

STORAGE NAME: h2151.ep

DATE: April 5, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
ENVIRONMENTAL PROTECTION
ANALYSIS**

BILL #: HB 2151 (PCB 99-03a)

RELATING TO: Petroleum contamination

SPONSOR(S): Committee on Environmental Protection; and Representative Dockery

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) ENVIRONMENTAL PROTECTION YEAS 12 NAYS 0

(2)

I. SUMMARY:

PCB 99-03 provides that funding for source removal activities may be provided up to \$5 million from the Inland Protection Trust Fund in advance of the priority ranking system. However, a prioritization schedule must be established for these activities that is consistent with this statute.

This bill also requires, under the Petroleum Cleanup Participation Program, that the department and the person responsible for site rehabilitation must complete their cost-sharing agreement negotiations within 120 days of commencement. If the parties are unable to complete negotiations, the department is to terminate negotiations, deem the site ineligible under this program and revoke all liability protections under this statutory subsection. In addition, this bill eliminates the provision which states that any person who knowingly acquires title to contaminated property is not eligible for restoration funding under this program.

Furthermore, under this bill, the Department of Environmental Protection (department) is to select five sites for innovative technology pilot programs. The department is to select innovative products and processes, based upon competitive bidding procedures as set forth in the statute, to use on the pilot projects.

Lastly, this bill recognizes that it is appropriate for persons assuming responsibility for clean up of new discharges which occur after December 31, 1998, at sites with existing contamination which was already determined to be eligible for state funded clean up, to share in the costs. Therefore, this bill authorizes the department to enter into site rehabilitation agreements with such persons assuming responsibility for new discharges. The agreements are to include: allocation of the financial responsibilities of both parties; establish the method which will guarantee the applicant's commitment to pay; establish priority of the clean up; pay any applicable deductibles, copayments or other program eligibility requirements. The application for a site rehabilitation agreement is to be submitted no later than 120 days from discovery of the new discharge and must include an assessment report and a certification that the applicant has the authority to enter into the agreement. This bill also provides for procedural requirements of this agreement and exclusions thereof. The parties must complete their negotiations within 90 days of commencement. If the terms of the agreement are not fulfilled by the applicant, then the applicant forfeits the right to funding and the department or local government may compel enforcement of the clean up.

This bill also repeals the repealing date relating to the preapproved advanced cleanup program allowing the program to continue into the future.

The provisions of this bill are retroactive to January 1, 1999, except as provided in s. 376.30714(11). This act is to take effect upon becoming a law.

See the Fiscal section herein for the fiscal impact of this bill.

On March 30, 1999 the Committee on Environmental Protection adopted a strike everything amendment that is traveling with this bill. Please see "Amendments or Committee Substitute Changes" section.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The preservation of surface and ground waters is a matter of highest urgency and priority, as these waters provide the primary source for potable water in this state. Currently, there are over fifteen thousand underground petroleum tanks which store a significant amount of petroleum and petroleum products throughout the state of Florida. Spills, leaks and discharges from these storage tanks pose a significant threat to the quality of ground and surface waters. When contamination occurs, remedial measures are delayed for long periods of time which result in greater damage to the environment and higher costs to remove the contamination. As such, an adequate source of financial resources must be made available to provide for an expeditious supply of alternate sources of water and to provide a means for prompt investigation and clean up of contaminated sites without delay.

Accordingly, in 1986 the Legislature enacted the State Underground Petroleum Environmental Response Act (Super Act) which created the Inland Protection Trust Fund as set forth in s. 376.3071, F.S. The Inland Protection Trust Fund (Fund) is a repository of monies to enable the Department of Environmental Protection (department) to respond to incidents of contamination in order of priority.

The Super Act also created several programs to facilitate site rehabilitation. The **Early Detection Incentive Program (EDI)** is created to encourage early detection and clean up of contaminated sites. EDI provides two options for site rehabilitation: first, it makes monies available from the Fund for state contracted clean up, however, the site owner is placed in order of priority ranking; second, it will provide reimbursement to site owners who opt to remediate their own sites rather than wait for the state to act. Participation in this program is limited to contaminated sites reported to the department at any time between June 30, 1986 and December 31, 1988. As of December 31, 1988, no additional applicants were being accepted into this program.

In 1988, the Legislature created the **Petroleum Liability Restoration Insurance Program (PLRIP)**. This program was designed to gradually bring insurance companies into the petroleum contamination market and provide insurance coverage to site owners. Under federal laws, a site owner is required to maintain \$1 million in insurance coverage. Prior to 1993, this program provided full insurance coverage to site owners, less their appropriate deductible. However, for discharges reported to the department from 1994 to 1996, the department paid \$300,000 of restoration costs, less the deductible. This encouraged the site owners to obtain additional insurance coverage to reach the \$1 million insurance requirement. From 1997 - 1998, the department paid \$150,000 of restoration costs and as of January 1, 1999, no insurance coverage is provided. This system gradually encouraged site owners to obtain additional insurance coverage and brought insurance carriers into this market.

The Legislature also created the **Abandoned Tank Restoration Program (ATRP)** which provides financial assistance for site restoration at facilities which have not stored petroleum since March 1, 1990 and were not eligible for EDI or PLRIP. Usually, the property owners did not know the property was used for petroleum storage or that the statutory programs applied to their property. This program is still open to site owners who do not have the financial resources to rehabilitate their site.

In 1996, the Legislature declared that the programs were preceding at a higher rate than the Fund revenues could support. This resulted in a large backlog of reimbursement slips from site owners and excessive costs to the Fund. As such, the Legislature ended the reimbursement process and declared that all eligible petroleum cleanups were to be conducted on a preapproval system. All preapproved sites were addressed on a priority ranking schedule, rehabilitating those sites with the greatest threat to human health and the environment first. The preapproval system requires the department to allow competitive bidding and negotiate contracts with contractors to undertake site remediation. Payment by the department to the contractors is based upon terms of the contract. The department may, based upon its experience and past performance of the contractor, retain up to 25 percent of the contracted amount or use performance bonds to assure performance.

Also in 1996, the Legislature created the **Preapproved Advanced Cleanup** program. Site owners eligible for cleanup under the EDI, ATRP, or PLRIP programs may competitively bid for authorization to have the state rehabilitate their site in advance of the department's priority ranking schedule. The site owner may bid at least a 25 percent copayment. Many bids reached 50 percent which resulted in the state paying for only half of the rehabilitation costs and allowed the site owner to advance their priority ranking. The department is authorized to contract up to \$10 million in preapproved advanced

cleanup work each fiscal year. This act will expire on October 1, 1999. (SB 192 is pending which would repeal this expiration clause and enable the preapproved advanced cleanup program to continue.)

In addition, in 1996, the Legislature created the **Petroleum Cleanup Participation Program (PCPP)**. If the contaminated sites were covered under any of the other above-mentioned programs, then funding assistance was to continue under the respective program. However, PCPP provides funding assistance for all property which was previously ineligible for participation in the state clean up programs. Contaminated sites prior to January 1, 1995, became eligible for limited state funding up to \$300,000 per site. If funding assistance is available under this program, the person responsible for site rehabilitation must enter into a preapproved site rehabilitation agreement with the department and provide for a 25 percent copayment. This cost may be reduced if the party can show that they are financially unable to comply with the copayment. Any person who knowingly acquires title to contaminated property is not eligible for restoration funding under this subsection.

As of January 1, 1999, all of the above mentioned programs are closed to new applicants, except ATRP for certain persons. If a person is assuming responsibility for new petroleum discharges, that person is personally financially responsible and is to turn to their insurance carrier for relief.

B. EFFECT OF PROPOSED CHANGES:

This bill states that funding may be provided in advance of the department's priority ranking system for source removal activities, however, this funding is limited to \$5 million from the Fund during any fiscal year. A separate prioritization ranking must be established for these sites.

In regard to the Petroleum Cleanup Participation Program (PCPP), this bill requires the department and the person responsible for site rehabilitation to complete cost sharing agreement negotiations within 120 days after the date of commencement. If the parties are unable to complete negotiations within this time period, the department must terminate negotiations, deem the site ineligible under this program and revoke all liability protection as provided in this subsection. According to the department, the effect of this is to expedite the negotiation process or have the person assuming responsibility for the rehabilitation removed from the program to engage in individual cleanup.

Also, as related to PCPP, this bill deletes the provision which states that a person who knowingly acquires title to contaminated property shall not be eligible for restoration funding. According to the department, the impact of this is to ensure that subsequent property owners are eligible for state funding under this program.

This bill creates an innovative pilot program which allows the department to utilize innovative products and processes on pilot sites which have a ranking of ten or less.

Sites where new petroleum discharge is mixed with existing petroleum discharge which is already determined to be eligible for state funded clean up is referenced as a "mixed plume." This bill recognizes that it is appropriate for the persons assuming responsibility for clean up of *new* discharges (which occur after December 31, 1998) at mixed plume sites to share in the total cost of clean up of those discharges. Therefore, this bill authorizes the department to enter into site rehabilitation agreements with persons assuming responsibility for clean up of the new discharges. This bill does not *require* negotiation or *assign* financial responsibility between the two parties regarding the old discharge and the new discharge, but instead, *authorizes* the department to *enter into an agreement* with such responsible party. More specifically, this bill states which provisions the agreement should contain, along with its procedural requirements, e.g., if the parties are unable to agree on financial apportionment then the provisions of chapter 120 apply.

According to the department, insurance companies were not willing to provide coverage to site owners if they were to be exposed to liability for both old and new petroleum discharges at mixed plume sites, especially since the old discharge is already assigned under a state program to be rehabilitated at some point in the future. Under this scenario, it is possible that the insurance carriers may deny coverage to site owners, reducing the competitive market of insurance carriers in this field and leaving the site owner without the financial resources to clean the new discharges. However, this bill provides a solution to this concern and allows the department to enter into site rehabilitation agreement with insurance companies (on behalf of the parties) and appropriate liability and financial

responsibility respectively. Therefore, the insurance carriers may continue to provide insurance coverage in this market for their respective share of the site owners liability.

This section also provides the following:

- definitions of the following terms: applicant, existing contamination, new discharge and qualified site.
- that persons assuming responsibility for the new discharge are to remove, to the extent practicable, the free product attributable to the new discharge at his or her expense, and in accordance with the statute and departmental rules.
- authorize the department, as of January 1, 1999, to negotiate and enter into site rehabilitation agreements with the applicants of sites contaminated by both existing and new discharge. The agreement must include (but is not limited to) the following:
 - ① allocation of the financial responsibilities of both the department and the applicant;
 - ② the method which will guarantee the applicant's commitment to pay;
 - ③ the priority in which the clean up will occur; and
 - ④ payment of any applicable deductibles, copayments or other program eligibility requirements.
- an application for a site rehabilitation agreement must be submitted no later than 120 days from discovery of the new discharge and must include:
 - ① an assessment report of the new discharges; and
 - ② certification that the applicant has the authority to enter into the agreement;
- only one application may be submitted for any new discharge, any costs incurred to comply with this section are nonrefundable and the application form is not subject to Chapter 120.
- if the parties cannot agree on the apportionment of the financial responsibilities for the site, then Chapter 120 applies and the administrative law judge is to consider any admissible evidence relating the apportionment of the discharges.
- certain exclusions from this section.
- if the parties are unable to complete their negotiations within 90 days after commencement, the department is to terminate negotiations and the site is barred from receiving further consideration under this section, unless the parties mutually agree to extend the deadline.
- all site rehabilitation at such qualified sites is to be conducted pursuant to this statute. If the terms of the site rehabilitation agreement are not fulfilled by the applicant, then the applicant forfeits the right to funding and the department, or local government, may compel enforcement of the clean up.
- new discharges under this section do not constitute an independent entitlement to restoration clean up or clean up of existing contamination in advance of its priority ranking.
- upon entering into a site rehabilitation agreement, no person who is responsible for contamination is subject to administrative or judicial action notwithstanding other provisions of law, and under certain terms. Under this bill, a cause of action shall not

accrue during the time the agreement is in effect for the purposes of chapter 95. However, if state funding is discontinued, then the provisions of this subsection will no longer apply.

- the department may pursue penalties for violations of any law or department rule.
- the provisions of this section are retroactive to January 1, 1999 except as provided in s. 376.30714(11), F.S.

In addition, the Preapproved Advanced Cleanup Program is scheduled to be repealed on October 1, 1999. This bill repeals subsection (7) of s. 376.30713, F.S., which in effect, allows the program to continue, instead of being repealed.

This act is to take effect upon becoming law.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

An agency program is not eliminated or reduced.

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

This bill does not purport to provide services to families of children.

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

This bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Amends ss. 376.3071; 376.30711 and creates s. 376.30714.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 376.3071, F.S., to provide that funding for source removal may be provided in advance of the priority ranking system and no more than \$5 million is to be used from the Inland Protection Trust Fund in any fiscal year for the removal.

This section also creates a provision which requires the department and the person assuming responsibility for the site rehabilitation to complete negotiations of their cost-sharing agreement within 120 days after commencement.

Lastly, this section eliminates the provision which makes any person who knowingly acquires title to contaminated property ineligible for restoration funding under this subsection.

Section 2: Amends s. 376.30711, F.S., to allow the department to use letters of credit to assure performance of a contractor regarding site rehabilitation work.

Provides that the department must select five sites eligible for state restoration funding assistance under this section to establish an innovative technology pilot program.

Section 3: Creates s. 376.30714, F.S., to provide that it is appropriate for persons assuming responsibility for new discharges which occur after December 31, 1998, which are mixed with old discharges determined to be eligible for state-funded clean up, to enter into an agreement to share in the costs of managing and conducting the clean up of those discharges.

Section 4: Repeals subsection (7) of s. 376.30713, F.S., which scheduled s. 376.30713, F.S., for repeal on October 1, 1999. This will allow the Preapproved Advanced Cleanup Program to continue into the future, instead of being repealed.

Section 5: Provides that this act shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

The only cost to the fund will be for administration costs incurred as a result of negotiating contracts. This is expected to be minimal. The fund, for purposes of cleanup activities, should face no additional exposure. Also, limited resources may be required to create a separate prioritization mechanism for source removal. This is also expected to be minimal.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Private persons, or their insurance company will incur the rehabilitation costs for new discharges.

2. Direct Private Sector Benefits:

Encourages insurance companies to continue to provide coverage to site owners.

3. Effects on Competition, Private Enterprise and Employment Markets:

Encourages insurance companies to continue to provide coverage to site owners, thereby encouraging the competitive market between insurance companies in this field.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 30, 1999, the Committee on Environmental Protection adopted a strike everything amendment to PCB 99-03 that is traveling with this bill. This amendment is different from PCB 99-03 in that:

- Funding for free product recovery may be provided in advance of the priority ranking system; However, if such funding is provided, then:
 - ① a separate prioritization schedule must be established;
 - ② the department shall reevaluate the site after free product removal is complete; and
 - ③ no more than \$5 million may be used per fiscal year.
- Sites eligible for the innovative technology program shall be representative of varying geographic areas;
- The Preapproved Advance Cleanup Program will be reviewed by the Legislature again prior to March 1, 2001;
- Free product is to be removed according to certain statutory provisions and department rules adopted pursuant thereto; and
- Persons are not eligible to participate in site rehabilitation agreements if a person required to report a new discharge or required to initiate free product recovery upon discovery as required by department rule, adopted pursuant to ss. 376.303 and 376.3071(5), failed to do so.

The Committee then passed PCB03-ep, as amended, by a vote of YEAS 12 to NAYS 0.

STORAGE NAME: h2151.ep
DATE: April 5, 1999
PAGE 10

VII. SIGNATURES:

COMMITTEE ON ENVIRONMENTAL PROTECTION:

Prepared by:

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