STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEACH AND TENNIS CLUB CONDOMINIUM,	)	
Petitioner,	)	
vs.	)	CASE NO. 95-1941
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

RECOMMENDED ORDER

Final hearing in the above-styled case was held on June 16, 1995. Robert E. Meale, Hearing Officer of the Division of Administrative Hearings, participated by videoconference from Tallahassee, as did Respondent's counsel Douglas Beason and representative William E. Truman. Petitioner's counsel and representative, as well as the court reporter, attended the hearing in Ft. Myers.

APPEARANCES

The parties were represented at the hearing as follows:

For Petitioner: Thomas B. Hart
Humphrey & Knott, P.A.
Post OFfice Box 2449
Ft. Myers, Florida 33902-2449

For Respondent: W. Douglas Beason
Assistant General Counsel
Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, Floirda 32399-2400

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is entitled to participate in the Florida Petroleum Liability and Restoration Insurance Program, pursuant to the provisions of Section 376.3072(2)(a)3, Florida Statutes (Supp. 1994).

PRELIMINARY STATEMENT

At the hearing, the parties agree to present a stipulation to the hearing officer. The facts below are derived from the stipulation. Neither party called any witnesses. The parties agreed to admission of Hearing Officer Exhibit 1 as the sole exhibit.

The record was left open to allow Petitioner to review certain materials and indicate whether it wished to attempt to show that it satisfied the requirement of financial responsibility, as of December 31, 1993, by one or more of the means listed in 40 C.F.R. 280, Subpart H. By letter dated June 29, 1995, Petitioner advised that it would not seek to make such a showing.

The transcript was filed July 10, 1995. The numbered proposed findings of fact of both parties are adopted or adopted in substance.

FINDINGS OF FACT

1. Petitioner is a residential condominium association.

2. Petitioner owned or operated a 1000-gallon tank to store diesel oil to operate an emergency power generator. Following the discovery of an underground discharge, Petitioner closed the tank and reported the discharge to Respondent on July 12, 1994.

3. Following the receipt of an application, Respondent, by letter dated March 22, 1995, determined that Petitioner was ineligible to participate in the Florida Petroleum Liability and Restoration Insurance Program (Program). The reason cited for the determination is:

> Pursuant to Section 376.3072(2)(a)3.a, F.S. the facility was required to be in compliance with the Department rules at the time of the discharge. Pursuant to Section 62-761.480, F.A.C. owners or operators of storage tank systems containing petroleum products should have demonstrated to the Department the ability to pay for facility cleanup and third-party liability resulting from a discharge at the facility. The compliance deadline for financial responsibility for this facility was December 31, 1993. At the time of discovery of the discharge, there was no documentation to demonstrate financial responsibility for this facility. Therefore, this site is not eligible for restoration coverage.

4. Petitioner did not make any showing of financial responsibility prior to December 31, 1993. The significance of the June 29 letter from Petitioner's counsel is that, even ignoring Petitioner's failure to demonstrate financial responsibility to Respondent by December 31, 1993, Petitioner cannot prove that it met the financial responsibility requirements as of such date.

5. Petitioner is a small business under Section 288.703(1).

6. Upon discovery of the discharge, Petitioner promptly reported the discharge to Respondent and drained and removed the system from service.

7. Petitioner did not intentionally cause or conceal a discharge or disable leak detection equipment.

8. Petitioner proceeded to complete initial remedial action as defined by the rules.

9. Petitioner never received an eligibility order from Respondent, so Petitioner was excused from applying for third- party liability coverage.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes (Supp. 1994). All references to Rules are to the Florida Administrative Code.)

11. Petitioner has the burden of showing that it is eligible to participate in the Program. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

12. The Legislature created the Program to "provide restoration funding assistance to facilities regulated by and in compliance with the department's petroleum storage tank rules." Section 376.3072(1).

13. Section 376.3072(2)(a) provides in relevant part:

> Any owner or operator of a petroleum storage system may become an insured in the restoration insurance program at a facility provided:
>
> 1. A site at which an incident has occurred shall be eligible for restoration if the insured is a participant in the third-party liability insurance program or otherwise meets applicable financial responsibility requirements. After July 1, 1993, the insured must also provide the required excess insurance coverage or self-insurance for restoration to achieve the financial responsibility requirements of 40 C.F.R. s. 280.97, subpart H, not covered by paragraph (e).
>
> * * *
>
> 3. A site where a discharge is reported to the department prior to January 1, 1995, where the owner is a small business under s. 288.703(1), . . . shall be eligible for [specified] eligible restoration costs ..., provided that:
>
> a. The facility was in compliance with department rules at the time of the discharge.
>
> b. The owner or operator has, upon discovery of a discharge, promptly reported the discharge to the department, and drained and removed the system from service, if necessary.
>
> c. The owner or operator has not intentionally caused or concealed a discharge or disabled leak detection equipment.
>
> d. The owner or operator proceeds to complete initial remedial action as defined by department rules.
>
> e. The owner or operator, if required and if it has not already done so, applies for third-party liability coverage for the facility within 30 days of receipt of an eligibility order issued by the department pursuant to this provision.

14. Section 376.3072(2)(b) provides in relevant part:

> 1. To be eligible to be certified as an insured facility, for discharges reported after January 1, 1989, the owner or operator shall file an affidavit upon enrollment in the program and must file an affidavit each year upon the scheduled date of payment of the annual registration fee assessed pursuant to s. 376.303, or, upon the date of installation of the facility or enrollment in the program and each year thereafter, if the facility is a petroleum storage system that is not subject to the registration fee. ...
> 2. Except as provided in paragraph (a), to be eligible, the insured must demonstrate to the department that at the time the discharge was reported, the insured had financial responsibility for third-party claims and excess coverage, as required by this section and 40 C.F.R. s. 280.97(h)
> 3. To be eligible, the facility shall be in compliance with department rules as demonstrated at the most recent inspection conducted by the department or the insured demonstrates that any necessary corrective actions identified at the most recent inspection have been corrected as ordered by the department. Should a reinspection of the facility be necessary to demonstrate compliance, the insured shall pay an inspection fee not to exceed $500 per facility . . ..
> 4. The department shall issue an order stating that the site is eligible for restoration coverage if the criteria listed in subparagraphs 1-3 are met.
> 5. Upon the filing of a discharge notification with the department, the department may inspect the facility. The department shall provide restoration coverage for the facility when a claim requesting such coverage is filed, unless
> a. The insured has failed to abate the known source of a discharge;
> b. The insured has failed to take corrective action as required by the department; or
> c. The insured has intentionally caused or concealed a discharge or disabled leak detection equipment.
> . . .

15. Petitioner makes several arguments as to why it is eligible to participate in the Program. None of these arguments is persuasive.

16. Petitioner argues that Section 376.3072(2)(b)2 removes the requirement of financial responsibility for small businesses seeking to participate in the Program under Section 376.3072(2)(a)3. Petitioner relies on the introductory clause of Section 376.3072(2)(b)2, "Except as provided in paragraph (a)."

17. Petitioner misreads the Section 376.3072. The purpose of the introductory clause is to avoid conflict between two subsections of Section 376.3072(2). Section 376.3072(2)(a)1 contains two financial-responsibility requirements. The first requirement, applicable to incidents occurring on or

before July 1, 1993, requires a certain extent of financial responsibility. This is the first sentence of Section 376.3072(2)(a)1. The second requirement, applicable to incidents occurring after July 1, 1993, requires the "required excess insurance coverage or self-insurance . . . to achieve the financial responsibility requirements of 40 C.F.R. 280.97, subpart H . . .." This is the second sentence of Section 376.3072(2)(a)1.

18. The portion of Section 376.3072(2)(b)2 after the introductory clause restates the more onerous financial- responsibility requirement of the second sentence of Section 376.3072(2)(a)1. Without the introductory clause, Section 376.3072(2)(b)2 would thus conflict with the first sentence of Section 376.3072(2)(a)1 for incidents occurring on or before July 1, 1993.

19. Petitioner argues that the small-business provisions of Section 376.3072(2)(a)3 do not require financial responsibility for additional reasons.

20. Petitioner argues that its underground storage tank was in compliance with the rules because it was not subject to the rules. Petitioner relies on Rule 62-761.300(2)(h) and (p), which exempt from the requirements of Chapter 62-761:

> (h) Any storage tank system used for storing heating oil for consumptive use on the premises where stored [and]
> (p) Any residential storage tank system[.]

21. It is unnecessary to determine whether tank was subject to the rules. If Petitioner's tank fell within either or both of these exemptions, then it would not be subject to the rules. This does not mean that the tank would comply with the rules and thus be eligible for coverage under the Program. To the contrary, the Program is reserved for facilities "regulated by and in compliance with" the rules. If Petitioner's argument were correct, its tank would not be regulated by the rules and would not be eligible for coverage under the Program.

22. In the alternative, Petitioner argues that, if financial responsibility is a requirement of the small-business provisions of Section 376.3072(2)(a)3, then Petitioner's tank is not in violation of the rules until Petitioner is given a chance to correct the violation. Petitioner relies on Section 376.3072(2)(b)3, which addresses the compliance of facilities and provides that a participant may show compliance by showing that any violations cited in the most recent inspection have been corrected.

23. This argument confuses the facility with the owner or operator. The financial-responsibility requirements are imposed on owners or operators, not facilities. DEP inspects facilities. Section 376.3072(2)(a)3 provides only that, when a facility is cited, the participant has a chance to correct the deficiency. Other provisions make it clear that if an owner or operator lacks financial responsibility at the relevant time, it is ineligible to participate in the Program. The inspections and corrective actions described in Section 376.3072(2)(a)3 apply to facilities, not owners or operators.

24. Petitioner argues that it was not subject to the financial-responsibility requirements due to provisions of 40 C.F.R. 280. Either these provisions do not apply to Petitioner's tank or, if they do, they are covered in the discussion of similar provisions contained in Chapter 62-761.

RECOMMENDATION

It is

RECOMMENDED that the Department of Environmental Protection enter a final order determining that Petitioner is ineligible to participate in the Program.

ENTERED on July 24, 1995, in Tallahassee, Florida.

ROBERT E. MEALE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
on July 24, 1995.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.