

Releases & Real Estate & Risk

Presented By:
Jason A. Wiles, Esq.

PURPOSE

Provide an overview of:

- ▶ Legal Liabilities of Petroleum Contaminated Real Estate
- ▶ Minimizing Risk of Environmental Liability
 - ▶ Pre-acquisition Due Diligence
 - ▶ Compliance
 - ▶ Incidents, Releases, and Discharges
- ▶ Minimizing Environmental Cleanup Costs
 - ▶ Funding Mechanisms for Petroleum Contamination Assessment & Remediation
 - ▶ Remedial Options

CONTAMINATED REAL ESTATE

Forget the 3 “L’s”:

LOCATION, LOCATION, LOCATION

With Commercial Real Estate:

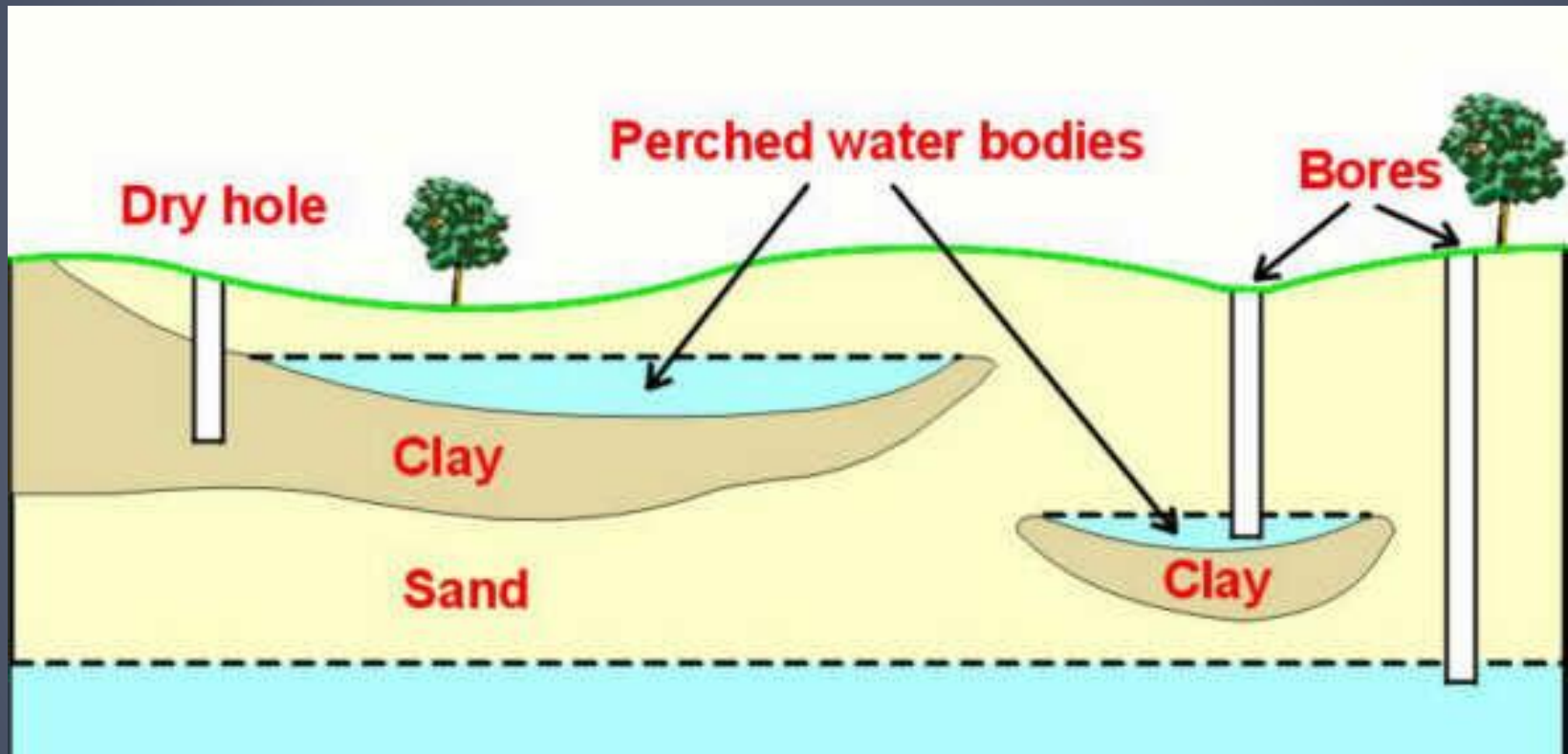
RISK RELEASE REMEDIATION

- ▶ **Ninety percent** of Florida’s drinking water comes from several aquifers underlying the State,
- ▶ Total number of contaminated sites registered in a state funded program eligible – **19,164**
- ▶ Average cost of cleanup of petroleum contaminated site in FL – **\$400,000 - \$1 Million**

PETROLEUM CONTAMINATION IN NY

- ▶ **Ninety percent** of Florida's drinking water comes from several aquifers underlying the State,
- ▶ Total number of contaminated sites registered in a state funded program eligible – **19,164**
- ▶ Average cost of cleanup of petroleum contaminated site in FL –
\$400,000 - \$1 Million
- ▶ Discharges reported: 1993 – **1836** → 2011 – **243**
- ▶ State Funding – IPTF - **\$125 Million**

FLORIDA'S HYDROLOGY





Legal Liabilities & Petroleum Contaminated Real Estate

- ▶ Federal –
 - ▶ CERCLA
 - ▶ RCRA
 - ▶ Energy Action of 2005
 - ▶ (CAA and CWA)
- ▶ State
 - ▶ Chapter 376
 - ▶ Chapter 403
- ▶ Local
 - ▶ DERM –
 - ▶ Building Codes/Zoning
- ▶ Agency - FDEP
 - ▶ Chapter 62-761, 62-762, & 62-770, Florida Administrative Code



FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION BUREAU OF PETROLEUM STORAGE SYSTEMS - BPSS

BPSS has two basic missions.

“The first is to clean up, in a health threat priority order system, all known petroleum-contaminated sites eligible in one of the five legislative cleanup programs and to ensure that all non-eligible discharges are cleaned up in accordance with **Chapter 62-770, FAC.**”

“The second mission is to reduce or eliminate future discharges to ensure that the State does not suffer a petroleum contamination relapse of the magnitude that was discovered in the late 1980s and early 1990s.”
(Compliance)



Minimizing Risks of Environmental Liability

American Society for Testing and Materials (ASTM)

- ▶ ASTM – E1527
- ▶ The purpose
 - ▶ define **good commercial and customary practice** in the United States of America for conducting an **environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants** within the scope of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. 9601) and petroleum products.
 - ▶ intended to permit a user to satisfy one of the requirements to qualify for the **innocent landowner, contiguous property owner, or bona fide prospective purchaser limitations on CERCLA liability** : that is, the practice that constitutes "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice" as defined at 42 U.S.C. 9601(35)(B)



<http://dwmedms.dep.state.fl.us/Oculus/servlet/login>



Oculus 5.5.6

Login ID:

Password:

Login

Change Password

Public Users please use the button below to log directly into OCULUS.

PUBLIC OCULUS LOGIN

Changes in the new version of OCULUS - [DEP Users](#) : [Public Users](#)

For OCULUS support, please e-mail: [servicedesk@dep.state.fl.us](mailto: servicedesk@dep.state.fl.us)

**Welcome to the Florida DEP Division of Waste Management
OCULUS Electronic Document Management System.**

The following programs have documents in the OCULUS document management system:

- Hazardous Waste
- Solid Waste
- Storage Tanks
- Waste Cleanup

Help using OCULUS

We have several tools to help in using the OCULUS Document Management System. At any point, users can click the help menu item to open the [Online help system](#) for help using OCULUS features. For help finding documents in OCULUS, please see the [Public Document Taxonomy](#). If you believe that you've found an error with a document, please contact [servicedesk@dep.state.fl.us](mailto: servicedesk@dep.state.fl.us) to report the problem.

At times Microsoft Office updates may cause users to lose the ability to "View" TIF documents in OCULUS and limit their options to 'Save' or 'Cancel' when trying to view them. If your computer is experiencing this problem, please try the steps outlined [in this document](#).

If you can open documents correctly but find black pages while viewing "TIF" documents from OCULUS or you are having other trouble viewing documents, please [follow these instructions](#) for help installing an alternative viewer.

If you're still having trouble, please contact [servicedesk@dep.state.fl.us](mailto: servicedesk@dep.state.fl.us) for assistance.

Compliance

- ▶ 62-761 and 62-762
- ▶ Monthly Visual Inspections, Release Detection, Financial Responsibility, Testing, Records,
 - ▶ Operator Training
 - ▶ Corrosion
- ▶ Fines - Federal(NY – MD) - State
- ▶ Insurance
- ▶ Real Estate Transactions

Incidents & Discharges

INCIDENT

- ▶ A condition or situation indicating that a discharge may have occurred from a storage tank system. 62-761.200(29)

So what does that mean?

INCIDENT

- ▶ Failed SIR evaluation
- ▶ Perforations, corrosion holes, weld failures
- ▶ Sudden loss of product
- ▶ Odors



INCIDENT

- ▶ Loss >100 gallons on impervious surfaces
- ▶ Positive response of detection devices
- ▶ Free product in sump



INCIDENT

1. Submit Incident Notification Form (INF) 62.761.900(6) within 24 hours of discovery of incident
2. **Put insurance carrier on notice**
3. You have 14 days to investigate the incident, to verify whether or not it's a "discharge"
 - ▶ If a "discharge has occurred...."

DISCHARGE

- ▶ Any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, or dumping of any regulated substance that affects lands and the surface and ground waters of the State.
62.761.200(13)

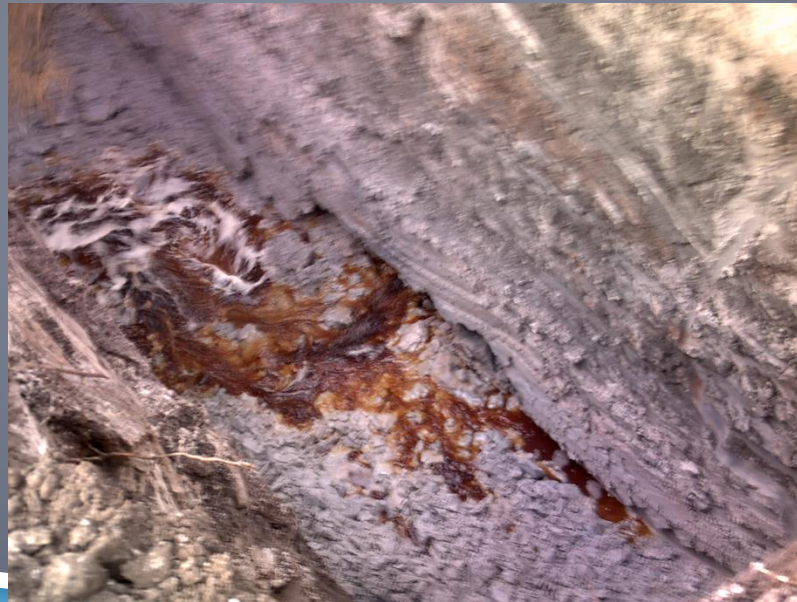
So what does that mean?

DISCHARGE

- ▶ Analytical results of surface water, groundwater, or soils indicating contamination
- ▶ Spill or overfill event to soil ≥ 25 gallons

DISCHARGE

- ▶ Free product or sheen in surface or groundwater, soils, basements, sewers, and utility lines



DISCHARGE

- ▶ Exception: If contamination is part of a known discharge then no DRF
- ▶ Do not assume... we know what that does...



- ▶ Contact Consultant

DISCHARGE

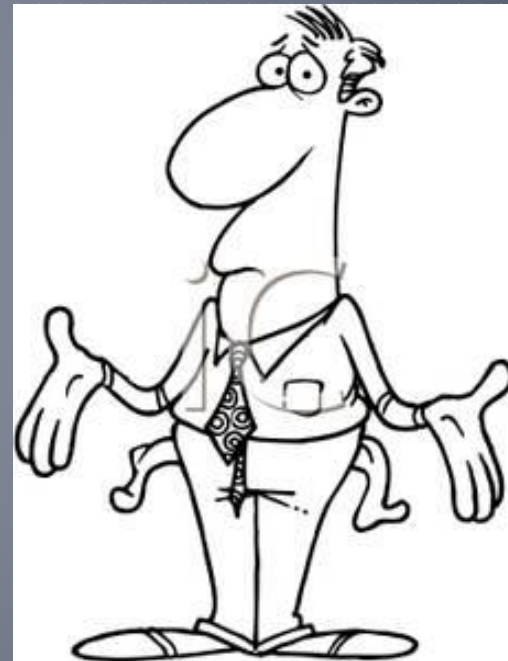
- ▶ Submit Discharge Reporting Form (DRF) 62.761.900(1) *within 24 hours of discovery of discharge*
- ▶ County will require you to initiate site assessment and cleanup activities
- ▶ **NOTIFY YOUR INSURANCE CARRIER**

Minimizing Costs of Cleanup

Funding Available



Out of Pocket



Contamination Cleanup Funding Resources

FUNDING

- ▶ IPTF - FDEP Programs
 - ▶ 6 ways to obtain State funding
- ▶ Insurance
- ▶ Out of Pocket

Chapter 376, Florida Statutes (1984)

Inland Protection Trust
Fund

Early Detection Incentive
Program (EDI)

Petroleum Liability &
Restoration Insurance
Program (PLIRP)

Abandoned Tanks
Restoration Program
(ATRP)

Petroleum Cleanup
Participation Program
(PCPP)

Innocent Victim

INLAND PROTECTION TRUST FUND (IPTF)

- ▶ Est. 1986 as dedicated fund for cleanup of petroleum contamination
- ▶ Funded from tax on every barrel of petroleum in, or imported into, the State
- ▶ Tax generates over \$200 million for the IPTF
- ▶ Florida Department of Environmental Protection administers the funds under the Preapproval Program

FDEP PREAPPROVAL PROGRAMS

- ▶ Early Detection Incentive Program (**EDI**)
- ▶ Petroleum Liability and Restoration Insurance Program (**PLIRP**)
- ▶ Abandoned Tank Restoration Program (**ATRP**)
- ▶ Innocent Victim Petroleum Storage System Restoration Program (**IVP**)
- ▶ Petroleum Cleanup Participation Program (**PCCP**)
- ▶ Consent Order based on inability to pay

FDEP PREAPPROVAL PROGRAMS

- ▶ Cleanup funding eligibility remains with the discharge regardless of changes in real property or storage tank owners

EDI PROGRAM

- ▶ First of the eligibility programs created in 1986
- ▶ Amnesty program in which the State pays for cleanup
- ▶ Covers discharges between 1986 and 1988
- ▶ There are no caps or deductibles for EDI eligible sites

PLIRP

- ▶ Intended to take over where EDI left off, 1988-1998
- ▶ Deductibles and rules have changed frequently
- ▶ PLIRP has two deductibles:
 - ▶ discharge date (\$500-\$10,000)
 - ▶ supplemental from penalties (\$5,000-\$25,000)
- ▶ The cap depends upon discharge date
- ▶ PLIRP funding caps are currently:
 - ▶ \$300,000
 - ▶ \$400,000
 - ▶ \$1.2 million per incident

ATRP

- ▶ Created to address contamination at facilities that were “out of the business of storing petroleum”
- ▶ Eligibility requires a facility cannot have stored petroleum products for use of sale since 1996
- ▶ ATRP deductible is set at \$500
- ▶ No cap!

INNOCENT VICTIM

- ▶ A subset of the ATRP program
- ▶ Created by the State Legislature in 2005 for sites
 - ▶ acquired prior to July 1, 1990
 - ▶ ceased operating as a petroleum storage or retail business prior to January 1, 1995

PCPP

- ▶ Created in an attempt to include all sites that had missed all of their previous opportunities
- ▶ \$400,000 cap
- ▶ Discharges are eligible pending completion of
 - ▶ Limited Contamination Assessment Report (LCAR)
 - ▶ an agreement to share 25% of cost

POLLUTION LIABILITY INSURANCE

- ▶ “The Premises Pollution Liability (PPL) Policy offers industrial, commercial, and agricultural property owners, managers and developers a broad range of pollution liability protection for **gradual, as well as sudden and accidental, first-party and third-party environmental liabilities.**”
- ▶ “This fixed-site Pollution Liability coverage is available for a wide range of facilities and responds to **losses arising from pollution events at or emanating from an insured location.** On and off-site clean-up costs, as well as, third party claims arising from sudden and gradual pollution events at an insured's location(s) are included in this form.
- ▶ Great supplement to complications in Fund Coverage and offsite contamination... not guaranteed coverage

SITE INVESTIGATION & INTERIM SOURCE REMOVAL

- ▶ Interim Source Removal
 - ▶ Free Product Recovery
 - ▶ Source Removal (Soil)
 - ▶ Short – Term Groundwater Recovery
 - ▶ Report with 60 days of Completion

SITE INVESTIGATION

- ▶ Free Product Removal
 - ▶ Start within 3 Days
 - ▶ Active and Passive Methods
 - ▶ Notification within 10 days
 - ▶ Report Annually



SITE INVESTIGATION

- ▶ **Free Product Removal**
 - ▶ Passive Recovery
 - ▶ Absorbent Pads
 - ▶ Absorbent Sock
 - ▶ Absorbent Media
 - ▶ Disposal



SITE INVESTIGATION

- ▶ Free Product Removal
 - ▶ Active Recovery
 - ▶ Bailing
 - ▶ Skimmer Pumping
 - ▶ Vacuum Recovery
 - ▶ Do not use Shop Vac



SITE INVESTIGATION

► Source Removal



SITE INVESTIGATION

- ▶ Source Removal
 - ▶ Disposal
 - ▶ 60 Days
 - ▶ Soils only
 - ▶ Lab Data
 - ▶ Land Farming

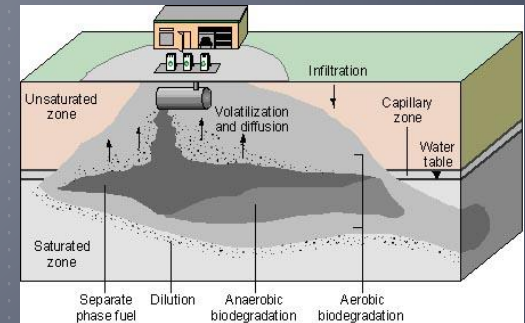
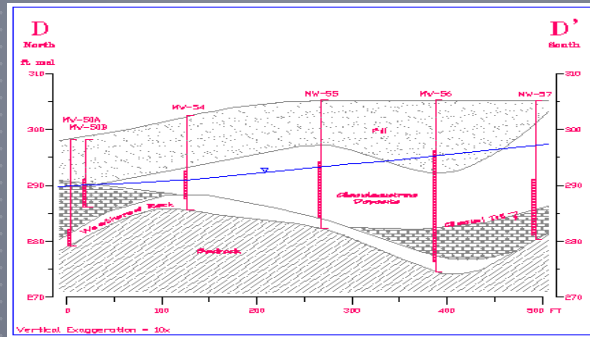
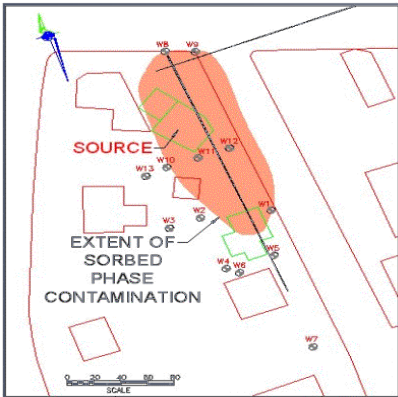


▶ Short Term Groundwater Recovery

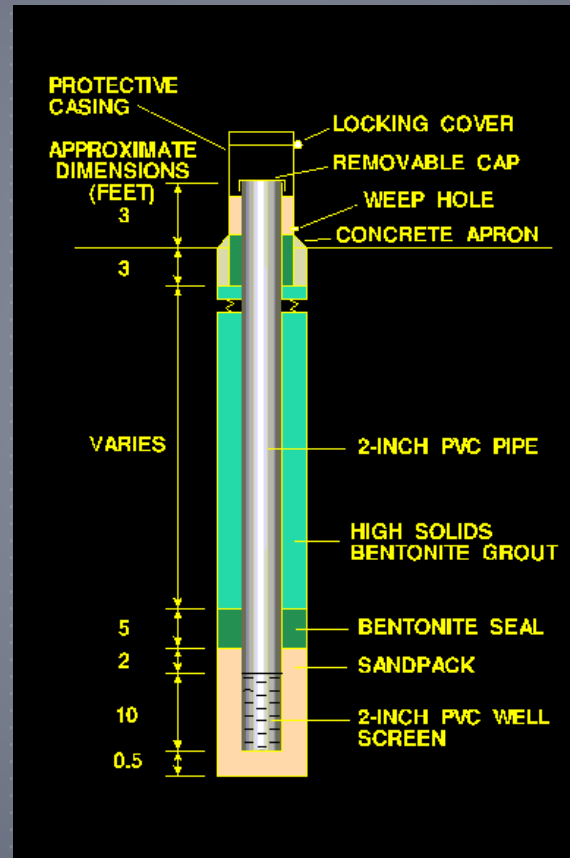
- ▶ Plume < ¼ Acre
- ▶ No Free Product
- ▶ Not to Exceed 30 Days
- ▶ No Onsite Treatment
- ▶ Sample 30 Days Later
- ▶ Vacuum Truck or Submersible Pump

SITE INVESTIGATION HORIZONTAL & VERTICAL DELINEATION

MAP OF IMPACTED SOIL



SITE INVESTIGATION GROUNDWATER CONTAMINATION



SITE INVESTIGATION

► Lab Testing

ANALYTICAL DATA

Laboratory Sample Number: 107679

Sample Time: 14:30

Grab or Composite: G

Client Sample ID: SB-22

Sample Date: 9/7/2010

Matrix: GW

Client Sample Location:

Date Received: 09/08/2010

Volatiles by Gas Chromatography/PID/ECLD

Preparation Method / Date: NA

InstrumentID: GC1021PID1

Extraction Method / Date: 5030 - 09/08/2010

DataFile: PID2-58387

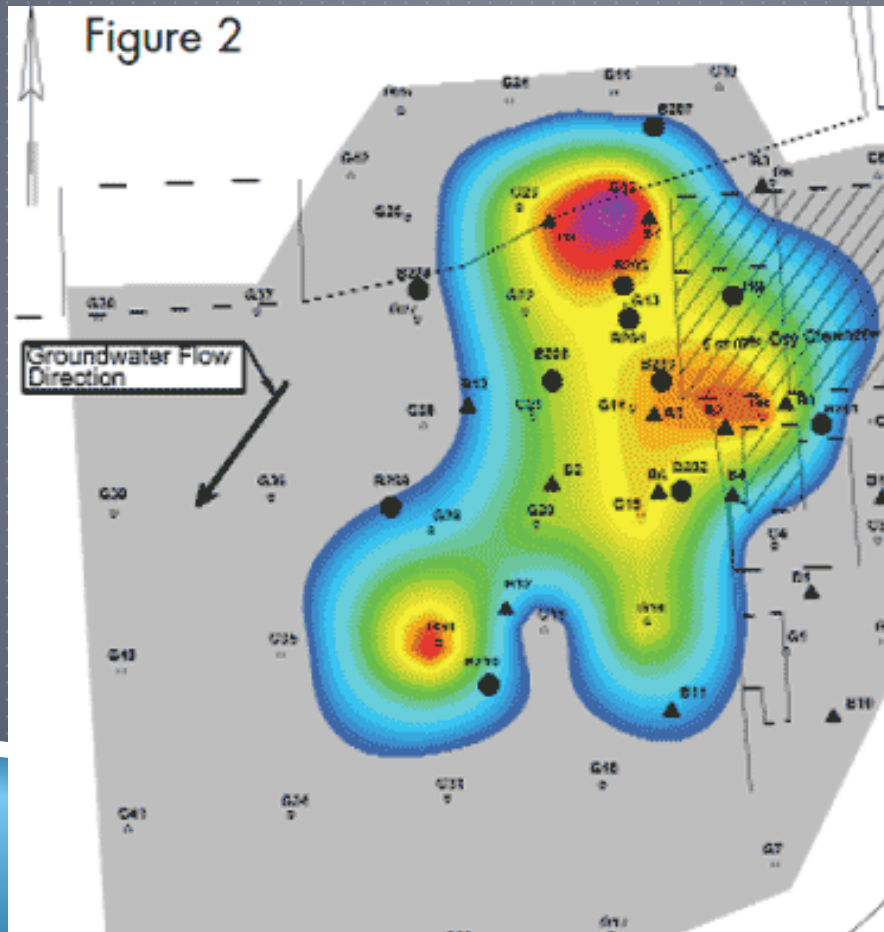
Sample Volume (L): 0.0050

Analysis Method / Date: 8021B - 09/08/2010

Analysis Time:

ANALYTE	CAS No.	RESULT	DF	MDL	PQL	UNITS	ANALYST
METHYL-TERT-BUTYL ETHER	1634-04-4	6.0	1.0	0.20	1.0	ug/L	MTA
BENZENE	71-43-2	0.88 U	1.0	0.88	1.0	ug/L	MTA
TOLUENE	108-88-3	0.50 IV	1.0	0.44	1.0	ug/L	MTA
ETHYLBENZENE	100-41-4	0.43 U	1.0	0.43	1.0	ug/L	MTA
TOTAL XYLENES	1330-20-7	1.3 U	1.0	1.3	2.0	ug/L	MTA
A,A,A-TRIFLUOROTOLUENE (S\$)		102	1.0	NA	70% - 130%	%	MTA

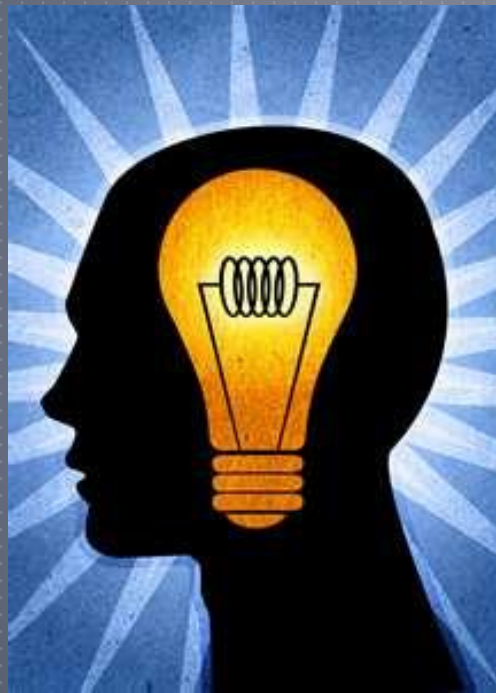
► Extent Of Contamination



REMEDIAL OPTIONS

REMEDIAL OPTIONS

► Remedial Action Plan



REMEDIAL OPTIONS

Excavation



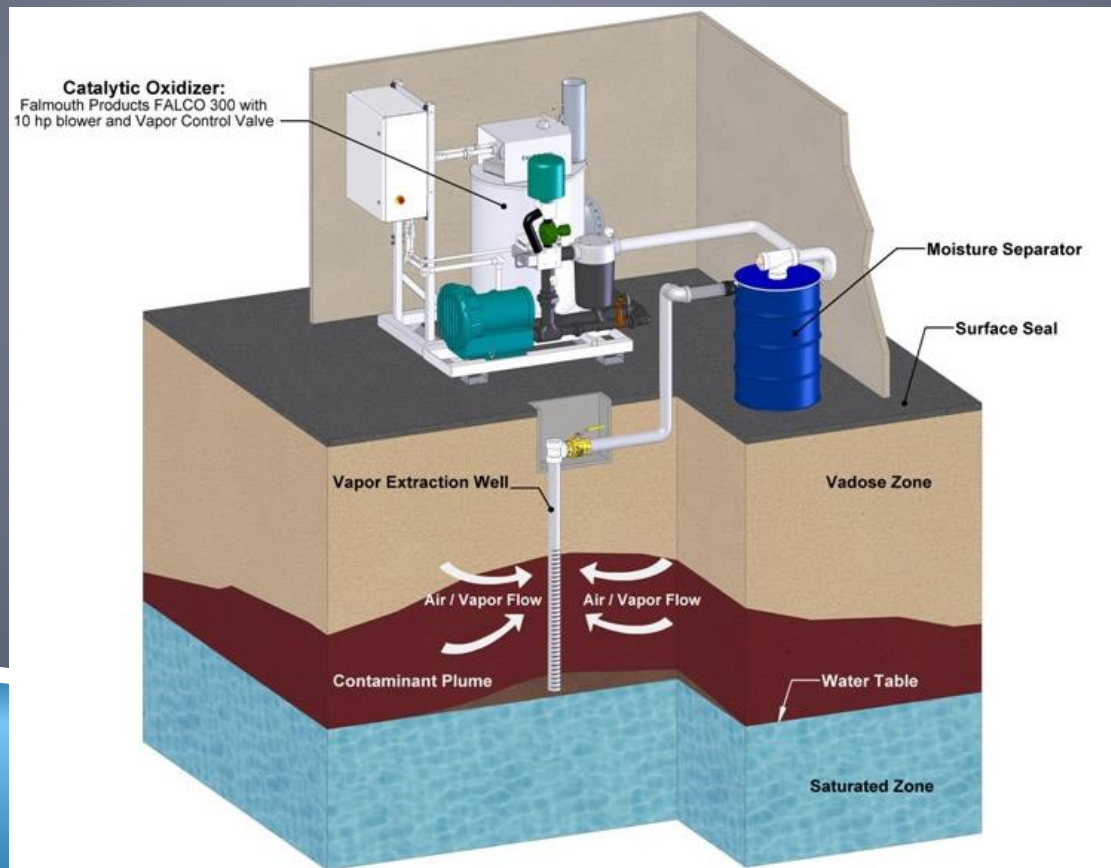
REMEDIAL OPTIONS

► In-situ Options



REMEDIAL OPTIONS

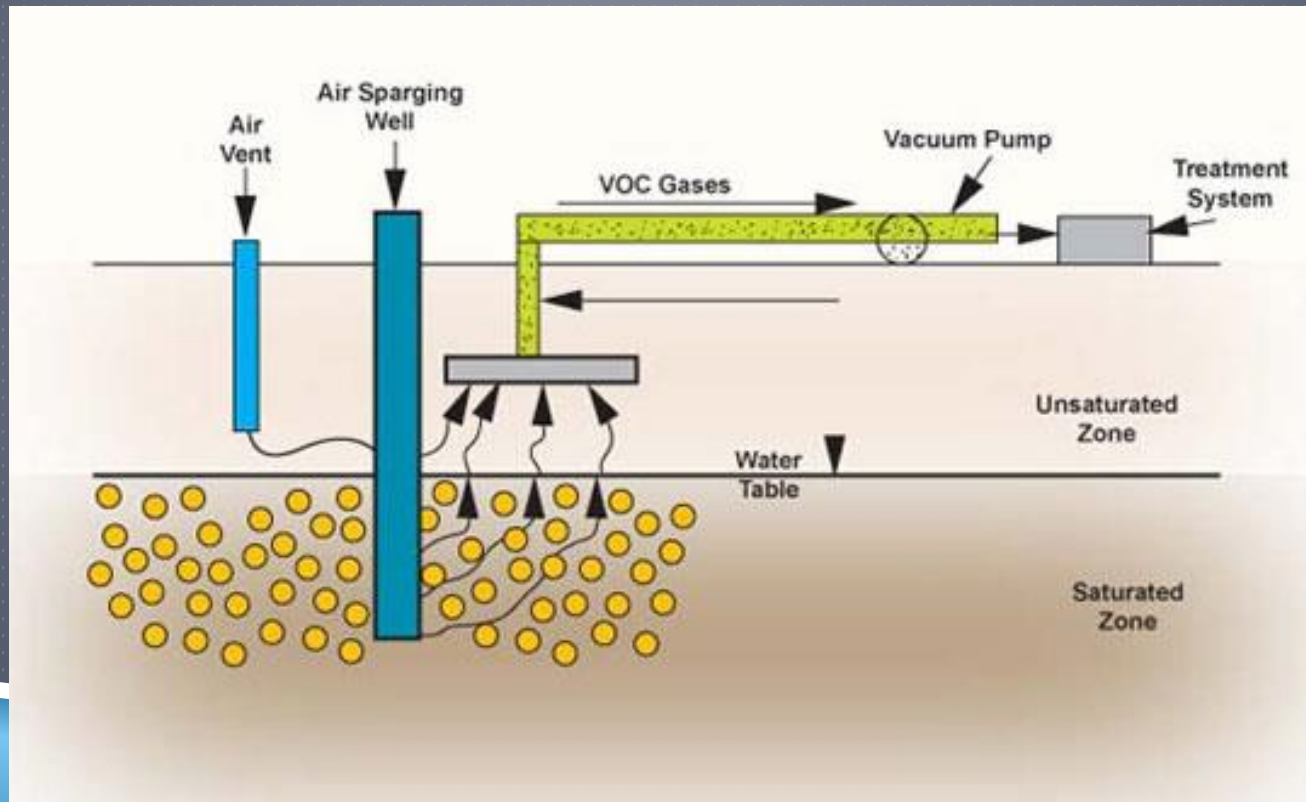
► In-situ Options Soil Vapor Extraction



SOIL VAPOR EXTRACTION (SVE)

REMEDIAL OPTIONS

► In-situ Options - Air Sparge



REMEDIAL OPTIONS

► Air Stripping



REMEDIAL OPTIONS



REMEDIAL OPTIONS



REMEDIAL OPTIONS



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REMEDIAL OPTIONS

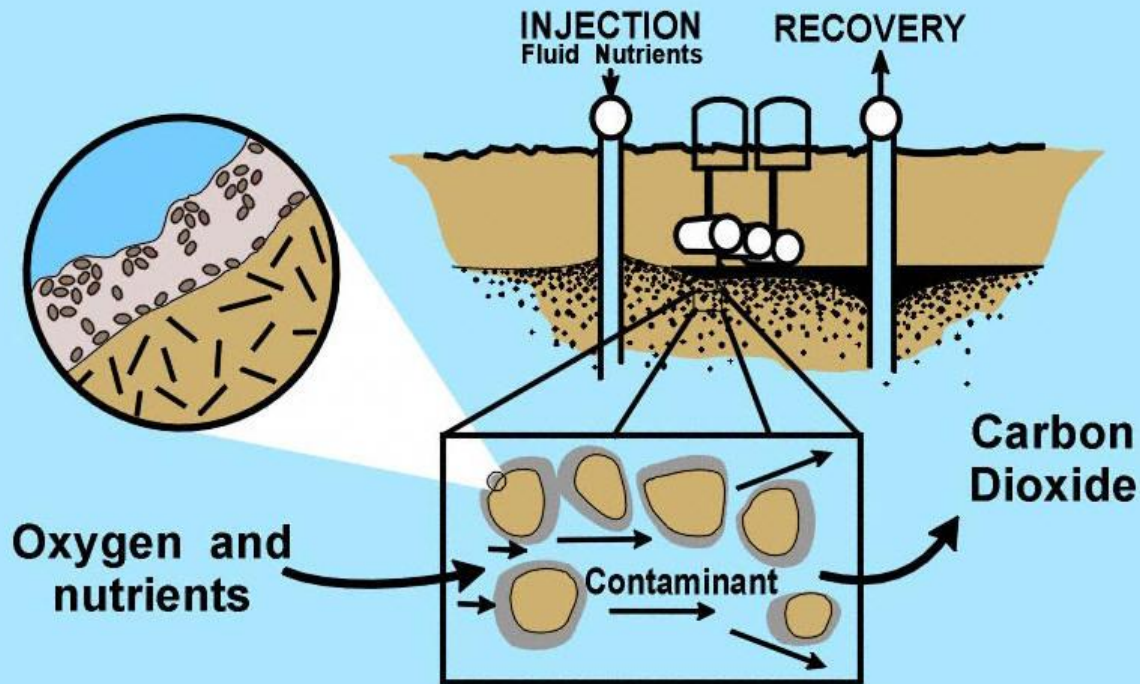
► Chemical



REMEDIAL OPTIONS

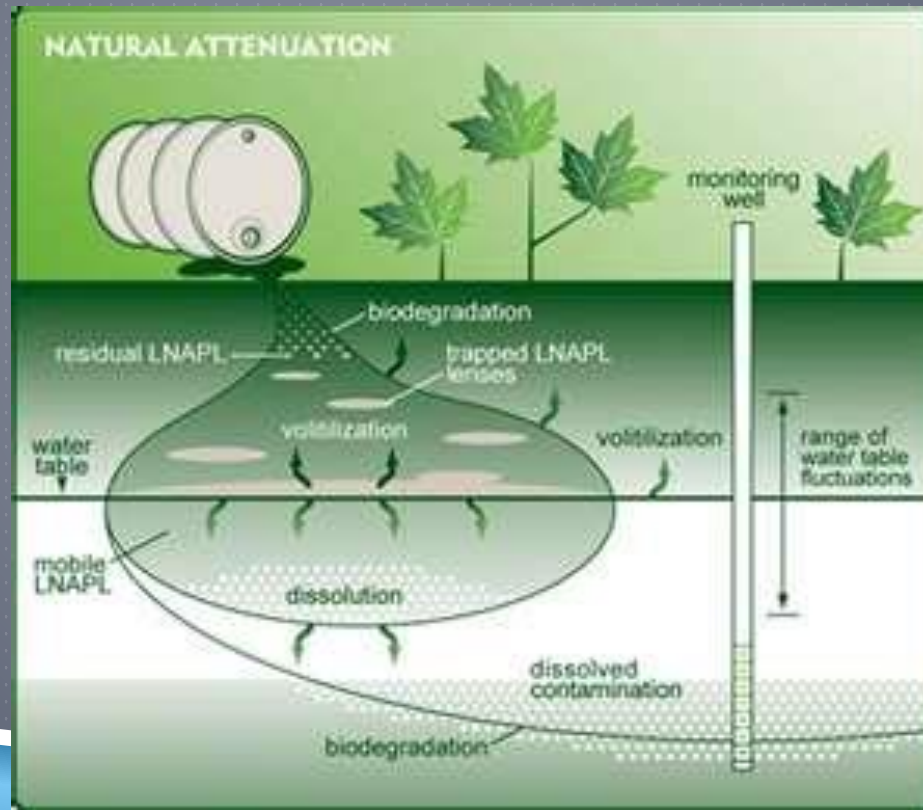
► Biological

Bioremediation



REMEDIAL OPTIONS

► Natural Attenuation



QUESTIONS?

Useful Links

Incident Notification and Discharge Reporting Forms:

http://www.dep.state.fl.us/waste/quick_topics/forms/pages/62-761.htm

Storage Tank Regulation Main Page:

<http://www.dep.state.fl.us/waste/categories/tanks/default.htm>

Underground Storage Tank Rules (Chapter 62-761, F.A.C.):

http://www.dep.state.fl.us/waste/quick_topics/rules/default.htm



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