STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASHER G. SULLIVAN, JR., d/b/a ST. AUGUSTINE TRUST,	)	
Petitioner,	)	
and	)	Case No. 02-4850
ASSAD O. KNIO and SELMA KNIO,	)	
Intervenors,	)	
vs.	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Charles A. Stampelos, the assigned Administrative Law Judge of the Division of Administrative Hearings, on September 4, 2003, in Tallahassee, Florida.

APPEARANCES

For Petitioner Asher G. Sullivan, Jr., d/b/a St. Augustine Trust:

Gary S. Edinger, Esquire
305 Northeast First Street
Gainesville, Florida 32601

For Intervenors Assad O. Knio and Selma Knio:

Sidney F. Ansbacher, Esquire
Upchurch, Bailey & Upchurch, P.A.
Post Office Drawer 3007
St. Augustine, Florida 32085

For Respondent Department of Environmental Protection:

Stan M. Warden, Esquire
Department of Environmental Protection
The Douglas Building
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue presented is whether, pursuant to Section 376.3072, Florida Statutes, Petitioner, Asher G. Sullivan, Jr., d/b/a St. Augustine Trust, is eligible for restoration coverage pursuant to the Florida Petroleum Liability Restoration and Insurance Program (FPLRIP), Section 376.3072, Florida Statutes.

PRELIMINARY STATEMENT

On or about October 8, 2002, Petitioner filed a claim with the Department of Environmental Protection (Department) for restoration coverage under FPLRIP for the clean-up of a petroleum discharge at DEP Facility No. 558515938.

On October 21, 2002, the Department issued a letter to Petitioner concluding that Petitioner's facility (DEP Facility No. 558515938; Chevron-207) was not been properly enrolled in FPLRIP pursuant to Section 376.3072(2)(b)2., after September 3,

1998, and therefore, the facility was "not eligible for state assisted petroleum product remediation."

On or about November 7, 2002, Petitioner filed a timely Request for Formal Administrative Hearing with the Department, and the Department forwarded the request to the Division of Administrative Hearings (DOAH) on December 19, 2002, for the assignment of an administrative law judge to conduct a final hearing.

On January 14, 2003, a Petition to Intervene was filed on behalf of Assad O. Knio and Selma Knio (Intervenors), who formerly owned the facility referred to above and hold the mortgage on the property. On January 21, 2003, intervention was granted. (Intervenors support Petitioner in this case.)

On July 3, 2003, the Department filed a Motion for Summary Order, which was treated as a motion to relinquish jurisdiction pursuant to Section 120.57(1)(i). Petitioner and Intervenors filed separate responses to the Department's motion. On July 14, 2003, the Department's motion was denied.

On July 11, 2003, Petitioner and Intervenors filed a Unilateral Pre-Hearing Stipulation, in light of the pending hearing date, which was continued.

On September 3, 2003, the Department filed a Motion in Limine to prohibit Petitioner and Intervenors from providing evidence concerning specific terms of Petitioner's insurance

agreement and "concerning any date of petroleum discharge." The Department's Motion in Limine was considered during the final hearing and the motion was denied, subject to noting the Department's standing objection to evidence offered in support of these two issues, and further subject to the caveat that the Department make an objection to specific evidence regarding both issues.

On September 3, 2003, the Department filed a Pre-Hearing Statement. At the outset of the final hearing, the parties agreed to certain facts which required no proof at hearing. These facts are included in Petitioner's and Intervenors Unilateral Pre-Hearing Stipulation, at pages 6-8, as follows:

> 1. All of the parties have standing.
> 2. Petitioner owns the following described FDEP Facility: Café Erotica Restaurant, 2620 S.R. 207, Elkton, Florida 32033, FDEP Facility No. 558515938.
> 3. Petitioner last held a certificate of insurance on the Facility, which states it has an annual term of September 3, 1997, through September 3, 1998.
> 4. On August 2, 1998, FLIPA, as agent for Petitioner's insurance company, sent a letter to Petitioner asking for information to renew the policy. On September 11, 1998, FLIPA wrote again to Petitioner, saying that the policy was canceled on September 3, 1998.
> 5. Petitioner removed the underground storage tanks at the Facility on or about September 15, and filed a Discharge Reporting Form on September 17, 1998.
> 6. Petitioner applied with Respondent for site coverage for the discharge under the Florida Petroleum Liability Restoration

Insurance Program ("FRLRIP") under Section 376.3072(2)(b), Florida Statutes.

7. By October 21, 2002, letter (the "Denial Letter"), the Respondent denied FPLRIP eligibility stating that the Facility was ineligible because the Facility was not "properly enrolled" in FRLRIP after September 3, 1998.

8. [deleted]

9. The Respondent did not issue an eligibility order "upon report of [the] discharge," as set forth in Section 376.3072(2)(b)4, Florida Statutes.

10. That basis of denial at paragraph E.7., above, remains the Respondent's position today.

11. Lewis Cornman was the Respondent's representative who made the determination of denial reflected in the Denial Letter. He still concurs with the position set forth in E.7., above.

12. Mr. Cornman relied on the dates in the Certificate of Eligibility generated by FLIPA as agent for the Respondent in determining to deny the Petitioner's request.

13. The petroleum discharge that was reported on or about September 15, 1998, has not been abated.

After granting several continuances, the final hearing was held on September 4, 2003, in Tallahassee, Florida.

During the final hearing, the parties agreed to the admission of Joint Exhibits A through R. Petitioner presented the testimony of Asher G. Sullivan, Jr. Intervenor presented the testimony of Lewis J. Cornman, Jr., Environmental Manager for the Department of Environmental Protection; Robert D. Fingar, Esquire; and William C. Zegel, P.E., D.E.E. Petitioner offered Exhibit 1, a policy of insurance, to which the Department

objected. Ruling on the admissibility of Petitioner's Exhibit 1 was reserved, and the objection is overruled.

The Department, rather than calling Mr. Cornman during its case-in-chief, was authorized to present its case, in part, through cross-examination of Mr. Cornman. The Department's Exhibit 1 was admitted without objection. The Department also called Mr. Sullivan during its case-in-chief.

The one-volume Transcript (referred to herein by the symbol (T:) followed by a page reference) of the final hearing was filed with DOAH on October 1, 2003. After granting two unopposed extensions of time, all the parties filed separate proposed recommended orders, and they have been considered in the preparation of this Recommended Order.

All citations are to Florida Statutes (2002), unless otherwise indicated.

FINDINGS OF FACT

The Parties

1. Asher G. Sullivan, Jr., owns and is the trustee of the Asher G. Sullivan, Jr. St. Augustine Trust (Trust). The Trust owns a Florida Department of Environmental Protection Facility known as Café Erotica Restaurant, 2620 S.R. 207, Elkton, Florida 32033, FDEP Facility No. 558515938. See Endnote 1. The Trust purchased the property in or around 1995. Neither Mr. Sullivan nor the Trust ever operated a petroleum facility or a gas

station on the property. However, the property, when purchased by the Trust, had underground petroleum storage tanks. (The parties stipulated that all of the parties have standing.)

2. Intervenors, Assad O. Knio and Selma Knio, formerly owned the property, and currently hold the mortgage on the property.

3. The Department is charged with the statutory responsibility pursuant to Section 376.3072, to determine whether facilities are eligible to participate in FPLRIP.

Insurance and Eligibility

4. A Certificate of Insurance was issued by Commerce & Industry Insurance Company to Asher G. Sullivan, Jr. St. Augustine Trust, certifying "that it has issued liability insurance covering the following underground storage tank(s): CHEVRON-207 2630 SR 207 ELKTON FL 32033 7 Tanks."[1] The effective date of the Certificate of Insurance, Policy No. FPL8079861, was September 3, 1997, and the period of coverage was from September 3, 1997, to September 3, 1998. The limits of liability are $1 million for each loss and $1 million for all losses, exclusive of legal defense costs. (Mr. Sullivan believed that a similar certificate of insurance and policy covered the facility's tanks on the property between September 1996 and September 1997 which was renewed thereafter.)

5. The Certificate of Insurance was issued

> for taking corrective action and compensating third parties for bodily injury and property damage caused by sudden accidental releases and non-sudden accidental releases, in accordance with and subject to the limits of liability exclusions, conditions and other terms of the policy arising from operating the underground storage tank(s) identified above.

6. Subparagraphs 2.d. and e. of the Certificate of Insurance provide:

> d. Cancellation or any other termination of the insurance by the 'Insurer', except for non-payment of premium and misrepresentation by the insured, will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured.
>
> Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured.
>
> e. The insurance covers claims otherwise covered by the policy that are reported to the 'Insurer' within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced after the policy retroactive date if applicable and prior to such policy renewal or termination date. Claims reported under such extended reporting period are subject to the terms, conditions, limits, including limits of liability and exclusions of the policy.

The authorized agent of the insurer certified, at the bottom of page two of the Certificate, "that the wording of this instrument is identical to the wording in 40 CFR 280.97(b)(2) and that the 'Insurer' is licensed to transact the business of insurance in one or more states." See 40 C.F.R. Section 280.97(b)(2)2.d. and e. See Finding of Fact 50.

7. Petitioner's Exhibit 1 was issued by Commerce & Industry Insurance Company, and is entitled "Florida Storage Tank Third-Party Liability and Corrective Action Policy (Policy)." It is more than a fair inference that this is the Policy referred to in the Certificate of Insurance. This Policy states that it

> is a Claims-Made-and-Reported policy for third party liability coverage. It is a Release-Reported Policy for corrective action coverage. This policy is site-specific: only scheduled tanks are covered.
>
> This insurance is excess over any restoration (corrective action) funding for storage tanks whose owners qualify for and are eligible for reimbursement from the Florida Inland Protection Trust Fund as part of the Restoration Insurance Program of the Florida Petroleum Liability and Restoration and Insurance Program.

8. The Policy provides conditions for cancellation and non-renewal and, in part, states: "B.1. The **NAMED INSURED** may cancel this policy by mailing or delivering to the Company advance written notice of cancellation. 2. If this policy has

been in effect for more than ninety (90) days the Company may cancel this policy or the coverage afforded by this policy with respect to a particular **Storage Tank System** only for one or more of the following reasons: a. Nonpayment of premium . . . ." (Emphasis in original.) Condition B.3. provides: "If the Company cancels this policy for [nonpayment of premium], the Company will mail or deliver to the **Named Insured** first listed in the Declarations, written notice of cancellation, accompanied by the reasons for cancellation at least" ten days before the effective date of cancellation. (Emphasis in original.)

9. Conditions B.4.a. and b. of the Policy provide:

> 4. Non-Renewal:
>
> > a. If the Company decides not to renew this policy the Company will mail or deliver to the **Named Insured** written notice of nonrenewal, accompanied by the reason for nonrenewal, accompanied by the reason for nonrenewal, at least forty-five (45) days prior to the expiration of this policy.
> >
> > b. Any notice of nonrenewal will be mailed or delivered to the **Named Insured's** last mailing address known to the Company. If notice is mailed, proof of mailing will be sufficient proof of notice.

(Emphasis in original.)

10. On or about September 12, 1997, the Department issued[2] a "Notice of Eligibility" (Notice) to Asher G. Sullivan, Jr. St. Augustine Trust, for a term of eligibility effective

September 3, 1997, and an expiration date of September 3, 1998.[3] This Notice related to Petroleum Liability and Restoration Insurance Program Coverage. The Notice also stated:

> The following operator/operator [Asher G. Sullivan Jr. St. Augustine Trust] has demonstrated financial responsibility for third party liability for contamination related to the storage of regulated petroleum products and is therefore eligible for Restoration Coverage under the Petroleum Restoration Insurance Program, Section 376.3072, Florida Statutes, for the facilities listed on the attached sheet(s), contingent upon continued compliance with Chapter 376, F.S., and Chapter 62-761, F.A.C. and/or 62-762, F.A.C.

(Consistent with the Certificate of Insurance mentioned above, the facility name is Chevron-207.)

11. FPLRIP provides third-party liability and excess coverage to owners and/or operators who have registered storage tank systems, such as underground storage tanks (USTs).

12. There are several ways to demonstrate financial responsibility, including, but not limited to, obtaining insurance, as here. See Fla. Admin. Code R. 62-761.400(3). As an owner of USTs, Petitioner was required to demonstrate financial responsibility in the amount of $1 million per occurrence and $1 million on an annual aggregate amount. 40 C.F.R. Section 280.93(a)(1) and (b)(1); Fla. Admin. Code R. 62-761.400(3)(b).

13. Participation in FPLRIP was voluntary to the extent that not every owner or operator of a UST, such as Petitioner, was required to participate in this state program, notwithstanding the state and federal requirements that financial responsibility be demonstrated by virtue of ownership or operation of a UST. See, e.g., Sections 376.301(18) and 376.309; Fla. Admin. Code R. 62-761.400(3); 40 C.F.R. Section 280.93. However, if insurance, such as the insurance policy obtained in this case, was chosen as the financial responsibility mechanism, participation in FPLRIP was required because federal law required first dollar coverage for financial responsibility. 40 C.F.R. Section 280.93(a)(1) and (b)(1). Stated otherwise, here, the Policy had a $150,000 deductible, and FPLRIP provides the first $150,000 worth of coverage, subject to a deductible. Section 376.3072(2)(d)2.d. See also Fla. Admin. Code R. 62-761.400(3)(a)3. ("Financial responsibility requirements for petroleum storage systems containing petroleum products may be supplemented by participation in the [FPLRIP] to the extent provided in Section 376.3072, F.S.")

14. Because Petitioner chose insurance as the financial responsibility mechanism, the Department relied on the Certificate of Insurance to determine the financial responsibility of Petitioner of the Chevron-207 facility. Once

this Certificate of Insurance was issued, the Department issued a Notice of Eligibility to the Petitioner, so the facility could be eligible to participate in FPLRIP. See Endnotes 3 and 5.

15. The Department determined that Petitioner demonstrated financial responsibility under FPLRIP for a term of one year, here from September 3, 1997, through September 3, 1998. This meant that, under the Department's interpretation of FPLRIP by Lewis J. Cornman, Environmental Manager for the Department,[4] a discharge would be covered under FPLRIP only if it occurred and was discovered during the insurance policy period (here September 3, 1997 through September 3, 1998) set forth in the Notice of Eligibility. See (T: 67-70, 75-77, and 83.)

16. A penalty or deductible amount may be imposed if the discharge is not reported to the Department in a timely fashion, i.e., within 24 hours after discovery of the discharge (suspected release). Section 376.3072(2)(d)2.f.(I). (Thus, the filing of an untimely report would not affect coverage or eligibility under FPLRIP.) (T: 68-69.)

17. Mr. Fagin, an expert witness testifying on behalf of Intervenors, opined that FPLRIP "is a discovery and reporting period program," which means that Petitioner is not eligible under FPLRIP because the date of discovery and report of the discharge was subsequent to the end of the insurance policy period, September 3, 1998, unless the Policy period is extended.

Mr. Fagin focused on Section 376.3072(2)(b)4., which states in part: "Upon report of a discharge, the department shall issue an order stating that the site is eligible for restoration coverage unless the insured . . . cannot demonstrate that he or she has obtained and maintained the financial responsibility for third-party claims and excess coverage as required by subparagraph 2."[5] Mr. Fagin reads this subsection to require that "upon report of a discharge," a facility owner, such as Petitioner, must maintain financial responsibility (here maintain a policy of insurance) on the date the discharge was discovered, here September 15, 1998, and reported, here September 17, 1998. (T: 106, 108, and 113.)

18. For Mr. Fagin, the crux of the issue is whether Petitioner's insurance policy was effective on September 15, 1998, and September 17, 1998. The answer to this question, for Mr. Fagin, is whether the 10 or 60-day provisions set forth in Subparagraph 2.d. of the Certificate of Insurance, see Finding of Fact 6, apply to extend the Policy past September 3, 1998, and through September 15 and 17, 1998. For Mr. Fagin, it does not matter if the discharge was discovered prior to September 3, 1998, because of his and Mr. Cornman's interpretation of Subsection 376.3072(2)(b)4. See Finding of Fact 39.

19. Mr. Fagin opines that the 10-day provision applies here, extending the Policy expiration date (or the effective

date of cancellation or non-renewal) at least until September 21, 1998, 10 days after the September 11, 1998 letter, see Finding of Fact 25. (T: 91-92.) See also Endnote 9.

20. Mr. Fagin believes the Department's (Mr. Cornman) interpretation, see Finding of Fact 15, is reasonable even if, according to Mr. Fagin, it may lead to a potentially absurd result whereby there may be insurance coverage under the terms of the Policy (but no coverage under FPLRIP) when a discharge is reported within the six-month extended reporting period (after the expiration of the Policy) and if the discharge occurred during the term of the Policy, here prior to September 3, 1998. See Findings of Fact 40-44, finding that the discharge occurred at Petitioner's facility prior to September 3, 1998.

The Policy is Not Renewed by Petitioner or Terminated by the Insurer

21. By letter dated August 2, 1998, Ben Harrison, Account Manager for FPLIPA,[6] wrote Mr. Sullivan a letter addressed to Asher G. Sullivan, Jr. St. Augustine Trust, referencing Policy FPL8079861, the subject of the Notice of Eligibility and Certificate of Insurance, and stated:

> In May, 1998 we mailed renewal application to be used in renewing reference policy. We requested that application be returned to us by July 3, 1998.
>
> To date, we have not received the required paperwork that would allow us to quote this account. Please forward application and

> affidavit and any tight test information that you have concerning underground tanks.
>
> We cannot quote this account without the required paperwork. Policy cannot be renewed if paperwork is not received.

22. Mr. Sullivan received the August 2, 1998, letter prior to September 3, 1998. Mr. Sullivan had the opportunity to renew the Policy before September 3, 1998. (T: 23, 30.) Mr. Sullivan did not respond to the August 2, 1998, letter "[b]ecause [according to Mr. Sullivan] the tanks were due to be pulled out before September the 3rd." (T: 29-30.) Mr. Sullivan thought, in reference to the August 2, 1998, letter, that if he did not "sign and renew the application, there would not be any insurance after September 3rd." In other words, Mr. Sullivan did not make any attempt prior to September 3, 1998, to renew the Policy, including providing any information to the insurance company or its agent, Mr. Harrison. (T: 30.)

23. Mr. Sullivan did not mail or deliver or otherwise give any notice of cancellation of the Policy to the insurance company, or its agent. (T: 41-42.)

24. Mr. Sullivan maintains that he had insurance coverage for the discharge in question "[b]ecause there was a six-month tail-end coverage, and also [he] was supposed to be notified by the insurance company within 10 days of the cancellation of insurance." (T: 40.) (But, Mr. Sullivan defers to his legal

counsel regarding coverage issues.) (T: 45.) Mr. Sullivan stated that he did not receive a letter from the insurance company or FPLRIP until the September 11, 1998, letter that the insurance would be cancelled. (T: 40.) He interpreted this letter to mean that the Policy would not be renewed. (T: 20.)

25. On September 11, 1998, Mr. Harrison advised Mr. Sullivan, by letter, that the Policy expired on September 3, 1998, and stated:

> If policy holder has not been approved by the Department of Environmental Protection under another EPA approved financial responsibility mechanish [sic], policy holder no longer has access to the State Restoration Fund for new discharges. Excess coverage over the State Fund has also expired.
>
> We have had no response from the renewal application that we mailed out nor from my letter of Aug [sic] 2, 1998 stating that we could not quote the account nor bound without the application and affidavit.
>
> If you have any questions on how to reinstate the policy please call us at 1-800-475-4055.

(Emphasis in original.)

26. Mr. Harrison testified by deposition. In 1989, he began working for the Florida Petroleum Liability Insurance Program Administrators in Cocoa, Florida. His duties included issuing quotes, mailing out renewal paperwork applications, and upon receipt, converting "the indications into policies once the

money and appropriate paperwork comes in." FPLIPA began with the issuance of third-party liability insurance. When the State of Florida began reducing the amount that they would provide for cleanup, FPLIPA provided, through AIG, the excess coverage that was required.

27. According to Mr. Harrison, the Policy at issue in this case, was terminated because the Petitioner did not renew it.

28. Mr. Harrison refers to his September 11, 1998, letter, as a "letter informing [Mr. Sullivan] that his coverage had lapsed" or expired. Mr. Harrison did not intend that either his August 2, or September 11, 1998, letters be considered as notice(s) of termination or cancellation of the Policy.

29. Mr. Harrison was the account manager on all of the files related to Mr. Sullivan.

30. Mr. Harrison stated that if the Policy was to be terminated, he would have had to notify Petitioner in writing and if the Policy was not going to be renewed by the insurance company, he would have had to notify Petitioner in writing 60 days prior to the renewal date. Mr. Harrison advised that termination letters are furnished by FPLIPA for an insurance company, here referring to AIG.[7]

Discovery and Reporting of the Discharge

31. Several petroleum USTs were located at the facility and on the property owned by the Trust. After a one to two-week

delay, on or about September 15, 1998, the storage tanks were removed from the property by a contractor who Mr. Sullivan believes was named Pipeline Industries (Pipeline).[8] The removal operation was performed over the course of several days. During the course of removal, Pipeline informed him that there was a discharge of petroleum found on the property.

32. The tanks on the property were removed intact on September 15, 1998. At that time, it was certified that the tanks were empty, and were removed without holes in them. (It appears that the Department reported the tanks as empty in February 1996.) (T: 128, 146.)

33. Pipeline filed a Discharge Report Form with the Department on September 17, 1998. This Form recites that a discharge was confirmed on the property on September 15, 1998.

34. Within less than a week, upon learning of the discharge, Mr. Sullivan's right-hand-man, J.C. Brunel, advised Commerce & Industry Insurance Company that the storage tanks had been removed and that there was a discharge. Thereafter, and on some unknown date, the insurance company advised Mr. Sullivan that no coverage would be provided.

35. Mr. Sullivan was made aware of the existence of the storage tanks before the Trust bought the property. He believes that the last time that the site was used as a gasoline station was probably in 1992. Mr. Sullivan was not aware of any other

spills or discharges that might have occurred on the property other than what was reported by Pipeline in September 1998.

36. Mr. Sullivan has no personal knowledge when the discharge occurred. He was on the property on and off at the time when Pipeline removed the storage tanks, but probably not on-site when the tanks were actually removed. Pipeline could have caused the discharge, but it is uncertain.

37. Mr. Sullivan relied upon his hired experts (ECT) to determine when the petroleum discharge occurred, the extent of the discharge, and the cost of the clean-up.

The Discharge

38. As noted above, the Discharge Report Form indicates confirmation of a discharge on September 15, 1998.

39. The Department contends that the discharge occurred on September 15, 1998, after the insurance policy expired on September 3, 1998. Mr. Cornman determined that the site was ineligible because the site was not properly enrolled in FPLRIP because Petitioner did not maintain financial responsibility when the discharge occurred after the time period of coverage, i.e., after the Policy expired on September 3, 1998. This position was based on the Notice of Eligibility which states the coverage existed from September 3, 1997 through September 3, 1998. See also Findings of Fact 10 and 15.

40. Petitioner contends, in part, that the discharge occurred during the policy period, i.e., prior to September 3, 1998, and was timely reported during the extended reporting period. In the alternative, Petitioner contends that the Policy was never properly terminated or cancelled by the insurance company or its agent (by not providing appropriate notice of termination or cancellation) and, as a result, the Policy was still effective on September 15, 1998, and September 17, 1998, the dates when the discharge was discovered and the report submitted to the Department, respectively. Thus, Petitioner contends that Petitioner is eligible under FPLRIP, having maintained insurance coverage through and including the report of discharge. See Finding of Fact 18.

41. The only scientific evidence presented in this case as to when the petroleum discharge occurred on the property was elicited from Dr. William Case Zegel. Dr. Zegel has a chemical engineering undergraduate degree; and a doctor of science degree in chemical engineering. Dr. Zegel has been associated with Water and Air Research, Incorporated, in Gainesville, Florida, since 1979. He is president of the company and principal engineer. He is a licensed professional engineer in the State of Florida. Dr. Zegel has substantial experience in determining how chemicals are released into the environment.

42. Dr. Zegel is familiar with the property at issue in this proceeding. He was on-site for a day. He spent approximately 100 hours analyzing the site conditions and the petroleum discharge related to the property owned by Petitioner. Further, he reviewed data collected by "ECT," in particular, two sets of data taken about 600 days apart. From this data, he could determine how things changed on the property. He also performed what is called "reverse modeling" to determine when a discharge may have occurred on the property. While stating that the modeling, and the estimates derived therefrom, are not precise as to a particular day or month, Dr. Zegel stated that one estimate indicated that the discharge occurred before March 12, 1999, and a second wave of modeling indicated that the discharge occurred in November 1998. (T: 124, 140.)

43. After identifying specific details of the available data, and his analysis, Dr. Zegel's opined that the discharge occurred prior to September 15, 1998, and that the release into the environment occurred before that date. He also opined that the discharge on the property occurred perhaps as early as 1996. It is not probable that the discharge would have occurred after September 15, 1998.

44. It seems odd that no discharge was detected prior to September 15, 1998, given the status of the tanks. Nevertheless, Dr. Zegel's testimony is credible and persuasive.

The weight of the evidence, including no expert opinion to the contrary, supports the finding that the discharge reported to the Department on September 17, 1998, occurred prior to September 3, 1998, although the specific date of the discharge is unknown.

Petitioner's Application for Coverage under FPLRIP

45. Mr. Sullivan, on behalf of the Trust, applied, with the Department, for restoration coverage for the discharge under FPLRIP.

46. On October 21, 2002, the Department issued a letter to Mr. Sullivan on behalf of the Trust, denying FPLRIP eligibility, stating that the facility was ineligible because the facility was not "properly enrolled in FRLRIP after September 3, 1998." Stated otherwise, the Department determined that the site was ineligible because the site was not properly enrolled in FPLRIP and Petitioner did not maintain financial responsibility because the discharge occurred after coverage expired on September 3, 1998. The Department relied on the dates in the Notice of Eligibility generated by FPLIPA as agent for the Department in determining the denial of Petitioner's request. As of the October 21, 2002, letter, and when Mr. Cornman testified, the only information provided the Department regarding the date of discharge was the discharge confirmation date (September 15, 1998) reported by Petitioner on September 17, 1998.

The Environmental Protection Agency's (EPA) Regulations and Interpretations

47. In 1988, the EPA promulgated financial responsibility requirements applicable to owners and operators of USTs containing petroleum, which included amendments to 40 C.F.R. Part 280, Subpart H. See 53 Fed. Reg. 433322, 1988 WL 258482 (Oct. 26, 1988) for the EPA's explanation of the regulations. See also 52 Fed. Reg. 12786, 1987 WL 131023 (April 17, 1987.)

48. In 1989, the EPA amended several provisions of 40 C.F.R. Part 280, Subpart H and, material here, 40 C.F.R. Sections 280.97(b)(1) and (b)(2), pertaining to financial responsibility requirements for UST's containing petroleum. The 1989 amendments refined required language of endorsements to existing insurance policies and certificates of insurance for insurance and risk retention group coverage. See 54 Fed. Reg. 47077-02, 1989 WL 287711 (Nov. 9, 1989) for the EPA's explanation of the amendments.

49. Currently, 40 C.F.R. Section 280.97 deals with "[i]nsurance and risk retention group coverage." Subsection 280.97(a), provides: "An owner or operator may satisfy the requirements of [Section] 290.93 [sic] by obtaining liability insurance that conforms to the requirements of this section from a qualified insurer or risk retention group. Such insurance may

be in the form of a separate insurance policy or an endorsement to an existing insurance policy."

50. Subsection 280.97(b) provides in part: "Each insurance policy must be amended by an endorsement, worded as specified in paragraph (b)(1), or evidenced by a certificate of insurance worded as specified in paragraph (b)(2) of this section . . . ." Pertinent here, Subsections 280.97(b)(2)2.d. and e. provide:

> d. Cancellation or any other termination of the insurance by the ["Insurer" or "Group"] will be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured. Cancellation for non-payment of premium or misrepresentation by the insured will be effective only upon written notice and only after expiration of a minimum of 10 days after a copy of such written notice is received by the insured.
>
> [Insert for claims-made policies:
>
> e. The insurance covers claims otherwise covered by the policy that are reported to the ["Insurer" or "Group"] within six months of the effective date of cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered occurrence that commenced prior to such policy retroactive date, if applicable, and prior to such policy renewal or termination date. Claims reported under such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.]
>
> * * *

51. The issues confronting the EPA in 1989, and which prompted the revisions set forth above, pertained to, in part, the EPA's efforts to make clear that the mandatory language in the certificate of insurance (Subsection 280.97(b)(2)2.e.) "requires that a claims-made insurance contract cover claims for any occurrence that commenced during the term of the policy and that is discovered and reported to the insurer within six months of the effective date of the cancellation or other termination of the policy." 54 Fed. Reg. at 47079. "This provision was meant to address concerns that a claims-made policy might leave a gap in coverage if, for example, a claim is reported after the expiration of a policy for a release that began prior to the policy expiration date." Id. The issue for the EPA was whether insurers should be required to provide an extended reporting period and the EPA stated its intention "that insurers provide extended reporting period coverage only where the termination or non-renewal of the policy results in the owner or operator having no coverage for releases that occurred during the time period of the previous policy and which are reported within six months after the termination or non-renewal of that policy. For discussion purposes, EPA has labeled this predicament as a 'gap' in coverage." Id.

52. The EPA identified "only two situations where the termination of a policy results in a 'gap' in coverage, and thus

only two situations where the insured whose policy is terminated must obtain extended reporting period coverage. The first situation occurs when the insured renews his existing policy or purchases a new policy and the renewed policy contains a retroactive date subsequent to the retroactive date of the insured's previous insurance policy. The second situation occurs where the policy is terminated or is not otherwise renewed and the insured elects a financial assurance mechanism other than insurance (such as a guarantee, surety bond, etc.) as a replacement. EPA is today promulgating revised language to clarify EPA's intended interpretation of paragraph 2.e. of the Endorsement contained in [Subsection 280.97(b)(1)] and of paragraph 2.e. of the Certification contained in [Subsection] 280.97(b)(2)."

53. Additionally, the EPA defines "termination," as used in Subsections 280.97(b)(1) and (2), to mean "only those changes that could result in a gap in coverage as where the insured has not obtained substitute coverage or has obtained substitute coverage with a different retroactive date than the retroactive date of the original policy." 40 C.F.R. Section 280.92; 54 Fed. Reg. at 47080.

54. Relevant here, the EPA amended Subsections 280.97(b)(1)d., 280.97(b)(2)d., and 280.105(a)(2) [now 280.109(a)(2)]

> to allow an insurer to terminate an insurance contract for non-payment of premium or misrepresentation by the insured after a 10 day notice period. EPA does not intend for this shortening of the coverage period from 60 to 10 days to apply to termination for any reason other than non-payment of premium or misrepresentation. The Agency is aware that some state insurance laws mandate a longer period following cancellation. In order to accommodate these state-specific situations, the amended language of [Section] 280.97(b)(1) Endorsement paragraph d and [Section] 280.105(a)(2) [now 280.109(a)(2)] specifies that the mandatory coverage period following termination for non-payment of premium or misrepresentation shall be a 'minimum of 10 days.' The insurer is still bound to provide the owner or operator with written notice of cancellation with the 10 day period beginning upon receipt of notice by the owner or operator.

54 Fed. Reg. at 47080. See also Endnote 9.

55. Conversely, the EPA expressly did not amend

> the requirement for a six-month extended reporting period following cancellation for non-payment of premium or misrepresentation. As noted in the previous section, the [EPA] believes that such a reporting period must be mandatory for all claims-made insurance contracts used to demonstrate financial assurance, regardless for the reason for termination. The six-month extended reporting period is essential to avoiding gaps in coverage that could threaten human health and environment, especially in cases where the owner or operator may have as few as 10 days upon receipt of notice of cancellation to obtain substitute coverage. The distinction between the two provisions, extended reporting period and the effective date of cancellation, is that even if a policy is cancelled for non-payment of premium, the extended reporting period merely extends the time during which an

> insured may report occurrences covered by the policy for which he or she has already paid. Thus the extended reporting provision does not provide the insured with a benefit for which he or she has not paid. In contrast, any delay in the effective date of a policy cancellation or termination due to regulatory requirements provides insureds who failed to pay their premium coverage for which they have not paid.

Id. at 47080-47081.

CONCLUSIONS OF LAW

Jurisdiction

56. The Division of Administrative Hearings has jurisdiction over the subject matter of, and the parties to, this proceeding. Sections 120.569 and 120.57(1).

The Parties - Standing

57. Petitioner and Intervenors have standing in this proceeding.

58. The Department of Environmental Protection has the statutory duty to determine eligibility for restoration coverage under FPLRIP.

Burden of Proof

59. This is a de novo proceeding designed to formulate final agency action. Petitioner has applied for restoration coverage under FPLRIP. Petitioner has the burden of showing by a preponderance of the "credible and credited evidence" entitlement to restoration coverage under FPLRIP. Department of

Transportation v. J.W.C., Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981); Section 120.57(1)(j). If this preliminary showing is made by Petitioner, the application cannot be denied "unless contrary evidence of equivalent quality is presented by the" Department. Id.

Eligibility Pursuant to FPLRIP

60. In 1976, Congress passed the Resource and Recovery Act (RCRC), Pub. L. No. 94-580, 90 Stat. 2795 (1976)(codified as amended at 42 U.S.C. Sections 6901-6991). Among other matters covered under RCRA, Congress provided for the regulation of USTs, 42 U.S.C. Section 6991 et seq., including authorizing the Administrator of EPA to adopt regulations pertaining to financial responsibility. 42 U.S.C. Section 6991b(d). Insurance was one of several mechanism which could be used to demonstrate financial responsibility. 42 U.S.C. Section 6991b(d)(1).

61. Consistent with this authorization, in 1988, the EPA promulgated financial responsibility regulations, 40 C.F.R. Parts 280 and 281. See 53 Fed. Reg. 43322, 1988 WL 258482 (Oct. 26, 1988). Several of these regulations, material here, were amended in 1989. 54 Fed. Reg. 47077-02, 1989 WL 287711 (Nov. 9, 1989).

62. All owners or operators of defined petroleum storage tanks must demonstrate financial responsibility as a matter of

federal law as implemented by federal regulations. 40 C.F.R. Section 280.93(a)(b). An owner or operator may use one or a combination of mechanisms, including insurance coverage. 40 C.F.R. Sections 280.94(a)(1) and 280.97. If insurance is chosen, the certificate of insurance must conform to the requirements of 40 C.F.R. Section 280.97, including, and material here, Subsections 280.97(b)(2)2.d. and e., printed in full in Finding of Fact 50. The dollar amount of financial responsibility is set forth in 40 C.F.R. Section 280.93. For example, $1 million is required for owners or operators of one to 100 petroleum underground storage tanks. 40 C.F.R. Section 280.93(b)(1).

63. The State of Florida requires each owner of a defined facility "to establish and maintain evidence of financial responsibility" "to meet the liabilities which may be incurred under ss. 376.30-376.319." Section 376.309(1). See Endnote 3.

64. The Department has the authority to, in part, establish rules for the regulation of USTs, Section 376.303(1)(a), and the Department has done so, including but not limited to, promulgating rules regarding the registration and financial responsibility of USTs. Fla. Admin. Code R. 62-761.400(3)(b)("Underground storage tank systems. The minimum requirements for financial responsibility for USTs containing

petroleum products shall be the same as provided by C.F.R. Title 40, Part 280, Subpart H.")

65. In an effort to supplement the owner or operator's financial responsibility, the State of Florida enacted FPLRIP. Section 376.3072. See also Fla. Admin. Code R. 62-761.400(a)3.("Financial responsibility requirements for petroleum storage systems containing petroleum products may be supplemented by participation in [FPLRIP] to the extent provided by Section 373.3072, F.S.")

66. The Department administers FPLRIP. This program provides restoration funding assistance to facilities regulated by the Department's petroleum storage tank rules. Section 376.3072(1).

67. Subsection 376.3072(2)(a)1. provides: "A site at which an incident has occurred shall be eligible for restoration if the insured is a participant in the third-party liability 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 (d)." See Section 376.3072(4)(c), for a definition of "incident." Material here, Subsection 376.3072(2)(d)2.d., provides: "For discharges reported to the department from

January 1, 1997, to December 31, 1998, the department shall pay up to $150,000 of eligible restoration costs, less a deductible of $10,000." "Beginning January 1, 1999, no restoration coverage shall be provided." Section 376.3072(2)(d)2.e.

68. "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 . . . . Thereafter, the facility's annual inspection report shall serve as evidence of the facility's compliance with department rules. The facility's certificate as an insured facility may be revoked only if the insured fails to correct a violation identified in an inspection report before a discharge occurs. The facility's certification may be restored when the violation is corrected as verified by reinspection." Section 376.3072(2)(b)1.

69. Subsections 376.3072(2)(b)2. and 4. provide:

> 2. Except as provided in paragraph (a), to be eligible to be certified as an insured facility, the applicant must demonstrate to the department that the applicant has financial responsibility for third-party claims and excess coverage, as required by this section and 40 C.F.R. s. 280.97(h) and that the applicant maintains such insurance during the applicant's participation as an insured facility.
>
> * * *
>
> 4. Upon a report of a discharge, the department shall issue an order stating that

> the site is eligible for restoration coverage unless the insured has intentionally caused or concealed a discharge or disabled leak detection equipment, has misrepresented facts in the affidavit filed pursuant to subparagraph 1., or cannot demonstrate that he or she has obtained and maintained the financial responsibility for third-party claims and excess coverage as required in subparagraph 2.

(Emphasis added.) (In 1996, the Legislature, in part and material here, amended Subsections 376.3072(2)(b)2. and 4. Ch. 96-277, Section 8, at 1159-1160, Laws of Fla. See House of Representatives as Further Revised by the Committee on Appropriations Bill Analysis & Economic Impact Statement, CS/HB 1127 (April 24, 1996)(Series 19, Carton 2689, Florida State Archives)).

70. In this case, Petitioner timely provided the Department with a Certificate of Insurance, evidencing third-party and excess coverage, for Petitioner's facility which housed several USTs. The Department issued Petitioner a Notice of Eligibility based on the Certificate of Insurance. Thus, the Department determined that Petitioner demonstrated financial responsibility at the time the Notice of Eligibility was issued, which enabled Petitioner to be eligible to participate in FPLRIP.

71. The term of Petitioner's insurance policy expired of its own terms on September 3, 1998.

72. On September 17, 1998, a Discharge Report Form was filed with the Department, confirming a discharge at the facility on September 15, 1998.

73. During this de novo hearing, Petitioner proved that the discharge, which was the subject of the Discharge Report Form, most likely occurred prior to September 3, 1998, within the Policy period. The discharge was reported to the Department within the extended reporting period recited in the Certificate of Insurance.

74. In order for Petitioner to be eligible for restoration coverage under FPLRIP, for the first-dollar coverage up to $150,000, and subject to the statutory deductible, "[u]pon report of a discharge," Petitioner must demonstrate that he has obtained and maintained the financial responsibility for third-party claims and excess coverage as required in subparagraph 2. Section 376.3072(2)(b)4. Subsection 376.3072(2)(b)2. requires Petitioner to demonstrate that he complied with the financial responsibility requirements required by Section 373.3072 and 40 C.F.R. Section 280.97, and "maintains such insurance during [Petitioner's] participation as an insured facility." These requirements were enacted in 1996. Ch. 96-277, Section 8, at 1159-1160, Laws of Fla. None of the parties offered any extrinsic evidence of legislative intent, and independent

research discloses none. See Conclusion of Law 69, referring to a legislative staff analysis.

75. The plain language of these provisions requires Petitioner, having selected insurance and FPLRIP as the mechanisms for financial responsibility, to have an appropriate insurance policy in effect on September 17, 1998, the date the Discharge Report Form was filed with the Department. The fact that the discharge was reported to the Department within the six-month extended reporting period does not satisfy the requirements of Subsections 376.3072(2)(b)2. and 4., because the Policy, or part of the financial responsibility mechanism, expired on September 3, 1998. This analysis reflects the Department's interpretation and is entitled to great deference. AmeriSteel Corp. v. Clark, 691 So. 2d 473, 477 (Fla. 1997). The Department's view is not contrary to the statute's plain and ordinary meaning. See PAC for Equality v. Department of State, Florida Elections Commission, 542 So. 2d 459, 460 (Fla. 2d DCA 1989). See also Florida Department of Education v. Cooper, Case No. 1D-4040, 2003 WL 22508245 (Fla. 1st DCA No. 6, 2003). (A liberal construction of Chapter 376, Part II, Florida Statutes, does not change the result. See Alto v. State of Florida, Department of Environmental Protection, Case No. 1D02-4579, 2003 WL 22508283 (Fla. 1st DCA. Nov. 6, 2003)).

76. This does not end the inquiry because Petitioner contends that the Policy period was extended through and including, at least, September 21, 1998, because the insurance company did not give Petitioner notice of cancellation or termination of the Policy pursuant to the terms of the Certificate of Insurance and 40 C.F.R. Section 280.97(b)(2)d. See Findings of Fact 18 and 19.

77. Petitioner contends that the Policy period should be extended, at the very least, 10 days from the date of FPLIPA's September 11, 1998, letter advising Petitioner of the expiration of the Policy. If the Policy is extended, then the Policy would have been effective, i.e., not expired, on September 17, 1998, and Petitioner necessarily would have maintained the insurance "[u]pon report of the discharge," consistent with Subsections 376.3072(2)(b)2. and 4.

78. Whether the 10 or 60-day notice provisions apply in this case is not without doubt. During the promulgation of, and amendments to, 40 C.F.R. Section 280.97, and in particular in 1988 and 1989, the EPA generated a substantial amount of information regarding its interpretation of these provisions (and other provisions including the extended reporting provision) and, at times, the discussion is confusing. See, e.g., Findings of Fact 47-55.[9]

79. There is only one cited case on the subject, Federated Mutual Insurance Company v. Germany, 712 So. 2d 1245 (Fla. 5th DCA 1998). In Federated Mutual Insurance Company, Germany leased and operated a service station and carried pollution liability insurance which included liability coverage for third-party bodily injury and property damage. On October 6, 1989, and retroactive to September 12, 1989, Germany sent the insurance company (Federated) a letter of cancellation, advising that Germany decided to move coverage to the state insurance program. After Germany turned over control of the station, a successor transferee discovered petroleum contamination on March 19, 1990. On March 29, 1990, the Department also "discovered free product in a monitoring well." Federated was notified shortly thereafter.

80. A Notice of Violation was issued three and a half years later. The then owners of the property sued their predecessors. Cross-claims were filed. Germany filed a third-party complaint against Federated.

81. According to the court's opinion, the trial court was asked to determine whether then existing 40 C.F.R. Section 280.97(d) applied. (This subsection required the endorsement to include the following: '(d) Cancellation or any other termination of the insurance by the insurer will be effective only after the expiration of 60 days after a copy of such

written notice is received by the insured." Compare 53 Fed. Reg. at 43375-43376, which cited this provision as 40 C.F.R. Section 280.97(1)2.d.)

82. Also, the "cancellation" provisions of the insurance policy were recited which, in part, allowed Germany to cancel by giving written notice of cancellation and also allowed Federated to cancel by, in part, giving Germany notice of cancellation at least 10 days before the effective date of cancellation if cancelled for nonpayment of premium or 30 days for any other reason.

83. The trial court initially denied Federated's motion for summary judgment. A successor judge also denied a renewed motion filed by Federated, construing the 60-day (C.F.R.) provision in favor of Germany.

84. The court reversed and determined that the claim was not covered under the policy because the 60-day provision "plainly applies only where the insurer has initiated the cancellation or other termination of an insurance policy. If there is any genuine doubt about who cancels a policy, i.e., whether an insured cancels or merely requests an insurer to cancel, this question is answered in the policy." Id. at 1248. (Emphasis in original.)

85. The court also noted that the 60-day provision was mandated by federal rule and that

> if ambiguity is perceived, the court's duty is to attempt to determine the intent of the rule, not to construe the rule in favor of coverage. The obvious purpose of the provision is to protect a policyholder from a sudden gap in coverage caused by an insurer's involuntary cancellation or termination of the policy. See 54 Fed. Reg. 47077-02 (1989); see also Cat 'N Fiddle, Inc. v. Century Ins. Co., 213 So. 2d 701 (Fla. 1968)(purpose of provision in insurance policy providing for cancellation only after notice to insured for prescribed period is to permit insured to obtain insurance elsewhere without exposure). The sixty-day delay in cancellation is designed to permit a policyholder to obtain new coverage prior to the effective date of the cancellation or other termination (such as non-renewal). It is not meant to apply where the policyholder has sent a notice of cancellation of the policy to the insurer, who then cancels the policy at the insured's request and on the date the insured requests.

Id. at 1248. (Emphasis in original.)

86. Here, the insurer did not cancel or terminate the Policy and neither did the insured. Mr. Sullivan, on behalf of the Trust, was advised of, and received notice of, the opportunity to renew the Policy prior to September 3, 1998. Mr. Sullivan was advised: "Policy cannot be renewed if paperwork is not received." Mr. Sullivan knew that if he did not "sign and renew the application, there would not be any insurance after September 3rd."

87. "The lapse or expiration of an insurance policy is distinguishable from a policy cancellation: when the insurer acts to terminate a policy during its term, the policy has been

cancelled; when the insured fails to pay a renewal premium before the policy expiration date, however, the policy has lapsed . . . . These principles are consistent with the general rule that a contract which specifies the period of duration terminates on the expiration of such period." Unruh v. Prudential Property and Casualty Insurance Company, 3 F. Supp. 2d 1204, 1206 (D. Kan. 1998). (Citations omitted.) "The general rule than an insurance policy lapses if the insured fails to pay the renewal premium before the policy expiration date may be modified by a statutory requirement of notice." Id. at 1207. (Citations omitted.) "Contractual requirements of notice may also avoid a lapse of the policy." Id. (Citations omitted.) See also Mountain Fuel Supply v. Reliance Insurance Company, 933 F.2d 882, 890 n.11 (10th Cir. 1991).

88. In this case, there was no involuntary cancellation or termination of the Policy. Federated Mutual Insurance Company, 712 So. 2d at 1248. The Policy expired by its express terms and the 10 or 60-day provisions referred to herein do not apply to extend the period of coverage. Petitioner did not prove that it maintained insurance coverage on the reporting date, and accordingly did not maintain financial responsibility when the discharge was reported to the Department on September 17, 1998. Therefore, Petitioner is not eligible to participate in FPLRIP.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Environmental Protection enter a final order that Petitioner is not eligible for restoration coverage under FPLRIP.

DONE AND ENTERED this 12th day of November, 2003, in Tallahassee, Leon County, Florida.

S

CHARLES A. STAMPELOS
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Filed with the Clerk of the
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this 12th day of November, 2003.

ENDNOTES

[1]/ The parties stipulated that Petitioner owns the facility at 2620 S.R. 207, whereas the Certificate of Insurance is issued to the facility (Chevron-207) located at 2630 S.R. 207. There is no dispute in this proceeding that the property described in the Certificate of Insurance is at the approximate location as the facility owned by Petitioner, and which is the site of the discharge.

[2]/ The Notice of Eligibility was generated by the agent, here the Florida Petroleum Liability Insurance Program

Administrators, Inc. (FPLIPA), for the insurance company, here Commerce & Industry Insurance Company, and the Department. The Notice was sent to the Department and verified, and then sent to the applicant.

[3]/ "Each owner of a facility is required to establish and maintain evidence of financial responsibility. Such evidence of financial responsibility shall be the only evidence required by the department that such owner has the ability to meet the liabilities which may be incurred under ss. 376.30-376.319." Section 376.309(1). A "'[f]acility' means a nonresidential location containing, or which contained, any underground stationary tank or tanks which contain hazardous substances or pollutants . . . ." Section 376.301(18). "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 . . . . Thereafter, the facility's annual inspection report shall serve as evidence of the facility's compliance with department rules . . . ." Section 376.3072(2)(b)1. Petitioner is the owner of a site and "facility" which contained several USTs.

[4]/ Mr. Cornman oversees eligibility for clean-up programs with the Department, including FPLRIP; the early Detection Incentive Program; the Petroleum Clean-up Participation program; and the Tank Restoration Program. He is also the compliance and insurance subsection administrator and oversees contracts and financial responsibility requirements.

[5]/ Subsection 376.3072(2)(b)2. provides: "Except as provided in paragraph (a), to be eligible to be certified as an insured facility, the applicant must demonstrate to the department that the applicant has financial responsibility for third-party claims and excess coverage, as required by this section and 40 C.F.R. s. 280.97(h) and that the applicant maintains such insurance during the applicant's participation as an insured facility." Pursuant to the Notice of Eligibility, the Department determined that, at the time of the issuance of this Notice, Petitioner was eligible for restoration coverage under the FPLRIP, subject to continued compliance. See Finding of Fact 10.

[6]/ The Department contracted with FPLIPA, which in turn, issued insurance policies on behalf of the insurance company, here Commerce and Industry Insurance Company.

[7]/ The deposition of Mr. Harrison was attended by all counsel of record for the parties in this case, and by Douglas M. Halsey, Esquire, on behalf of AIG Insurance Company.

[8]/ Mr. Sullivan stated that the storage tanks were scheduled to be removed prior to September 3, 1998, and that any delay in the removal was due to Pipeline.

[9]/ With respect to the shortened 60-day period adopted in 1988, the EPA stated: "As noted earlier, a 60-day notice period is standard in many states. In addition, insurers, for example, could protect themselves by establishing an appropriate schedule of premium payment. Insurers could require payment 90 days before the expiration date of coverage for the maintenance or renewal of the policy. An insurer could then terminate the policy with 60 days notice if an insured does not meet the schedule of payment within 30 days of the premium due date. The Agency therefore is requiring a 60-day notice period for termination of coverage in the event of non-payment of premium by an insured." 53 Fed. Reg. at 43357. See also 53 Fed. Reg. at 43349-43351. The quoted language was referred to by Mr. Fingar. (T: 95-96.) (The 60-day period was shortened to 10 days in 1989 for cancellation by the insurer for non-payment of premium or misrepresentation by the insured. 40 C.F.R. Section 280.97(b)(2)2.d.) In referring to the 10-day period, Mr. Fingar suggests that the EPA is "imposing a burden on the insurance company by attaching another 10 days onto the policy period. (T: 96.) Mr. Fingar also stated that the EPA wanted "to ensure some sort of overlap so that there would be continuous coverage, and so they imposed this 10-day burden on the first insurance carrier to prevent that gap from occurring." (T: 94.)

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.