



Propane Container Filling Laws, Regulations and Standards

The Safety Reasons Supporting Accountability

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March 2010
Rev. Jan./2012

Propane Container Filling Laws, Regulations and Standards: The Safety Reasons Supporting Accountability

From the earliest days of the compressed gas industry, a fundamental safety principle has been that only the owner of a propane container, or his designated agent, should fill it. This industry safety requirement is justifiable since only the owner knows how the container has been used and has a vested interest in its proper use and maintenance and is, therefore, accountable. Accountability is very important for safety. Accountability underpins industry practices, industry standards, and state and federal laws and regulations, as will be demonstrated in this paper.

From time to time, questions have arisen regarding this principle, asking whether such a restriction is necessary for safety, or whether it constrains consumer choice. The most egregious example of this occurred in 1991 when the Utah Attorney General issued a legal opinion that such a rule of the state propane regulatory authority was a violation of the antitrust laws.¹ The Utah rule was based on language contained in the standard promulgated by the National Fire Protection Association (NFPA) entitled “Standard for the Storage and Handling of LP-Gases” (NFPA-58-1989). Subsequently, and out of concern for its liability exposure, NFPA acted to remove the requirement, found in §4-2.2.1, a provision that had been in place since at least 1946, and replaced it with a simple requirement that container filling be performed by “qualified persons.”

The Utah Attorney General’s opinion was overturned when a U.S. District Court declared that there was no antitrust violation.² In addition, earlier that same year, the Utah state legislature agreed with this safety principle and amended the Utah state propane law to add a specific requirement in their statutes that containers could only be filled by their owner or his designee.³

The purpose of this paper is to explain what a container law is, the rationale behind the principle of ownership filling, and to document the many standards, laws and regulations that have codified this safety principle.

What is a Container Law?

Simply stated, a container law restricts the filling of a propane gas storage tank or cylinder to its owner or someone having the owner’s authorization. (In this paper,

¹ Letter of March 5, 1991, from Arthur M. Strong, Utah Assistant Attorney General, and R. Paul Van Dam, Utah Attorney General, to D. Douglas Bodrero, Commissioner, Utah Department of Safety, in re: Request for Legal Opinion: Antitrust Considerations and NFPA 58 sec. 4-2.2.1.

² Declaratory Judgment in Civil Case No. 91-C-382G, April 15, 1992, Suburban Propane Division of Quantum Chemical Corporation, et al, vs. D. Douglas Bodrero and R. Paul Van Dam, Judge J. Thomas Greene, United States District Court, District of Utah, Central Division.

³ Title 53, Chapt. 7, §53-7-315.

propane tanks and cylinders, regardless of size or type, will be referred to commonly as “containers,” unless a distinction is required. Also, when referring to a “container law” the term should be read to mean either a law or regulation enacted by a governmental entity.) A typical container law provides: “A liquefied petroleum gas container shall be filled only by the owner or upon the owner’s authorization.”

Why is a Container Law needed?

The need for accountability underscores the need to restrict who can fill a container. Safety requires more than just specifying that a person be qualified or trained to fill a container. The container is an integral part of a pressurized fuel system. If it is filled improperly and becomes damaged because of the filler’s negligence, or is filled with contaminated gas, an accident could occur, resulting in property damage and personal injury. By restricting filling and servicing operations to the owner or his designated agent, there is accountability and a greater assurance that the proper filling procedures are followed. One who owns a container, or his agent, has the greatest interest in seeing that only safe filling procedures are followed and that all governmental requirements are met.

A propane storage tank differs in construction, pressure, cost and maintenance from storage containers for other fuel types. The risks associated with pressurized propane storage equipment, in comparison to heating oil tanks, for example, are significantly different. Propane companies are best positioned to inspect, service and undertake maintenance responsibilities for their propane containers due not only to the specialized training and experience of their employees, but also because the company maintains the service record of each container. The company knows the history of the tank, including where it has been installed, for how long, and whether any repairs or maintenance have been performed on the container.

The container’s owner is in the best position to know the condition of the tank, and only the owner or the owner’s authorized agent can be counted on to take the necessary safety precautions during the filling operation and to thoroughly inspect the container and its appurtenances at each filling. Moreover, both industry standards and federal rules require that prior to filling a container, the filler must ensure the container’s suitability and qualification for service.⁴ If anyone is permitted to fill a container without the owner’s knowledge or authority, it is impossible for the owner to ensure that these legal obligations are being met.

Aren’t many tanks owned by the consumer? How do they assure safe filling and proper maintenance?

⁴ See §7.2.2.11 of NFPA-58-2008 (A container shall not be filled if the container assembly does not meet the requirements for continued service). Also see §7.2.2.7 and §5.2.1.4 of NFPA-58-2008. For federal rule examples, see Title 49 CFR §180.3(a) and §180.205.

First, it is important to distinguish between the typical propane containers used for home heating, cooking or water heating, and those portable cylinders used for outdoor barbecue grilling or recreational vehicles. A typical home propane container is either a large DOT-specification cylinder or an ASME container holding from 100 to 1000 gallons of product. A small cylinder, commonly referred to as a 20-pound cylinder, holds about 5 gallons of propane gas.

Container laws typically apply only to larger ASME containers and DOT-specification cylinders that are used for home heating, cooking, and water heating, and not to portable cylinders (usually used for barbecues and with recreational vehicles). It is common industry practice for the propane retailer to retain ownership of these larger containers and lease them to their customers. By leasing the container, the retailer retains responsibility for its maintenance and inspection, and the container laws help to insure that he retains control over how product is placed into the container and by whom.

Yet, some consumers insist upon owning their containers. Retail propane dealers will sell a container to the consumer, but usually with great reluctance. Consumers do not realize that the purchase price of a propane container is only the first expense of ownership. In future years, a consumer may encounter substantial costs for equipment inspection, maintenance, repainting, replacement and repair. These inspection and repair requirements are often mandated by industry standards and state codes. When a consumer purchases his container, he assumes full responsibility for the container's maintenance and it is his responsibility to insure that the retail supplier from whom he purchases propane is supplying only specification product and is safely performing all required steps and inspections in the filling process.

The propane industry views consumer-owned containers as less than an ideal situation since the consumer is not an expert on propane gas, the maintenance of propane gas systems, or industry standards and state and federal codes. Consumers who own their containers and arrange for the timing of gas deliveries may not monitor their gas usage effectively or as efficiently as automatic delivery accounts with a delivery schedule controlled by the supplier. This may lead to an increased number of run outs, increased costs for leak checks (an added expense to the consumer), and most importantly an increased potential for injury or property damage arising in connection with a consumer's lighting of appliance pilot lights.

Finally, when a consumer shops for a propane delivery among many different potential suppliers, whoever is selected to fill that container has no vested interest in its maintenance or upkeep. The propane retailer in this instance does not know whether they will ever have an opportunity to make another sale to this customer. Most likely they made the sale because they offered the most attractive price for the gas, a price that reflects their product and delivery costs but not the cost of inspecting the container

and exterior propane piping. And, if the consumer has run out of gas, industry standards require the gas delivery person to conduct a leak check, a time-consuming step that is necessary to ensure the safe operation of the system.⁵

Is there a Federal container law?

The origins of the container law can be traced to the Interstate Commerce Commission (ICC) whose rules contained the proscription in the first publication of the Code of Federal Regulations, effective as of June 1, 1938.⁶ There is evidence that this original ICC rule dates to at least 1919. The DOT regulations, which incorporated the old ICC rules, currently provide as follows:

“(e) Ownership of cylinder. A cylinder filled with a hazardous material may not be offered for transportation unless it was filled by the owner of the cylinder or with the owner’s consent.”⁷

In their rules governing workplace safety, the U.S. Department of Labor’s Occupational Safety & Health Administration includes the following provision:

“(ii) Containers shall be filled or used only upon authorization of the owner.”⁸

The staff of the Federal agency dedicated to consumer safety, the U.S. Consumer Product Safety Commission, endorsed the principle of a container law in 1991.⁹

Why have states enacted container laws in addition to the Federal rules?

Federal laws and regulations generally apply only to interstate commerce, although pursuant to various statutory amendments, the DOT has extended the applicability of their hazardous materials regulations to situations where no interstate movement is involved¹⁰. State agencies that regulate the use of propane gas typically base their regulations on industry standards. While this system has generally worked well, it can leave gaps in the state’s regulatory scheme if, for example, a federal law does not apply or an industry standard is modified. This was demonstrated vividly in 1991 when NFPA, out of concern about its antitrust liability exposure due to the erroneous legal opinion of

⁵ §8.2.3, National Fuel Gas Code, 2009 Edition (NFPA-54/ANSI ASC Z223.1).

⁶ The ICC rule appeared in Title 49 CFR §80.172(d) as: *“Cylinders, charged by owner. Cylinders containing compressed gas must not be shipped unless they were charged by or with the consent of the owner of the cylinders.”*

⁷ Title 49 CFR §173.301(e).

⁸ Title 29 CFR §1910.110(b)(14)(ii).

⁹ Letter from Donald W. Switzer, CPSC Chemical Engineer, Directorate for Engineering Sciences, to T. C. Lemoff, NFPA, June 19, 1991.

¹⁰ See, e.g., Title 49 CFR §105.5, for a definition of transportation that includes “the movement of property and loading, unloading, or storage incidental to the movement” (emphasis added).

the Utah Attorney General, modified NFPA-58 to remove the ownership filling restriction.

State container laws and regulations are not dependent upon federal regulations or industry standards, nor are they affected by changes to them. Container laws (or administrative code provisions) have been adopted in at least 42 states. A detailed list by state of all container laws and regulations with code or statutory citations is attached. Copies of individual citations are available upon request.

What industry standards apply?

The Compressed Gas Association (CGA) was the first to establish the principle of ownership accountability within the standards they promulgate. This association, founded in 1913, was created for the purpose of developing and promoting safety standards and safe practices in the industrial gas industry. CGA bulletins and standards are frequently cited in both state and federal regulations. In 1931, members of the LP-gas industry split off from the CGA in order to create an organization devoted solely to enhancing the propane gas industry. That organization, now called the National Propane Gas Association (NPGA), is dedicated to promoting safety standards and safe practices for the propane gas segment of the compressed gas industry.

Founding members of NPGA were instrumental in the drafting of NFPA-58, and the organization has had member representatives on NFPA's Technical Committee on Liquefied Petroleum Gases since the committee's inception. It is unknown exactly when the principle of ownership filling restrictions was incorporated within NFPA-58, but it appears as early as 1946 and remained a part of that standard until its removal in 1991.

In 1991, the President of CGA wrote the President of NFPA to oppose deletion of the ownership requirement from NFPA-58. In his letter, he referenced CGA Safety Bulletin SB-3 that cites the DOT regulation on ownership. The Bulletin also refers to CGA Pamphlet P-1, which provides that "cylinders (containers) must not be charged except by the owner or with the owner's consent...."¹¹ This Bulletin is still in effect in the same form as in 1991.

Is a container filling restriction in the public interest?

In the absence of a container law, anyone is free to fill any tank, regardless of ownership. This undermines accountability and renders moot all safety programs. Without a restriction on filling, there is no incentive for the propane retailer to continue to carry the responsibility for tank maintenance.

¹¹ CGA Safety Bulletin SB-3-1983.

With no limitation on who may fill a container, the propane retailer who owns a leased tank could be found liable, even though blameless, if an accident occurred because of negligence on the part of the supplier who filled the tank. It is not inconceivable that tank leasing would cease without restrictions on who may fill containers, consumers would be forced to purchase and maintain their own tanks, and safety would be degraded.

Container laws also serve a genuine public safety purpose. In order to assist firefighters and other emergency responders, retail propane marketers routinely equip consumer containers with markings, such as flags and aerials, in heavy snow areas so that they may be quickly located in times of emergency. Also, in flood-prone areas, propane tanks are usually staked, following industry safety guidelines, to prevent the tanks from floating away. There is little guarantee, and it is highly improbable, that a consumer would think to provide these added emergency response measures or would wish to incur these expenses.

Insurance companies are concerned about the potential for increased liability exposure. In 1991, four of the industry's major insurers wrote in opposition to removal of the ownership restrictions from NFPA-58.¹² This increased risk exposure would force insurers to raise premiums on propane gas retailers and possibly result in some small retailers being unable to afford insurance.

Is a container filling restriction a restraint on trade?

A container law reflects basic property law rights. Antitrust scholars have examined this issue from many angles and concluded that the elements of an antitrust violation simply are not present.

1. Leasing tanks to consumers gives propane retailers no control over the market. Consumers can easily change gas suppliers, with only a minimal cost for switching tanks.
2. Entry into the propane gas market is relatively easy for start-up companies or for established companies expanding into new market areas. A fundamental principle of antitrust law is that absence of entry barriers into a market constrains anticompetitive conduct, irrespective of market share.

¹² Letters from Stephen P. Lincavage, Loss Control Manager, Continental Insurance, October 28, 1991; Charles A. Taylor, Jr., President, LPG Risk Retention Group Insurance Company, June 27, 1991; Wm. David Knight, Vice President, Ranger Insurance Company, June 19, 1991; and, William M. Sutcliffe, President, Underwriters Management Associates, Inc., July 3, 1991.

3. There is ample justification on the grounds of consumer safety, and it is clear from court cases that there is no antitrust violation in adopting a policy designed to promote safety.¹³

Summary and Conclusion

After nearly a century of industry standards and regulations restricting the filling of propane gas containers to the owner or the owner's authorized agent, this commonly accepted practice has proven its value as a safety rule. Endorsed by safety engineers, state and federal regulatory authorities, insurance companies, adopted by law or regulation in at least 42 states and tested in court, it is a rule by which propane retailers and consumers can live, and one they should not live without.

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Vers. 3/16/10

¹³ See, e.g., Clamp-All, 851 F.2d at 487; United States v. National Malleable & Steel Castings Co., 1957 Trade Cas. (CCH) ¶ 68,890 (N.D. Ohio), aff'd per curiam, 358 U.S. 38 (1958); Hatley v. American Quarter Horse Ass'n, 552 F.2d 646, 653 (5th Cir. 1977); Roofire Alarm Co. v. Royal Indem. Co., 202 F.Supp. 166, 169 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6th Cir.), cert. denied, 373 U.S. 949 (1963); Structural Laminating, Inc. v. Douglas Fir Plywood Ass'n, 261 F.Supp. 154 (D. Or.), aff'd, 399 F.2d 155 (9th Cir. 1966), cert. denied, 393 U.S. 1024 (1968). See also ECOS Elecs. Corp. v. Underwriters Laboratories, 743 F.2d 498, 503 (7th Cir. 1984), cert. denied, 469 U.S. 1210 (1985). Courts have recognized safety concerns as legitimate business justifications. Mozart Co. v. Mercedes-Benz of N. Am., Inc., 593 F.Supp. 1506, 1522 (N.D. Cal. 1984); Polytechnic Data Corp. v. Xerox Corp., 362 F. Supp. 1 (N.D. Ill. 1973). As stated by the court in Polytechnic Data: "It is clear from the cases that there is not an antitrust violation in adopting and implementing a policy which is designed to promote safety, protect the integrity of one's property or good will or assure proper functioning of equipment." 362 F. Supp. At 1.

State Container Laws and Regulations Updated January 2012

State	Citation
AL	Alabama Code, §9-17-109(d)
AZ	Title 36, Chapt. 13, Art. 2, §36-1624.01
AR	Chapt. 75, Subchapter 4, §15-75-406
CA	§§13480, 14427, 14430, 13560, Business & Professions Code
CO	Rev. Stats §8-20-301
CT	Regs, Dept of Public Safety, §29-331-5, amending NFPA 58, §4-2.2.1.
DE	Title 16, Chapter 72, §7202
FL	Title 33, Chapter 527, §527.07
GA	Rules of Safety Fire Commissioner, Chapt. 120-3-16-.06(b)
IL	Chapter 430 ILCS 10/3
IN	Title 22, Art. 11, Chapt. 15, (§22-11-15.1)
IA	Chapt. 101, §101.13
KS	Chapt. 55, Art. 11, §55-1102
KY	KRS Title 19, Chapt. 234, §234.190
LA	RS 40, §1846B.(3)(d)
ME	Title 10, Part 4, Chapt. 307, §1658-A
MD	Commercial Law §11-603
MA	Board of Fire Prevention Regulations: 527 CMR §6.05(4)
MI	Chapt. 429, Mich Compiled Laws, §429.11
MN	Minn. Stats. §229F.40
MO	Title 21 MRS, §323-030
MT	Title 82, Chapt. 15, §82-15-113 thru 115
NE	Chapt. 57, §557-504
NV	Chapt. 590, §590:535
NH	Title 31, Chapt. 339-B, §339-B:15
NJ	Title 21, §21:1B-4 of NJSA
NM	NM Admin Code, Title 19, §19.15.40.20
NC	Chapt. 119, Art. 5, §119-58(b)
ND	Title 23, Chapt. 23-13, §23-13-03.2
OH	OH Admin Code 1301:7-7-38, §3807.5
OK	Title 52, Chapt. 8, §420.9(g)
OR	Chapt. 480, §480.430
PA	Title 34, Chapt. 13A, §13.12
RI	Title 5, Chapter 83, § 5-83-3(b)
SC	LP-Gas Board has adopted a rule restricting filling of containers.
SD	Title 34, Chapt. 39, §34-39-9
TN	Title 68, Chapt. 135, §68-26-108
TX	Bus. & Commerce Code, Title 99, Chapt. 2002, §2002.004
UT	Title 53, Chapt. 7, §53-7-315
VT	CF111.19(a)
VA	Title 18.2, Chapt. 12, §18.2-494
WA	Administrative Code: WAC §296-24-47505(14)(b)
WI	Chapter 101, §101.16(3)

