

# Due Diligence in Facility Acquisitions

By Stephen F. Hilfiker

A properly conducted assessment for a petroleum storage facility should include baseline sampling and diligent research into complicated regulatory and insurance matters associated with the property. Environmental concerns are site-specific, and the level of investigation prior to acquisition should be considered carefully.

For portfolio acquisitions, researching all of the following may not be practical. Streamlined research and reporting procedures using databases designed for multi-site acquisitions are available. Please also keep in mind as you read the following that the level of diligence performed should be determined by the purchaser (with counsel from his attorney or consultant) based on his (or his lender's) individual risk tolerance. Customized, limited and cost-effective scopes of work can be performed, but if so, a trained professional should be alert to the following issues during the course of the investigation.

Phase I Environmental Site Assessments are often considered unnecessary at gas station sites if the facility is already eligible for the Petroleum Cleanup Program. Some prospective purchasers will skip the Phase I ESA because the potential sources of contamination are considered obvious. In such cases, a common due diligence practice is to proceed directly to sampling of the subject property to assess current contamination concentrations at the site. The environmental risks can typically be managed or mitigated with economical strategies if identified prior to purchase.

No assessment service can completely rule out risk. Future property owners may desire a higher level of protection against liability in the event unforeseen or hidden conditions arise after closing.

If liability defenses may need to be implemented after closing, purchasers should utilize (during the due diligence phase) the "All Appropriate Inquiry" (AAI) standardized scope of work defined by the EPA and ASTM International designation E1527-05.

All of the research typically conducted in a Phase I ESA 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. Special emphasis should be placed on the following:

**A properly conducted assessment for a petroleum storage facility should include baseline sampling and diligent research into complicated regulatory and insurance matters associated with the property.**

1. Diligent research should be performed regarding current and former facility operations. If automotive services have been provided, parts washers, used oil tanks and the storage, handling and disposal of all automotive wastes need to be diligently investigated. Beware of chlorinated solvents.
2. Many older gas stations sold kerosene. Kerosene and used oil tanks are/were typically located away from the primary fuel storage tanks. Site assessment activity to identify and assess such tanks is important. Vent pipes and concrete or asphalt cuts can be clues to assist the investigation.
3. Court rulings have determined that all petroleum systems 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.
4. Specific regulatory research should be conducted to determine if the facility is in compliance with the Storage Tanks Rule, Florida Administrative Code, Chapter 62-761. Release-detection methods, tank and line tightness testing, results of recent compliance inspections and the status of pollution liability insurance coverage should be assessed.
5. The status of all petroleum discharges at the site should be investigated. Some of the Florida petroleum cleanup programs are discharge-specific, meaning only that particular discharge will be covered. The status of deductible payments, co-payments, funding caps, site score, the timing of future cleanup and the extent of contamination should be assessed for all discharges that are eligible for the program.
6. For discharges that are not eligible for the Petroleum Cleanup Program, Florida Administrative Code 62-770.600 will require a Site Assessment Report and possible subsequent remedial activity. The current status of compliance with 62-770 should be investigated.
7. If a non-eligible discharge occurs at a site that has had a separate eligible discharge, a Funding Allocation Agreement will be required for the responsible parties of both discharges to split the cost of the cleanup.

There are several issues to consider at sites that are eligible for the Petroleum Cleanup Program but have low scores, where the funding for the petroleum cleanup is several years away.

- Funding through the Free Product and Limited Source Removal initiatives is often overlooked.
- Overreliance on the benefits of the cleanup program can cause economically significant headaches.

- The extent of petroleum impact is important. Off-site migration could lead to third-party liability claims, which are generally not covered by the program according to rule 376.308(5), FS. There are precedent-setting court cases where adjacent property owners have been awarded damages due to contamination from the adjacent gas station. Many insurance policies maintained by gas station owners include coverage for third-party liability/off-site migration claims, but obtaining a determination of coverage in any pollution-related insurance matter can be challenging.
- Future remedial efforts may cause business disruption.
- Any contaminants encountered during voluntary construction or redevelopment of the site may need to be properly disposed.
- Advanced cleanup funding may be

available through FDEP programs if the responsible party is willing to make co-payments.

For properties that are eligible for the Petroleum Cleanup Program based on the Petroleum Liability Restoration Insurance Program (PLRIP), the consultant and/or property owner should assess the possibility for excess insurance coverage. Responsible parties will want this coverage if site remediation costs exceed the funding cap. For example, PLRIP sites with discharges in 1997 or 1998 have a \$10,000 deductible and a \$150,000 funding cap. FDEP required excess coverage in the amount of \$850,000 for these sites, and such insurance may be available if all required notification documents were appropriately completed.

Diligent assessments are valuable tools to manage environmental risk. Each site is different, and the level of investigation may vary. Contact a com-

petent professional experienced in these matters during the due diligence phase of site acquisition.

P.S.: Limited Source Removal Initiative (LSRI) funds for contaminated soil removal during tank upgrades do not count toward funding caps, and any unpaid deductibles will not be required. ○

*Steve Hilfiker is president of Environmental Risk Management Inc. (ERMI), president of the Florida Environmental Assessors Association and a member of the FPMA Environmental Committee. ERMI services include Phase I, baseline and portfolio assessments. ERMI is an FDEP petroleum cleanup contractor, engineering firm and Florida-licensed geology business. Steve has numerous related articles in the library of [www.ermi.net](http://www.ermi.net) and can be reached at 1-888-ENV-MGMT (1-888-368-6468) or [info@ermi.net](mailto:info@ermi.net).*