

Extra Diligence Required for Phase I ESA's on Gas Station Sites

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A Phase I Environmental Site Assessment for a gas station site requires very diligent research into complicated regulatory and insurance matters associated with the property. Many users of Phase I Environmental Site Assessments think that a Phase I is not necessary at gas station sites because the facility is already eligible for the Petroleum Cleanup Program or because the potential sources of contamination are so obvious. This is a dangerous position to take as described in the April 2002 Florida Specifier Article entitled "Beware of Over Reliance on Cleanup Programs in Real Estate Deals". Similarly, some prospective purchasers will skip the Phase I ESA and proceed directly to a Phase II for sampling of the subject property to identify current contamination concentrations at the site. Unless a diligent Phase I ESA is performed prior to acquiring a gas station site, there are many environmental risks that may not be addressed which may turn into liabilities for the future owner.

All of the typical research typically conducted in a Phase I Environmental Site Assessment should be performed on a gas station site. Historical land uses such as agricultural or industrial, could be a source of unknown contamination on the property. Off site sources of contamination may also impact the subject property. So a gas station Phase I should start off with the usual historical, regulatory and site research to identify any potential environmental concerns other than the fuel system operating at the site.

Diligent research needs to be performed regarding the subject property current and former land uses. If the facility ever provided automotive services, parts washers, used oil tanks and the storage, handling and disposal of all automotive wastes needs to be diligently investigated. Many older gas stations sold kerosene. Kerosene and used oil tanks are/were typically located away from the primary fuel storage tanks.

Court rulings have determined that all petroleum tanks on eligible EDI properties would be included in the petroleum cleanup unless these tanks were specifically excluded in the eligibility order. Based on this, discharges from kerosene and or used oil tanks may be eligible for funding at some properties.

Specific regulatory research needs to be conducted to determine if the facility is in compliance with the Storage Tanks Rule, Florida Administrative Code, Chapter 62-761. The method of release detection should be investigated. Fuel deliveries, statistical inventory reconciliation, tank and line tightness testing, results of recent compliance inspections, status of new release insurance coverage, and other pertinent information related to compliance and release detection should be addressed.

All petroleum discharges at the site should be documented. The results of each discharge should be reported. The eligibility status and cleanup status for each discharge can be obtained through research of FDEP records. As discussed in prior Florida Specifier Articles, there are several programs that can lead to eligibility in the Florida Petroleum Cleanup Program. Some programs

are discharge specific, meaning that only that particular discharge will be covered. Deductibles, co-payments, funding caps, site score, timing of future cleanup and the extent of contamination should be addressed for all discharges that are eligible for the Petroleum Cleanup Program.

For discharges that are not eligible for the Petroleum Cleanup Program, Florida Administrative Code 62-770.600 will require a Site Assessment Report. The current status of compliance with 62-770 should be investigated.

If a non-eligible discharge occurs at a site with another eligible discharge, a Funding Allocation Agreement will be required for the responsible parties of both discharges to split the cost of the cleanup. The FDEP document "Limited Contamination Assessment Reports to Support a Site Rehabilitation Funding Allocation Agreement under Section 376.30714, F.S." dated June 17, 1999 will provide guidance on this process.

On sites that are eligible for the Petroleum Cleanup Program but have low scores, where the funding for the petroleum cleanup is several years away, the extent of petroleum impact is important. Offsite migration could lead to third party liability claims. There are precedent setting court cases where adjacent property owners have been awarded damages due to contamination from the adjacent gas station. Most insurance policies maintained by gas station owners include coverage for third party liability/offsite migration claims. But in most cases, to receive coverage for such claims, the insurance company needs to be notified of the original discharge and at the time the third party claim is made. The consultant performing the Phase I should determine if the current or future property owner would be covered by insurance if such a claim was made. Prospective purchasers of gas station sites should position themselves by either assuming the existing insurance policy, establishing the appropriate retroactive date or requiring the seller to purchase extended reporting coverage to make sure that they are positioned for coverage in the event a third party claim is made from an adjacent land owner due to contamination from a prior discharge. Environmental attorneys should be consulted by prospective purchasers to verify coverage.

For properties that are eligible for the Petroleum Cleanup Program based on the Petroleum Liability Restoration Insurance Program (PLRIP) with discharges that occurred between January 1, 1994 and December 31, 1998, the consultant and/or property owner should verify that the excess insurance coverage would be in place and available in the event of site remediation costs exceeding the funding cap available through the Petroleum Cleanup Program. For example, PLRIP sites with discharges in 1997 or 1998 have a \$150,000 funding cap. FDEP required excess coverage in the amount of \$850,000 and such insurance should be available if all paperwork is appropriately completed. At the time of PLRIP application to the FDEP, the insurance company should also have been notified of the discharge and the possibility that the funding cap could be exceeded. This issue is very important and will become increasingly common as more and more cleanups are being conducted.

Each site is different. No article or generalized scope of work can guide site specific activities. All potential sources of contamination need to be assessed in a Phase I. This task takes a bit more effort when assessing a gas station.

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