



advanced cleanup program to be conducted under rules adopted for the petroleum contaminated site rehabilitation program.

## II. Present Situation:

The DEP Bureau of Petroleum Storage Systems regulates underground and aboveground storage tank systems. In 1983, Florida became one of the first states in the nation to pass legislation and adopt rules for underground and aboveground storage tank systems. Leaking storage tanks pose a significant threat to groundwater quality, and Florida relies on groundwater for about 92 percent of its drinking water needs.<sup>1</sup>

In 1986, the Legislature passed SB 206 which created the State Underground Petroleum Environmental Response Act (SUPER Act) to address the problems of pollution from leaking underground petroleum storage systems. The SUPER Act authorized the DEP to establish criteria for the prioritization, assessment and cleanup, and reimbursement for cleanup of contaminated sites. The bill also created the Inland Protection Trust Fund (IPTF), with a tax on petroleum products imported or produced in Florida as the primary revenue source. The SUPER Act established the Early Detection Incentive Program (EDI), which provided site owners with the option of conducting the cleanup themselves, and then receive reimbursement from the IPTF, or has the state conduct the cleanup in priority order.<sup>2</sup>

In 1989, the Legislature passed HB 430 to create the Petroleum Liability and Insurance Restoration Program (PLIRP). The PLIRP allowed eligible petroleum facilities to purchase \$1 million in pollution liability protection from a state contracted insurer. PLIRP also provided \$1 million worth of site restoration coverage through reimbursement or state cleanup.<sup>3</sup>

The Legislature passed CS/SB 2702 in 1990 to establish the Abandoned Tank Restoration Program (ATRP). The ATRP was created to address the contamination at facilities that had out-of-service or abandoned tanks as of March 1990. The ATRP originally had a one-year application period, but the deadline is now waived indefinitely for owners that are financially unable to pay for the closure of abandoned tanks.<sup>4</sup>

The Legislature passed HB 2477 in 1992 to phase out the state's role in the cleanup process and shift the cleanup sites to the reimbursement program.<sup>5</sup> The excise tax on petroleum and petroleum products was increased to pay for the expanded reimbursement program. The reimbursement program proved costly and within a few years the reimbursement amount exceeded the administrative capacity of the DEP and the financial resources of the IPTF.<sup>6</sup> By 1996, over 18,000 petroleum sites had been identified as contaminated and the program had accumulated \$551.5 million in unreimbursed claims.<sup>7</sup>

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<sup>1</sup> DEP, *Bureau of Petroleum Storage Systems*, <http://dep.state.fl.us/waste/categories/pss/default.htm> (last visited Mar. 18, 2013).

<sup>2</sup> Chapter 86-159, Laws of Fla.

<sup>3</sup> Chapter 89-188, Laws of Fla.

<sup>4</sup> Chapter 90-98, Laws of Fla.

<sup>5</sup> The term "cleanup sites" includes contaminated sites that are being remediated by the state or the property owner.

<sup>6</sup> Chapter 92-30, Laws of Fla.

<sup>7</sup> Comm. on Environmental Preservation, The Florida Senate, *Underground Petroleum Storage Tank Cleanup Program*, (Interim Report 2005-153) (Nov. 2004).

In 1995, the Legislature passed SB 1290 as a temporary measure to address the large backlog of reimbursement applications and unpaid claims. The bill required that only property owners who have received prior approval from the DEP for the scope of work and costs associated with the cleanup may continue with state funded site rehabilitation.<sup>8</sup>

In 1996, the legislature passed HB 1127 to implement the Petroleum Preapproval Program. The program required state-funded cleanups to be done on a preapproved basis, in priority order, and within the current fiscal year's budget. The Preapproval Program also required the DEP to use risk-based corrective action principles in the cleanup criteria rule. The Petroleum Cleanup Participation Program (PCPP) was created for sites that had missed the opportunity for state funding assistance but had reported contamination before 1995. Responsible parties were required to cost share in the cleanup and prepare a limited scope assessment at their expense. The Preapproved Advanced Cleanup (PAC) was created to allow sites to bypass the priority ranking list and receive funding in order to facilitate a public works project or property transaction. The PAC program requires applicants to cost share in the cleanup and to prepare limited scope assessments at their expense.<sup>9</sup>

In 1999, the Legislature passed HB 2151 to amend the Petroleum Preapproval Program and allow the DEP to provide funding for certain source removal activities. The bill also addressed new petroleum discharges that occur at a site with existing contamination and were reported after December 31, 1998. The bill allows a responsible party to enter into a Site Rehabilitation Agreement with the DEP and share in the cost and coordination of the cleanup, provided that the responsible party submits an application and a Limited Contamination Assessment Report to the DEP.<sup>10</sup>

In 2005, the Legislature passed CS/SB 1318 to substantially amend the Petroleum Preapproval Program.<sup>11</sup> Specifically, CS/SB 1318:

- Required that all of Florida's underground petroleum storage tanks be upgraded prior to January 1, 2010;
- Required the DEP to establish a process to uniformly encumber funds appropriated for the underground storage tank program throughout a fiscal year;
- Authorized the DEP to establish priorities based on a scoring system;
- Provided funding for limited interim soil-source removals for sites that become inaccessible for future remediation due to road infrastructure and right-of-way restrictions resulting from a pending Department of Transportation project;
- Provided funding for limited interim soil-source removals associated with the underground petroleum storage system upgrade that are conducted in advance of the site's priority ranking for cleanup;
- Limited the funding for source removal associated with the underground petroleum storage system upgrade to 10 sites per fiscal year per owner;
- Limited the amount of funding per facility and the activities that may be funded;

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<sup>8</sup> Chapter 95-2, Laws of Fla.

<sup>9</sup> Chapter 96-277, Laws of Fla.

<sup>10</sup> Chapter 199-376, Laws of Fla.

<sup>11</sup> See ss. 376.3071, 376.30713, 376.3075, and 376.30715, F.S.

- Limited the funding amount for Department of Transportation projects to \$1 million per fiscal year and \$10 million for underground petroleum storage system upgrade projects per fiscal year;
- Repealed the funding provisions as of June 30, 2008;
- Provided that the Preapproved Advanced Cleanup Participation Program is available for discharges of petroleum that are eligible for restoration funding under the Petroleum Cleanup Participation Program for the state's cost share of site rehabilitation; and
- Extended the life of the Inland Protection Financing Corporation from 2011 to 2025, and authorizes the corporation to issue notes and bonds, and to pay for large-scale cleanups such as ports, airports, and terminal facilities that are eligible for state funding.

The DEP is currently working with cleanup contractors, property owners, and other stakeholders to explore ways to make the state-funded petroleum cleanup program more efficient, including implementing the competitive bid process.

Pursuant to s. 376.30711, F.S., the state is authorized to use the competitive bid procedures or negotiated contracts for preapproving all costs and procedures for site-specific rehabilitation projects. Two competitive bidding pilot projects were conducted in 1996 and 2002; however, the DEP has not implemented competitive bidding on a permanent basis. Site cleanup and rehabilitation services are instead provided through preapproved, negotiated scopes of work under the state-funded petroleum cleanup program, which includes lump sum, and time and materials contracting.

Pursuant to s. 287.055, F.S., state agencies are required to adhere to specific competitive bidding procedures to:<sup>12</sup>

- Evaluate professional services and the capabilities of the contractor;
- Evaluate the statements of qualifications and performance data;
- Select at least three firms deemed to be the most highly qualified to perform the services; and
- Negotiate a contract with the most qualified firm for a fair, competitive, and reasonable rate.

### III. Effect of Proposed Changes:

**Section 1** amends s. 287.055, F.S., to provide conforming language.

**Section 2** amends s. 376.30711, F.S., to provide legislative findings that the petroleum contamination site rehabilitation program be implemented efficiently and cost effectively. The bill specifies that before public funds are used to cleanup any site in the petroleum program, all private funds must be exhausted first; prohibits an owner or operator of a facility or storage tank to receive funding from the IPTF in addition to compensation from another funding source; and provides specific conditions which the owner or operator must certify to the DEP in order to be eligible for site rehabilitation funding. Specifically the bill requires the owner or operator to:

- Certify to the DEP that they have not received compensation from another funding source for site rehabilitation work for eligible discharges other than a state funding program;
- Confirm there is no insurance or other agreement that provides coverage for site rehabilitation other than state funding; and

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<sup>12</sup> See s. 287.055, F.S.

- Confirm no claims against an insurance policy, indemnity agreement or other agreement have been made for the costs associated with site rehabilitation.

In addition, the bill:

- Requires that if the owner or operator cannot provide the DEP with the information required, then the owner or operator is to provide the DEP with the date, amount, and source of all payments received for site rehabilitation. The owner or operator is also required to provide copies of all insurance policies or any agreements that provide coverage for the cost of site rehabilitation or claims against any insurance policies or agreements. In the event an owner makes a claim against an insurance policy or agreement, then the owner must immediately notify the DEP of the claim and provide the date, amount, and source of all payments received for site rehabilitation. The owner must immediately reimburse the DEP for the amount paid by the claim, or amount expended by the DEP, whichever is less. If the payment received is the result of a settlement, the DEP or court may determine how the amount received is to be allocated between site rehabilitation tasks paid for by public funds and tasks for which the claim was made.
- Specifies that the DEP has the right to subrogation to any insurance policies, indemnity agreements, or other agreements that provide funds for site rehabilitation.
- Allows the DEP to recover funds paid by the DEP if the owner or operator received double payment for site rehabilitation work. The bill also specifies that the DEP has authority to recover payments or overpayments from the IPTF.
- Requires the DEP to adopt rules which must include:
  - The applicable provisions in ch. 287, F.S., that do not conflict with the bill or other applicable provisions in ch. 376, F.S.;
  - Procedures for the DEP to develop a pool of qualified contractors through an open and competitive procurement process;
  - The ability for site owners to coordinate with the DEP to develop site-specific scopes of work;
  - The ability for site owners to eliminate certain contractors from the pool of contractors based on non-performance and subject to approval by the DEP;
  - Procedures to ensure the pool of contractors has the ability to visit the work site, conduct due diligence, and have questions answered by the DEP or site owners in order to ensure the competitive procurement process is effective;
  - Procedures to improve the effectiveness and efficiency of the site assessment process;
  - Procedures to ensure the contractors may not submit competitive bids unless approved by the DEP;
  - Procedures to ensure site rehabilitation is completed efficiently and cost effectively and in accordance with ch. 376, F.S., and other applicable statutes and rules;
  - Reporting deadlines for deliverables and departmental review and approval of deliverables;
  - Reporting on the progress of site rehabilitation through a public website; and
  - Procedures for the ongoing evaluation of contractor performance.
- Requires the contractors to meet all certification and license requirements imposed by law.
- Specifies it is unlawful for a contractor or subcontractor to receive IPTF funds in any capacity if the contractor or subcontractor:

- Owns property, has interest in property, or has beneficial interest in operations conducted on property upon which IPTF funds are expended;
- Is the relative of someone who owns or has voting interest in any decision affecting any percentage of property upon which IPTFs are being expended; or
- Serves as partner, director, officer, trustee, or managing employee of a corporation that owns or has voting interest in any decisions affecting the property upon which IPTF funds are expended.
- Requires all contractors performing work in the petroleum cleanup program to sign an affidavit affirming that they comply with these provisions. It also specifies that it is a third degree felony for anyone who violates state or federal law in soliciting or securing contracts for petroleum rehabilitation sites;
- Requires the DEP to select one to five sites on a yearly basis for innovative technology pilot programs.

**Section 3** amends s. 376.3071, F.S., to remove the references to the preapproval program and specifies that the DEP may establish a reasonable time period to evaluate the effectiveness of natural attenuation.

The bill allows the DEP to impose a lien on contaminated property equal to the estimated cost of bringing the site into compliance and includes provisions for property owners to release their properties from any liens claimed.

**Section 4** amends s. 376.30713, F.S., to remove any reference to the preapproval program and requires the advance cleanup program to be conducted according to the rules adopted pursuant to ss. 376.30711 and 287.0595, F.S.

**Section 5** amends s. 373.326, F.S., to exempt monitoring wells that are required for site rehabilitation activities from permitting or fee requirements.

**Section 6** provides the act shall take effect upon becoming law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill requires all available private funds be exhausted for site rehabilitation prior to the expenditure of public funds and prohibits owners from receiving duplicate funding from both the IPTF and other funding sources for the same site rehabilitation task. Contractors or subcontractors could not lawfully receive IPTF funds if they have an ownership or beneficial interest in sites being cleaned up.<sup>13</sup>

The initial preparation of bid packages may be time consuming and cause a transitional delay in authorizing work to private cleanup contractors selected as a result of the bid process; however, templates may be available for subsequent bids eliminating this delay. Bid protests may cause delays and smaller or mid-size cleanup contractors and construction subcontractors may be disadvantaged.<sup>14</sup>

Under a competitive bid cleanup contract, only success toward meeting the cleanup goal will be rewarded and an incentive may be provided to ensure the greatest possible success in the least amount of time. Delays may occur if there are a significant number of bid protests. However, those may decrease over time, if the DEP prevails in the bid protests and contract awards are upheld.<sup>15</sup>

**C. Government Sector Impact:**

Competitively bidding state-funded petroleum contaminated site cleanups could result in significant savings. The savings may be used to fund the cleanup of contaminated sites awaiting cleanup.<sup>16</sup>

The changes in the review and evaluation of bids on an ongoing basis could be time consuming but can be handled with existing staff and resources within DEP.<sup>17</sup>

The DEP will incur non-recurring costs of \$250,000 to \$300,000 to conduct rulemaking, including multiple workshops and staff time to implement a competitively bid cleanup program. According to the DEP, these costs can be absorbed with existing staff and budget authority.<sup>18</sup>

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<sup>13</sup> DEP, *Senate Bill 1416 Agency Analysis* (April 18, 2013) (on file with the Senate Committee on Environmental Preservation and Conservation).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> DEP, *Senate Bill 1416 Agency Analysis* (Mar. 18, 2013) (on file with the Senate Committee on Environmental Preservation and Conservation).

<sup>17</sup> *Id.*

<sup>18</sup> *Supra* note 14.

A competitive procurement model may result in an overall savings of 10 to 25 percent per year. The savings may be used on other contaminated sites awaiting cleanup. Review and evaluation of bids on an ongoing basis could be time consuming and may require a shifting of resources for the DEP. The permit and fee exemption for monitoring wells will save the DEP an indeterminate amount.<sup>19</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**Recommended CS/CS by Appropriations Subcommittee on General Government on April 17, 2013:**

- Provides the framework for the DEP to implement competitive bid procedures for the petroleum contaminated site rehabilitation program.
- Removes references to the “preapproval” program.
- Provides legislative findings and specifies that contaminated site rehabilitation be done efficiently and cost effectively.
- Requires private funds be exhausted before expending public funds and prohibits property owners from receiving double payment.
- Requires property owners to certify specific information to the DEP.
- Provides the DEP with the right to subrogation and the ability to recover funds in the case of double payment.
- Requires the DEP to adopt specific rules.
- Requires the contractors to meet certification and license requirements and sign an affidavit certifying that information.
- Prohibits any contractor or subcontractor from receiving IPTF funds if they have an ownership or beneficial interest in sites being cleaned up.
- Specifies that it is a third degree felony for anyone who violates state or federal law in soliciting or securing contracts for petroleum rehabilitation sites.
- Requires the DEP to select one to five sites on a yearly basis for innovative technology pilot programs.
- Provides that DEP may require active remediation for natural attenuation sites in certain circumstances.
- Allows the DEP to impose a lien on contaminated property.
- Requires the advance cleanup program to be conducted according to the rules adopted pursuant to ss. 376.30711 and 287.0595, F.S.

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<sup>19</sup> *Id.*

- Provides exemptions for monitoring wells.

**CS by Environmental Preservation and Conservation on March 21, 2013:**

The CS removes the reference to s. 287.0595, F.S. Section 287.0595, F.S., grants the DEP rulemaking authority to establish procedures for awarding contracts for cleanup of petroleum contaminated sites. The bill was not intended to exempt competitive bidding procedures from rulemaking.

B. Amendments:

None.