

Regulatory & Legal Issues Resulting from the Historical Use of PFAS at Brownfields Sites

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Topic Overview

- ▶ FDEP's "Provisional" Cleanup Target Levels (CTLs)
- ▶ Rulemaking Process (if Chapter 62-777, F.A.C., is amended)
- ▶ Grandfathering Provision
- ▶ Due Diligence
- ▶ Contamination Reporting
- ▶ Site Re-openers
- ▶ Insurance Options



What is a “Provisional CTL”?

- ▶ Rulemaking Process under Chapter 120, F.S.
- ▶ Last time, it took *five* years of rulemaking to adopt Ch. 62-777, F.A.C.
- ▶ Does FDEP have authority for these Provisional CTLs for PFOA/PFOS?
- ▶ Contaminated Media Forum presentation (in Tallahassee on 9/12/19)
 - ▶ FDEP is seeking input on provisional PFOA/PFOS CTLs by November 12. All the presentations and reference materials have been posted here:
<https://floridadep.gov/waste/district-business-support/content/contaminated-media-forum>

Important Legal Considerations

- ▶ Grandfathering Provision:
 - ▶ See subsection 62-780.150(5), F.A.C.
- ▶ Due Diligence: what happens if you find PFAS?
- ▶ Contamination Reporting: Do you have to report?
 - ▶ It depends... see Section 62-780.210, F.A.C.
- ▶ Brownfield Site Re-openers:
 - ▶ See Sections 376.30701(4) and 376.82(3), F.S.
- ▶ FDEP Enforcement will not likely be the driver. Banks and Buyers will drive the cleanup decisions, and “market forces” will determine whether *voluntary* cleanup of PFAS occurs.

Insurance Options

- ▶ Insurance Providers are definitely aware of the PFAS issue and trying to figure out how best to deal with it.
- ▶ Generally, an owner can acquire “Operational Risk” Insurance (i.e., for a sudden accidental discharge) and “Premises Pollution Liability (PPL)” Insurance (can be written forwards or backwards or both) for any type of contamination
- ▶ Generally, “Cleanup Exclusions” will be written into the insurance policy because if you conduct Due Diligence and choose to buy a property knowing it is contaminated, then it is not “fortuitous” (so insurance won’t cover cleanup costs)
- ▶ May still ensure for third-party claims.

Insurance Options

- ▶ If you have very detailed and specific information from Due Diligence (Phase I & II), you may be able to insure for *certain constituents* (i.e., those not found during DD) and third-party liability
- ▶ May be able to get an “Add Back” provision in your policy; i.e., excluded for now based on knowledge of contamination, but once you get an NFA/SRCO, coverage for the future can be added back into your policy. So, for example, if cleanup standards change in the future and a site re-opener occurs, then coverage would kick in.
- ▶ “Cost Cap” coverage is rare, regardless of constituent
- ▶ “Poor Man’s Cost Cap” = a High Deductible (likely not worth it)

Questions???

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