REALTORS and their clients should contact the TSSA (www.tssa.org or 1-877-682-8772) with any questions or concerns regarding the underground fuel tank located on the subject property.

Age of Underground Tank, in Years, from Date of Installation	Date to Remove or Upgrade * Underground Tank
25 or more, or unknown	October 1, 2006
20-24	October 1, 2007
10-19	October 1, 2008
0-9	October 1, 2009

* “Upgrade” means conform to the Installation Code for Oil Burning Equipment B139-00, which includes a double walled tank, piping approved for underground use and secondary containment for the piping. With all that needs to be done in order to “upgrade” underground fuel tanks, “upgrade” can safely be interpreted to mean “remove and replace”.

In addition, once an underground tank stops being used, or if it has not been used for 2 years, it must be removed, no matter what the age.

An underground fuel storage tank must be removed by a TSSA registered contractor. The removal must be performed by a Petroleum Equipment Mechanic 2 (PM2). A list of TSSA registered fuel oil contractors located in various municipalities can be found at www.tssa.org/fuels/assessed_contractor.asp. To find a PM2 in a specific municipality, contact the Ontario Petroleum Contractors' Association (OPCA) at www.opcaonline.org or (705) 735-9467. When an underground fuel storage tank is removed, an assessment report must be completed, setting out the extent that any fuel has made its way into the surrounding environment. Any contamination must be cleaned up and any resulting holes on the property must be returned to grade with clean fill.

As with all other fuel oil tank systems, underground fuel tanks (together with the boiler, furnace, water heater, etc.) need to be serviced and cleaned annually by a TSSA certified oil burner technician. In addition, certain underground tanks, for example those with a storage capacity of greater than 5000 litres, need to be leak-tested annually.

Currently, homeowners are required to have their tanks and other parts of the heating system safety inspected by their fuel oil supplier. The actual inspection must be carried out by a TSSA certified oil burner technician. Depending on the age and condition of the fuel tank and heating system, as revealed by this safety inspection, property owners may be required to upgrade the tank and/or heating system with specific leak and spill prevention equipment before the tank can receive fuel oil. If unacceptable conditions are found, corrective actions must be taken to conform with the Code within the time frame set out by the fuel oil supplier (such time frame will not exceed 90 days).

By May of 2004, all fuel oil customers (no matter what type of tank) must have had at least a basic (general, visual examination) inspection of the fuel oil tank system. By May of 2007 all fuel oil customers (no matter what type of tank) must have had a comprehensive inspection of the heating and delivery system (will be required at least every 10 years).

The TSSA has just issued a new information bulletin called *New Safety Laws To Prevent Fuel Oil Leaks and Spills*. It can be found at on the TSSA website, at www.tssa.org/fuels/home_heating.asp.

When buying or selling properties that contain underground fuel oil tanks

Among the many concerns regarding underground fuel oil tanks, three critical issues for REALTORS and their clients to consider are:

- whether the tank (in its present condition) has been registered with the TSSA, so that fuel oil will continue to be supplied to the property.
- even if the tank has been registered, has a safety inspection of the tank and heating system been conducted? Has the safety inspection revealed the need for upgrades or other improvements in order for fuel oil to continue to be supplied to the property?
- the potential liability issue of fuel oil tank leaks or spills, with the resulting soil and groundwater contamination and responsibility for the environment clean-up costs.

In order to address those significant issues as well as the other areas of concern, REALTORS, whether acting for the buyer or seller, should ensure that they receive responses (and all relevant documentation) to the following queries:

What type of fuel oil tank system is currently being used?

If it is underground, has it been registered with the TSSA?

What had to be done in order to obtain the registration? Was all the work completed?

How old is the fuel oil tank system? Remember, even if it has received TSSA registration, a buried fuel tank may need to be removed or replaced within the next decade, depending on the tank's age. Also, even above-ground basement fuel oil tanks may be uninsurable, depending on their age and/or their condition.

No matter what the type of fuel oil tank system, when was its last service, cleaning and safety inspection of the tank, boiler, furnace, water heater, etc.? Did the safety inspection reveal any deficiencies that need to be completed in order for fuel oil to continue to be supplied to the property?

Especially for an underground fuel oil tank, but no matter what the type of fuel oil tank system, has the fuel oil tank system been tested for leaks, spillage or other forms of contamination? Because they are buried, it is difficult to tell if underground fuel tanks are leaking and they may leak for years without the owner realizing it. The Ontario Petroleum Contractors' Association (OPCA - www.opcaonline.org or (705) 735-9467) should be able to assist in locating companies that test for fuel leaks.

Especially for an underground fuel oil tank, but no matter what the type of fuel oil tank system, has there been any leakage, spillage or other forms of contamination (or signs that would suggest that this may have occurred – a sudden, unexplained increase in oil consumption is a strong sign of a leak) from the tank system into the surrounding environs? If there has been, the clients' solicitors should immediately be consulted to ensure that all liability issues are properly addressed.

Are there other, unused fuel oil tank systems located on the property? If they are underground, what action has been taken to have them removed and any contamination cleaned up? If they are above-ground, have they been properly drained and plugged?

The next revision of the OREA standard form Seller Property Information Statement (Form #133) will contain items that should trigger the above-noted questions.

Armed with the information gathered in response to these inquiries, listing brokers will be in a position to advise their sellers as to what types of conditions and warranties to expect from buyers' offers. Sellers who are reluctant to disclose information regarding their fuel oil tank or sellers with leak/spillage concerns should be strongly encouraged to discuss the potential liability issues with their solicitors.

Armed with the information gathered in response to these inquiries, buyers may wish to discuss the potential issues with both their solicitors and their insurance brokers and, if necessary, may consider retaining the services of fuel oil tank inspectors. Buyers would then be in a better position to decide, which of the four new standard clauses (RES 79, RES 80, RES 81, RES 82) to include in the offer.

Above-ground (free standing) Fuel Oil Tanks

Above-ground (free standing) fuel oil tanks are defined as tanks that are installed at or above grade level within a building or within a secondary containment. However, tanks that are in direct contact with backfill material are not considered to be above-ground tanks. Free standing fuel oil tanks in basements that not in direct contact with backfill material are defined, by the TSSA, as “above-ground” tanks.

Above-ground tanks can be considered as “approved” by the TSSA provided that they were installed in accordance with the code at the time of installation. As long as it is not leaking, there is no age at which an above-ground tank must be removed or replaced.

However, even above-ground tanks may be uninsurable, depending upon their age. Buyers should consult with their insurance brokers regarding the insurance issues, especially when the above-ground tank is more than 10 years old, or if the seller cannot provide any proof of recent cleaning, inspection and safety testing, no matter what the age of the tank.

If an above-ground tank is not being used, it must be drained and plugged, but it does not have to be removed, according to the Code. If an above-ground fuel oil tank is removed, the TSSA must be notified; an assessment report must be completed setting out the extent that any fuel that has made its way into the surrounding environment; and any contamination must be cleaned up.

As with all other fuel oil tank systems, above-ground fuel tanks (together with the boiler, furnace, water heater, etc.) need to be serviced and cleaned annually by a TSSA certified oil burner technician.

Currently, homeowners are required to have their tanks and other parts of the heating system safety inspected by their fuel oil supplier. These inspections must be made by a TSSA certified oil burner technician. Depending on the age and condition of the fuel tank and heating system, as revealed by this safety inspection, property owners may be required to upgrade the tank and/or heating system with specific leak and spill prevention equipment before the tank can receive fuel oil. If unacceptable conditions are found, corrective actions must be taken to conform with the Code within the time frame set out by the fuel oil distributor (such time frame will not exceed 90 days).

By May of 2004, all fuel oil customers (no matter what type of tank) must have had at least a basic (general, visual examination) inspection of the fuel oil tank system. By May of 2007 all fuel oil customers (no matter what type of tank) must have had a comprehensive inspection of the heating and delivery system (will be required at least every 10 years).

Relevant RECO Code Provisions⁺

As with any other property information and disclosure issues, when representing sellers with fuel tank issues, REALTORS must ensure that they comply with the following sections of the RECO Code of Ethics (www.reco.on.ca/code_of_ethics_salespersons.htm) (full text on pages 8, 9 and 10 of this pamphlet):

Rule 2, especially Guiding Principles 2.5, 2.6, 2.7, 2.8 and 2.9;

Rule 7, especially Guiding Principle 7.1;

Rule 10, especially Guiding Principle 10.2;

Rule 11, especially Guiding Principles 11.1, 11.3 11.4 and 11.6; and

Rule 40, especially Guiding Principle 40.1.

As with any other property information and disclosure issues, when representing buyers who are considering acquiring property that may contain an underground fuel tank, REALTORS must ensure that they comply with the following sections of the RECO Code of Ethics (www.reco.on.ca/code_of_ethics_salespersons.htm) (full text on pages 8, 9 and 10 of this pamphlet):

Rule 2, especially Guiding Principle 2.1, 2.5, 2.8 and 2.9;

Rule 7, especially Guiding Principle 7.1;

Rule 11, especially Guiding Principles 11.2, 11.4 and 11.6; and

Rule 40, especially Guiding Principle 40.1.

REALTORS are encouraged to attend the following continuing education seminars: *“The Urban REALTOR in the Rural Environment”*, *“Environmental Awareness for Residential Properties”* and *“Contaminated Land: Avoiding Pitfalls and Closing Deals”*. REALTORS should contact OREA or their real estate board for details of any upcoming seminar in their area.

⁺ REALTORS must ensure that their professional conduct complies with all relevant provisions of the CREA and RECO Code of Ethics as well as their boards’ by-laws and MLS rules and regulations. The prominence given to certain sections of the RECO Code in this pamphlet does not mean that they are the only rules that a REALTOR must follow in a particular situation.

FROM THE RECO CODE OF ETHICS:

Rule 2

A Member shall endeavour to protect and promote the best interests of the Member's Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each transaction.

Guiding Principle 2.1

A Member has a fiduciary duty, professionally and at law, to endeavour to protect and promote the interests of the Member's Client to the extent that he or she may ethically or legally do so. This relationship of trust means that the Member never puts the Member's interests above those of the Client. Competence, diligence, full disclosure, obedience, loyalty, confidentiality and complete accounting are included in this duty.

Guiding Principle 2.5

A Member should fully disclose to the Member's Client, at the earliest practical opportunity, any information that the Member knows or ought to know which could affect the decision to proceed with the transaction. The Member should disclose to the Member's Client the material steps that the Member takes on the Client's behalf.

Guiding Principle 2.6

A Member's primary duty is to the Member's Client. However, the Member also has a duty to deal fairly with the public, other Members, third parties and the profession as a whole as represented by the Council. The Code of Ethics attempts to indicate how a Member can fulfill both sets of duties.

Guiding Principle 2.7

A Member, when dealing with a Customer, should not mislead the Customer as to any matters pertaining to the Property or Transaction.

Guiding Principle 2.8

A Member, when dealing with a Customer, should exercise reasonable care and skill when answering inquiries or giving information so that the answers or information are complete and accurate.

Guiding Principle 2.9

A Member should provide competent, thorough and skilled assistance when dealing with lawyers, mortgage lenders, home inspectors, surveyors and other third parties that may be involved in the Transaction, and should cooperate with those persons, to facilitate the successful completion of any Transaction, to the extent practical without breaching the Member's duties to the Member's Client.

Rule 7

A Member shall not discourage the Parties to a Transaction from seeking outside professional advice.

Guiding Principle 7.1

A Member should seek outside professional advice for each of the Parties to the Transaction and for the protection of the Member where it is reasonably beyond the expertise of the Member to set out accurately and appropriately any term or Agreement reached by the Parties. Outside professional advice would include lawyers, home inspectors, surveyors, accountants, insurance agents or brokers, mortgage consultants, land use planners, and environmental consultants.

Rule 10

A Member shall not make any statement or participate in the creation of any document or statement that the Member knows or ought to know is false or misleading.

Guiding Principle 10.2

A Member should not participate in any arrangement to conceal or withhold any facts pertaining to a Property.

Rule 11

A Member shall discover and verify the pertinent facts relating to the Property and Transaction relevant to the Member's Client that a reasonably prudent Member would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts.

Guiding Principle 11.1

Any fact that would affect a reasonable Person's decision to Sell the Property, the price for which a reasonable Person might be able to Sell the Property or a reasonable Person's ability to Sell the Property at a future date is a pertinent fact.

Guiding Principle 11.2

Any fact that could affect a reasonable Person's decision to Buy the Property, the price that a reasonable Person might pay for the Property or a reasonable Person's ability to resell the Property at a future date is a pertinent fact.

Guiding Principle 11.3

A Member representing a Seller of Residential Property should consider requesting that the Seller complete and sign a Vendor Property Information Statement and should attach a copy to the Agreement or provide in the Agreement, or otherwise, in writing to the Parties, a statement that the Seller refused or was unable to complete the Statement.

Guiding Principle 11.4

A Member should not rely completely on the information obtained from the Client when such information is pertinent and it can be practicably verified from an independent source.

Guiding Principle 11.6

A Member should, unless it is impractical to do so, verify pertinent facts and should not simply rely upon estimates or copies of information from previous sources.

Rule 40

A Member shall remain informed regarding recent developments in real estate, the essential facts which affect current market conditions and present business practices in order to be in a position to advise the Member's Clients and to assist Customers in a responsible and competent manner.

Guiding Principle 40.1

A Member should keep abreast of developments in the law and government programs relevant to the marketplace in which the Member operates.