Innocent Purchaser Defense
By

Stephen F. Hilfiker, MS, CFEA, REPA
President, Environmental Risk Management, Inc.

The following case study is based on a true story. It involves Phase I ESA consulting, a real estate transaction, and the petroleum cleanup program, and it demonstrates the need to consider all the rules and alternatives available to benefit property owners.

A landowner contacts an attorney to review liabilities associated with his property. He is in the process of requesting proposals to complete a Limited Contamination Assessment Report (LCAR) so he can participate in the Petroleum Contamination Participation Program (PCPP). He is grateful to have the 75 percent funding provided by the state, but concerned about his percentage of an unknown total remediation cost.

The attorney meets with the owner to review the file and discuss the project history. The owner relays that his family purchased the property in the 1970's and produces a copy of the Deed. The owner describes the land use that has been conducted on the property without impacting the environment since the late 1970s and demonstrates that they have not used or sold petroleum products at the site. While attempting to sell the property in the early 1990's, a Phase I Environmental Site Assessment (ESA) revealed a former gas station operation at the site. Phase II ESA sampling documented the presence of contamination in the vicinity of the former tank system. The real estate transaction did not close.

Based on the rules of §376.305, Florida Statutes (F.S.), the property owner would have been eligible for the Abandoned Tank Restoration Program anytime prior to June 30, 1996. The landowner lived out of state and was not informed of environmental programs in Florida at that time.

While attempting to sell the property again in the late 1990's, another consultant notified the property owner of the PCPP and the owner became eligible for the PCPP by signing the required Affidavit for Participation. Subsequently, after the score came into funding range, the owner paid over $10,000 toward a LCAR that was not approved by the FDEP. The owner was seeking bids to complete the LCAR and was preparing to spend several additional thousands of dollars for a remedial cost estimate to define his potential exposure.

During the attorney review meeting, the owner was informed of the innocent purchaser defense outlined in F.S. 376.308(1)(c) which reads as follows:

376.308 Liabilities and defenses of facilities.--

> (1) In any suit instituted by the department under ss. 376.30-376.319, it is not necessary to plead or prove negligence in any form or matter. The department need only plead and prove that the prohibited discharge or other polluting condition has occurred. The

following persons shall be liable to the department for any discharges or polluting condition:

(c) In the case of a discharge of petroleum, petroleum products, or drycleaning solvents, the owner of the facility, the drycleaning facility, or the wholesale supply facility, unless the owner can establish that he or she acquired title to property contaminated by the activities of a previous owner or operator or other third party, that he or she did not cause or contribute to the discharge, and that he or she did not know of the polluting condition at the time the owner acquired title. If the owner acquired title subsequent to July 1, 1992, or, in the case of a drycleaning facility or wholesale supply facility, subsequent to July 1, 1994, he or she must also establish by a preponderance of the evidence that he or she undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability. The court or hearing officer shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection. In an action relating to a discharge of petroleum, petroleum products, or drycleaning solvents under chapter 403, the defenses and definitions set forth herein shall apply.

At some point prior to spending over $10,000 assessing the site, the owner should have been notified of this defense. The environmental attorney prepared a defense, which included the following information:

- Proof of acquisition date prior to July 1, 1992
- Demonstration of no usage of petroleum products
- Demonstration of no contribution or exacerbation of the contamination on the property
- Demonstration of no knowledge of the contamination on the property prior to purchase
- Demonstration that the sale was not discounted for environmental concerns.

This information was presented by the environmental attorney to the Office of General Counsel of the FDEP. With this information, the possibility exists that the owner will be relieved of liability for the petroleum contamination on his property. The contamination at the property would then be cleaned up by the FDEP.

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.