

Over Reliance On Cleanup Program
IN REAL ESTATE TRANSACTIONS

By

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Environmental consultants, lenders, buyers, and real estate professionals, frequently rely on the provisions of the Florida Petroleum Cleanup Program when assessing environmental risks at properties in Florida. When a property is eligible for funding through the Petroleum Cleanup Program, now or in the future, parties interested in the property frequently consider environmental risks to be minimal without further investigation into the matter. In many cases, especially at Early Detection Incentive (EDI) sites, the risks are minimal and the provisions of the Petroleum Cleanup Program will resolve most or all of the environmental risks associated with the property. In many other cases, there are very real, potentially significant risks that can be easily overlooked, if the assessor over relies on the eligibility status of a property.

There are typically four ways for a property to be determined eligible for funding from the Inland Protection Trust Fund for petroleum cleanup services in accordance with Florida Statute Section 376.3071.

1. Early Detection Incentive (EDI): sites eligible for EDI are eligible for 100 percent petroleum cleanup funding associated with the entire petroleum storage tank system on the property in accordance with the rules for the program. This can include used oil tanks if the used oil tank was on the site at the time of EDI eligibility, provided the tank was not specifically excluded in the EDI eligibility order. Third party liability and subsequent non-eligible discharges are the major concerns with EDI sites.
2. Abandoned Tank Restoration Program (ATRP): there is a \$500 deductible and a 1 million dollar cap on petroleum cleanup funding for ATRP sites. This program provides restoration funding for contamination associated with the abandoned tanks that have been identified and made eligible at the property. Third party liability and non-eligible discharges are also concerns for ATRP sites.
3. Petroleum Liability Restoration and Insurance Program (PLRIP): this program is discharge specific. There is a required deductible and a funding cap, which are determined by the date of the discharge report. Deductibles range between \$500 and \$10,000. Funding caps range between \$150,000 and \$1,000,000. Excess insurance coverage is required to supplement the funding (up to \$500,000 or \$1,000,000 total coverage per discharge is required).

If the funding cap is exceeded, the excess insurance policy should cover the remainder of the claim, but the responsible party must act independently of the FDEP to secure the coverage. The FDEP will look to the responsible party to comply with FAC Chapter 62-770 "Petroleum Contamination Site Cleanup Criteria". If you are owning, assessing, or working on a cleanup at a PLRIP site and remediation costs may exceed the funding cap,

communications with the excess coverage provider are strongly recommended to verify coverage.

There are other potential concerns associated with sites that are eligible for PLRIP. As describe above, PLRIP is discharge specific. This means that the specific discharge that is covered by the insurance policy will be cleaned up in accordance with the rules of the Petroleum Cleanup Program. Other discharges on the property that are determined by the FDEP to be separate discharge incidents may not be covered under the PLRIP Program. These other discharges will be enforced and the responsible party will be required to assess and remedy the discharge in accordance with FAC Chapter 62-770. This is an important issue because petroleum discharges usually have a specific signature that can be determined by studying laboratory chromatograms, even if the two releases are both from gasoline.

In some cases, the second discharge is a separate petroleum product. For example, at a site in South Central Florida, there was a gasoline and diesel discharge discovered that was eligible for PLRIP. In a remote portion of the site, there was a used oil tank that leaked and free product was discovered. The used oil free product was determined ineligible for funding because it was not from the covered discharge. This issue was resolved by getting the used oil discharge eligible for PCPP (see next section). The site is now eligible for PLRIP and PCPP (one site, two programs).

In another case, there was a discharge along the southern boundary of a property that was eligible for PLRIP. A dispenser island was located a significant distance away from the location of the eligible discharge, and there was never any testing done in the vicinity in the dispenser island. If dissolved hydrocarbons with a different signature on the laboratory chromatogram are detected in the vicinity in the dispenser prior to a pending real estate transaction, it is likely that the FDEP would consider it a new discovery/new discharge. The site is an active gas station and the property owner carries insurance to pay for reasonable and necessary corrective action costs associated with a new discovery. The probable worst case scenario for the property owner is another deductible payment. If a new discovery is made, it will likely become a funding allocation agreement between the FDEP and the insurance company.

If this scenario happened at an abandoned gas station or another property with no insurance, the party responsible for the discharge would likely be liable for assessment and remediation of the non-eligible discharge. On sites without active insurance policies, new non-eligible discharges can be a very expensive problem.

4. Petroleum Contamination Participation Program (PCPP): for properties with discharges that occur prior to 1995, eligibility in the cleanup program can still be obtained through the PCPP. This program carries a 25 percent co-payment from the responsible party, and requires the responsible party to submit a Limited Contamination Assessment Report (LCAR) to define the extent of contamination and estimate remedial costs. The PCPP also has a funding cap of \$300,000. For example, if the LCAR costs \$20,000 and remediation costs \$400,000, the cost to the property owner would be \$120,000 (25% of \$400,000, plus \$20,000). Eligibility in PCPP requires significant financial participation

from the responsible party. The example above is extreme, but most PCPP owners face at least \$10,000 of expenses to resolve the matter.

There are several sites in the program where the owner share of remedial cost may exceed the property value.

PCPP owners have four options when considering their level of participation in the program.

Option A: Do Not Participate.

The program is voluntary, but failure to participate will render the facility ineligible for funding according to FDEP officials. The FDEP will designate a contractor, complete site remediation, and pursue 100% cost recovery from the responsible party, according to FDEP officials.

Option B: Demonstrate Inability to Pay (Indigent Status).

If responsible parties can demonstrate indigent status by submitting CPA attested financial statements and an “Ability to Pay Analysis” is performed by the FDEP to verify indigent status, then the co-payment and LCAR costs can be reduced or eliminated.

Option C: Sell the Property.

Property owners can sell the liability along with the property. There are many investor groups interested in taking on the risk of unknown remediation costs. These groups purchase properties at a reduced rate to offset the risk. Another alternative is to sell the property at a price based on fair market value and indemnify the purchaser. The proceeds could be used to pay for the assessment and remediation cost.

Option D: Participate.

The first step for the responsible party if they intend to participate is to notify the FDEP. Then a LCAR must be submitted with a PCPP affidavit and remedial cost estimate as described above. The affidavit demonstrates consent to participate in accordance with the rules of the program. The LCAR must be submitted in accordance with the June 9, 2000 Limited Contamination Assessment Report Preparation Guidance.

SUMMARY

Significant potential environmental risks can be associated with properties that are eligible for the Petroleum Cleanup Program. Assessors, buyers, lenders and real estate professionals must exercise diligence to determine the type of program that forms the basis of eligibility into the cleanup program and to identify the various environmental risks associated with the property. If there is an over reliance on the benefits of the cleanup program, it could lead to unexpected environmental liabilities.

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