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Mitigating Third-Party Damage Claims with Pay for Performance

by Bill Foskett

Pay-for-performance (PFP) UST cleanups might prove to be a tool for mitigating third-party damage claims associated with UST releases and related litigation. If a plume can be quickly and successfully remediated, the case for third-party damage may be nipped in the bud or mitigated if already filed.

Many time and materials (T&M) cleanups go on for years, run up high costs, and give no guarantee of a clean site. PFP cleanups offer a fixed price and a fixed time for reducing contamination below levels at which third-party damage claims are likely to be sustained.

The uncertain time and cost associated with T&M cleanups can invite larger third-party damage claims. Furthermore, the slowness of T&M cleanups can nurture third-party damages litigation. As the T&M cleanup grinds on and on with no apparent end in sight, a neighbor might begin to believe that the seemingly endless cleanup has stigmatized his or her own property, even if it has not been contaminated by an off-site plume. These parties assert that the endless neighboring cleanup diminishes their ability to sell or refinance their property.

At least one state is anticipating such claims and is using PFP as a means to reduce contamination at various sites expeditiously so that levels will be low enough within a short time frame to deter claims, if made. More detail on third-party damage claims and the use of PFP to mitigate them will be provided in the next issue of *LUSTLine*.

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