

# **Propane Container Filling Laws and Standards**

## **The Safety Reasons Supporting Accountability**

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## **Propane Container Filling Laws and Standards The Safety Reasons Supporting Accountability**

From the earliest days of the compressed gas industry, a fundamental safety principle has been that cylinders may only be filled by the owner or his designee. This industry safety requirement is predicated on the belief that only the owner knows how the container has been used or how it will be used 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. For example, in 1991 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.<sup>1</sup> 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). 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 replace 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.<sup>2</sup> In addition, earlier in 1992, the Utah state legislature amended the Utah state propane law to add a specific container law prohibition into the statutes so as to avoid any future challenges.<sup>3</sup>

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 the principle.

### *What is a Container Law?*

Simply stated, a container law restricts the filling of a propane gas storage tank, or container, to its owner or someone with the owner’s authorization. A typical law

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> Title 53, Chapt. 7, §53-7-315.

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, 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 designee, there is greater assurance that these acts are performed only by those with the greatest interest in seeing that they are performed properly.

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 hold a container owner responsible for ensuring the container's suitability and qualification for service. If anyone is permitted to fill a container without the owner's knowledge or authority, it would be difficult for the owner to meet these legal obligations.

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

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.

Most container laws apply only to larger ASME containers and not portable cylinders, and it is common industry practice for the propane retailer to retain ownership of those 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 who puts product into the container.

Yet, despite this common industry practice, some consumers will insist upon owning their containers and most retail propane dealers will sell the container to the consumer, usually with great reluctance. In those cases, the consumer then 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 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 or the maintenance of propane gas systems. A random filler has no vested interest in inspecting the system each time it is filled, or to alert the consumer to a potential problem with his consumer-owned tank. Moreover, if a random filler is allowed to fill a container owned by another marketer, not the consumer, this exposes the marketer who owns the container to liability for any acts or failure to act by the random filler. These situations should be avoided and discouraged in the interest of safety.

### *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.<sup>4</sup> Industry believes this original rule dates to at least 1919. The U.S. Department of Transportation 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.”*<sup>5</sup>

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.”*<sup>6</sup>

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.<sup>7</sup>

### *Why have a state law in addition to Federal?*

Federal laws and regulations generally apply only to interstate commerce. 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

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<sup>4</sup> 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.”*

<sup>5</sup> Title 49 CFR §173.301(e).

<sup>6</sup> Title 29 CFR §1910.110(b)(14)(ii).

<sup>7</sup> Letter from Donald W. Switzer, CPSC Chemical Engineer, Directorate for Engineering Sciences, to T. C. Lemoff, NFPA, June 19, 1991.

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

State container laws 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 41 states (see list attached). The status of container laws in the remaining nine states is as follows.

- Alaska – No container law.
- Hawaii – No container law.
- Idaho – No container law.
- Mississippi – No container law.
- New York – No container law. Legislature considered the issue in 2008, and will again in 2009.
- Rhode Island – No container law.
- Vermont – A consumer information flyer from the Office of the Attorney General indicates there is a container law. Propane tanks regulated by Vermont Fire Prevention & Bldg. Code. 10 V.S.A. §1922
- West Virginia – No container law.
- Wyoming – No container law.

#### 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. In 1931, members of the LP-gas industry split off from the CGA in order to develop an organization devoted solely to issues of interest to 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 shows up 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 which references 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...”<sup>8</sup>

*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.

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. The likelihood is 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.

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.<sup>9</sup> 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.

Inevitably, safety will deteriorate as more and more tanks are owned by consumers who buy their fuel from small, undercapitalized and underinsured suppliers who fill tanks but provide no inspection, maintenance, or repair service.

*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

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<sup>8</sup> CGA Safety Bulletin SB-3-1983.

<sup>9</sup> 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.

principle of antitrust law is that absence of entry barriers into a market constrains anticompetitive conduct, irrespective of market share.

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.<sup>10</sup>

### 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 as law by legislatures in at least 39 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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<sup>10</sup> 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 (5<sup>th</sup> Cir. 1977); Roofire Alarm Co. v. Royal Indem. Co., 202 F.Supp. 166, 169 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6<sup>th</sup> 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 (9<sup>th</sup> Cir. 1966), cert. denied, 393 U.S. 1024 (1968). See also ECOS Elecs. Corp. v. Underwriters Laboratories, 743 F.2d 498, 503 (7<sup>th</sup> 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  
Updated July 2009**

State	No Law	Citation
AL		Alabama Code, §9-17-109(d)
AK	No	
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)
HI	No	
ID	No	
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
MS	No	
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
NY	No	
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	No	
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			Flyer issued by Attorney General indicates there is a container law.
VA			Title 18.2, Chapt. 12, §18.2-494
WA			Administrative Code: WAC §296-24-47505(14)(b)
WV		No	
WI			Chapter 101, §101.16(3)
WY		No	