

Know Petroleum Cleanup Program Details

By

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A little bit of knowledge is a dangerous thing.

The Florida Petroleum Cleanup Program is very beneficial for environmental restoration and liability protection purposes. Sites that are eligible for the program have risks that are manageable, and the issues usually do not hinder closings. However, it is very common for buyers, lenders, and realtors to over rely on the Petroleum Cleanup Program, and that can be risky. Here is some information that can increase knowledge and reduce danger.

The Florida Petroleum Cleanup Program is the largest and most well funded petroleum cleanup program of any state in this nation. The Inland Protection Trust Fund generates up to 180 million dollars per year for petroleum cleanups in Florida. In many cases, property owners will not have to pay to cleanup the petroleum contamination on their property if the discharge that caused the contamination is eligible for the program. This includes all contamination from the eligible discharge that may have migrated off site onto adjacent properties.

Some of the details that commercial real estate brokers should understand are outlined in §376.308, Florida Statutes (F.S.). In this Section, the available defenses to liability are outlined. The innocent landowner defense that is available in Florida is outlined in §376.307(1). Liability protection for lenders is outlined in §376.308(3). Liability protection for property owners is outlined in §376.308(5) F.S.

There are generally four ways to be eligible for the Petroleum Cleanup Program:

- Early Detection Incentive (EDI)
- Abandoned Tank Restoration Program (ATRP)
- Petroleum Liability Restoration Insurance Program (PLRIP)
- Petroleum Contamination Participation Program (PCPP)

Each of these subprograms has various criteria for becoming eligible for the program, and there are various co-payment and deductible requirements associated with each program.

There are approximately 18,254 properties in the state that are eligible for petroleum cleanup funding. Approximately 3,328 of these sites have received regulatory closure and approximately 5,350 of these sites are actively undergoing cleanup. Approximately 9,576 properties are awaiting funding. Funding is not yet available on the waiting properties because they have a low score. Funding is made available to properties with sites that are scored 30 or higher. The scoring is based on a hazard ranking system, which is based primarily on the proximity to

drinking water. One common misperception is that a low score means the site is not very contaminated. The score has little relevance to the extent of contamination on the property.

Properties with low scores that may not be eligible for funding for many years can apply for the Pre-approved Advanced Cleanup Program (PAC). 10 million dollars from the trust fund is set aside each year to pay for advanced cleanups. To be eligible for the PAC, the responsible party must agree to participate in paying for the cleanup. A minimum bid of 25 percent is required. When the PAC was first opened, companies were bidding well over 50 percent to secure the advanced funding, but over the last few years, 25 percent bids have secured the advanced cleanup funding. If a buyer is interested in acquiring a clean property and is not interested in relying on the liability protections provided by the Petroleum Cleanup Program, then the PAC is usually a feasible solution that can help transactions close.

For eligible discharges, with the exception of deductibles, funding caps and co-payments, the only source of liability to responsible parties and property owners is third party liabilities associated with bodily injury or property damage (typically caused by off site migration). There are precedent setting court cases where adjacent property owners have been awarded damages. Third party liability is a legitimate concern, however, of the thousands of discharges in the state that cross property boundaries, it is relatively rare for the issue to create an actual liability for the responsible party.

The best programs to be in are the EDI, ATRP, and PLIRP, provided the PLIRP discharge was reported prior to 1994. These programs provide the property owner with either no or very minimal deductibles and either no or very high funding caps. PLIRP discharges after 1994 and PCPP Program sites have the potential for substantial cost participation on the part of the property owner. On these properties, if the owner fails to participate in the cleanup when their score becomes eligible for funds, the FDEP may choose to utilize the available funding and proceed with the cleanup to comply with their mission statement, which is to cleanup all petroleum discharges in the state. FDEP policy would allow them to either sue for cost recovery or place a lien on the property to recover their costs. Any such lien would be superior to a first mortgage and any other type of lien. Therefore it is urgent for eligible properties to participate, even if it involves out of pocket expenses, because the benefit of restoring the property value will far outweigh the cost of participating in the program (in most cases).

There are some other concerns to be aware of. The PLIRP Program is discharge specific. For example, if a discharge is eligible for the cleanup program in one part of the site (i.e., the dispenser island), and a subsequent discharge is discovered at another part of the property (i.e. tank area), the subsequent discharge may not be covered. Other issues revolve around the discovery of a new non-eligible discharge on properties that are already eligible for the petroleum cleanup program. Private insurance companies typically cover new discharges provided appropriate policies are in place. Such circumstances require funding allocation agreements, which will allocate the percentages of responsibility for the new discharge and old discharge, so one cleanup can take care of both problems. This will become increasingly common as the gas station sites upgrade their facilities to meet the 2009 tank upgrade requirement deadlines. There are many issues that pertain to properties that are adjacent to eligible facilities and many issues that pertain to a source property, which has contamination that

has migrated onto adjacent properties. The 20 strategies to manage environmental risks outlined in the April 2002 (electronic version) of The Voice will come into play in many of these cases.

Eligibility in the program provides us with numerous options. Any real estate transaction that is impeded by a site that is eligible for the Petroleum Cleanup Program should be further evaluated, because in most cases the risks can be managed to bring the transaction to a close.

About The Author

Steve Hilfiker is president of Environmental Risk Management, Inc. (ERMI), a DEP petroleum cleanup contractor, Florida-licensed engineering firm and geology business, and environmental forensic consulting firm. Steve is a former two-term president of the Florida Environmental Assessors Association, and can be reached through www.ermi.net or by calling 1-888-ENV-MGMT (1-888-368-6468). He is available for public speaking engagements to groups, organizations and conferences.