

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: PCS/SB 1582 (664100)

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on General Government) and Senator Dean

SUBJECT: Rehabilitation of Petroleum Contamination Sites

DATE: April 21, 2014 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gudeman</u>	<u>Uchino</u>	<u>EP</u>	<u>Favorable</u>
2.	<u>Howard</u>	<u>DeLoach</u>	<u>AGG</u>	<u>Fav/CS</u>
3.	<u>Howard</u>	<u>Kynoch</u>	<u>AP</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/SB 1582 revises the legislative intent for the Petroleum Restoration Program in the Department of Environmental Protection (DEP or department), requires competitive procurement for cleanup contracts, and amends contractor qualifications. The bill limits the eligibility funding for the Early Detection Incentive (EDI) Program, deletes obsolete provisions related to the reimbursement program, and repeals sections of statute related to the Petroleum Preapproval Program.

The DEP anticipates that the costs to the state for site rehabilitation will decrease with the implementation of competitive solicitation procedures. In the preapproved advanced cleanup program, lower costs of at least 25 percent are required for applicants participating in a performance-based contract for the cleanup of at least 20 sites. The increase in workload related to contracts and procurement can be handled with existing staff.

The bill takes effect on July 1, 2014.

II. Present Situation:

Petroleum Restoration Program

The Division of Waste Management within the DEP regulates underground and aboveground storage tank systems. In 1983, Florida became one of the first states to pass legislation and adopt rules to regulate underground and aboveground storage tanks.¹ Leaking storage tanks pose a significant threat to groundwater quality, and Florida relies on groundwater for about 92 percent of its drinking water needs.²

In 1986, the Legislature passed the State Underground Petroleum Environmental Response Act (SUPER Act) to address the problem of pollution from leaking underground petroleum storage systems. The SUPER Act authorized the DEP to establish criteria for the prioritization, assessment, cleanup, and reimbursement for cleanup of contaminated sites. The SUPER Act also created the Inland Protection Trust Fund (IPTF), which is funded by a tax on petroleum products imported or produced in Florida. 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 have the state conduct the cleanup in priority order.³

In 1988, the Legislature created the Petroleum Liability Insurance Program (PLIP) to provide third-party liability insurance to qualified program participants. The PLIP provided up to \$1 million of liability insurance for each incident of petroleum contamination.⁴ The program was revised in 1989 and renamed to the Petroleum Liability Insurance and Restoration Program (PLIRP). The PLIRP allows eligible petroleum facilities to purchase \$1 million in pollution liability protection from a state contracted insurer and provided \$1 million worth of site restoration coverage through reimbursement or state-funded cleanup.⁵

In 1990, the Legislature established 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 who are unable to pay for the closure of abandoned tanks.⁶

The Legislature began to phase out the state's role in the cleanup process in 1992 by shifting the cleanup of sites to the reimbursement program,⁷ which was funded by increasing the excise tax on petroleum and petroleum products.⁸ 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. By 1996, over 18,000 petroleum sites had been identified as

¹ See ch. 83-310, Laws of Fla.

² DEP, *Storage Tank Compliance*, <http://www.dep.state.fl.us/waste/categories/tanks/> (last visited Mar. 6, 2014).

³ Chapter 86-159, Laws of Fla.

⁴ Chapter 88-331, Laws of Fla.

⁵ Chapter 89-188, Laws of Fla.

⁶ Chapter 90-98, Laws of Fla.

⁷ The term "cleanup sites" includes contaminated sites that are being remediated by the state or the property owner.

⁸ Chapter 92-30, Laws of Fla.

contaminated and the program had accumulated \$551.5 million in outstanding reimbursement claims.⁹

In 1995, the Legislature passed a temporary measure to address the large backlog of reimbursement applications and unpaid claims and required a review of the petroleum underground storage tanks program. The measure only funded the remediation of sites that had received prior notice from the DEP.¹⁰

The Petroleum Preapproval Program (program) was implemented by the Legislature in 1996. The program required state-funded clean up of sites to be done on a preapproved basis, in priority order, and within the current fiscal year's budget. The 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.¹¹

The Preapproved Advanced Cleanup (PAC) program was also created in 1996 to allow property owners or responsible parties the opportunity to pay a portion of the cleanup costs in order to bypass the priority ranking list. The PAC program requires applicants to provide at least 25 percent of the total cleanup costs and requires the property owner to prepare limited scope assessments at their expense.¹²

Section 376.30713(4), F.S., authorizes the DEP to enter into PAC contracts for up to \$15 million each fiscal year and limits the amount a facility may receive to \$5 million per year. A facility includes multiple site facilities such as airports, ports, or terminal facilities.¹³ PAC applications are submitted to the DEP twice a year (between May 1 and June 30 and between November 1 and December 31). The applications are ranked based on the percentage of cost-sharing commitment proposed by the applicant, with the highest ranking given to the applicant that proposes the highest percentage of its share of costs.¹⁴ In 1999, the Legislature amended the Petroleum Preapproval Program to allow the DEP to fund certain source removal activities. The bill addressed new petroleum discharges that occurred at a site with existing contamination and were reported after December 31, 1998. The bill allowed a responsible party to enter into a Site Rehabilitation Agreement with the DEP and to share in the cost and coordination of the cleanup, provided that the responsible party submit an application and a Limited Contamination Assessment Report to the DEP.¹⁵

The Legislature substantially amended the Petroleum Preapproval Program in 2005 to require:

- All of Florida's underground petroleum storage tanks be upgraded prior to January 1, 2010;

⁹ Comm. on Environmental Preservation and Conservation, the Florida Senate, *Underground Petroleum Storage Tank Cleanup Program*, (Interim Report 2005-153) (Nov. 2004).

¹⁰ Chapter 95-2, Laws of Fla.

¹¹ Chapter 96-277, ss. 18-19, Laws of Fla.

¹² Section 376.30713, F.S.

¹³ Section 376.30713(4), F.S.

¹⁴ Section 376.30713(2), F.S.

¹⁵ Chapter 99-376, Laws of Fla.

- The DEP to establish a process to uniformly encumber funds appropriated for the underground storage tank program throughout a fiscal year;
- The DEP to establish priorities based on a scoring system;
- 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 pending Department of Transportation projects;
- 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 funding to 10 sites per fiscal year per owner for source removal associated with the underground petroleum storage system upgrade;
- Limited funding per facility and for activities that may be funded;
- Limited funding of \$1 million per fiscal year for Department of Transportation projects, and \$10 million per fiscal year for underground petroleum storage system upgrade projects;
- Repeal of funding provisions as of June 30, 2008;
- Availability of the Preapproved Advanced Cleanup Participation Program 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
- Extension of the life of the Inland Protection Financing Corporation from 2011 to 2025, and require 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.¹⁶

In 2013, the Legislature amended s. 376.30711, F.S., to require all task assignments, work orders, and contracts for providers under the preapproval program be procured through competitive bidding pursuant to ss. 287.056, 287.057, and 287.059, F.S., after June 30, 2014.¹⁷ Pursuant to s. 376.30711, F.S., the DEP is authorized to use competitive bid procedures or negotiated contracts for preapproving all costs and procedures for site-specific rehabilitation projects, but has not done so on a permanent basis.

Pursuant to s. 287.057, F.S., state agencies that competitively solicit contractual services exceeding \$35,000 must:

- Make the competitive solicitation available to all vendors;
- Include the time and date for the receipt of bids, proposal, or replies, and of the public opening;
- Include the contractual terms and conditions applicable to the procurement and the criteria used to determine acceptability and merit of the bid;
- Use the invitation to bid process when the agency is able to define the scope of work and establish the specifications of the services needed;
- Use the request for proposal process when the purpose of the services needed can be defined and the agency can identify the deliverables; and
- Use the invitation to negotiate process when the agency must determine the best method for achieving the specific goal and more than one vendor is able to provide the services.

¹⁶ Sections 376.3071, 376.30713, 376.3075, and 376.30715, F.S.

¹⁷ Chapter 2013-41, s. 29, Laws of Fla.

Contractual services that exceed the \$35,000 threshold must be procured through competitive sealed bids, competitive sealed proposals, or competitive sealed replies unless:

- The agency head determines there is an immediate danger to public health, safety, or welfare; and
- The agency purchases the services from a state procured contract that was contracted by another agency pursuant to s. 287.057(1), F.S.¹⁸

MyFloridaMarketPlace

The Department of Management Services established a statewide electronic registration and procurement system called MyFloridaMarketPlace. Pursuant to s. 287.057(23), F.S., a one percent transaction fee is charged to all vendors in order to utilize the system.¹⁹

Funding for the Petroleum Restoration Program

The Fiscal Year 2013-2014 General Appropriations Act (GAA) appropriated \$125 million to the DEP for the rehabilitation of eligible petroleum contaminated sites. The GAA directed that up to \$50 million be appropriated to fund petroleum rehabilitation task assignments, work orders, and contracts entered into prior to June 30, 2013. The remaining \$75 million was placed in reserve and was contingent upon submission of a plan for consideration by the Legislative Budget Commission (LBC) detailing how the DEP would improve the effectiveness and efficiency of the Petroleum Restoration Program. Also, no funds could be released after January 1, 2014, unless the DEP adopted rules to implement ss. 376.3071, 376.30711, and 376.30713, Florida Statutes. The DEP's plan was approved by the LBC on September 12, 2013, and rules were adopted on December 27, 2013. The remaining \$75 million in appropriation was released in March 2014.²⁰

The DEP is currently transitioning the Petroleum Restoration Program from the "preapproved contractor" approach to competitive procurement procedures pursuant to ss. 287.056, 287.057, and 287.059, F.S., and rules 62-771 and 62-772, F.A.C. As of January 31, 2014, there are approximately 17,300 sites or gasoline filling stations eligible for state funding and approximately 7,258 sites have been rehabilitated. Approximately 3,167 sites are currently undergoing some phase of site rehabilitation, and approximately 6,911 sites await rehabilitation. Site rehabilitation is funded based on available budget and the priority score. The score for each site ranges from five to 115, with five representing a very low potential threat to human health and the environment, and 115 representing a substantial potential threat.²¹

As of March 13, 2014, there are 60 approved cleanup contractors and 137 executed contracts. The DEP has:

- Obligated approximately \$57.1 million of the Fiscal Year 2013-2014 appropriation of \$125 million;

¹⁸ See s. 287.057, F.S.

¹⁹ See Rules 60A-1.030, 60A-1.031, and 60A-1.032, F.A.C.

²⁰ Chapter 2013-40, Laws of Fla.

²¹ DEP, *Senate Bill 1582 Agency Analysis*, 3 (Mar. 12, 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

- Directed assigned rehabilitation work to 149 sites with a total value of \$5,041,217, which is included in the total obligated amount of \$57.1 million; and
- Selected 13 sites to receive quotes from contractors for a total estimated value of \$4,216,075, which is not included in the \$57.1 million.²²

Legislative Ratification of Agency Rules

The Legislature required the DEP to adopt rules to implement ss. 376.3071, 376.30711, and 376.30713, F.S., by December 31, 2013, otherwise the remaining, unreleased funds appropriated for Fiscal Year 2013-2014 could not be released. On May 30, 2013, the DEP published a Notice of Rule Development in the Florida Administrative Register to create Rule 62-772, F.A.C., and amend Rule 62-771, F.A.C. The new rules provide the procedures for the procurement of contractual services for clean up of petroleum contaminated sites and amend the procedures for establishing the priority scoring system for petroleum contaminated sites. The rules were adopted on December 27, 2013.

Pursuant to s. 120.541, F.S., a rule that meets any of three thresholds must be ratified by the Legislature. The thresholds include:

- If the rule is likely to have an adverse impact on economic growth, private sector job creation or employment, or private sector investment in excess of \$1 million in the aggregate within five years after implementation of the rule;
- If the rule is likely to have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within five years after implementation of the rule; or
- If the rule is likely to increase regulatory costs, including any transactional costs, in excess of \$1 million in the aggregate within five years after implementation of the rule.²³

The DEP prepared a Statement of Estimated Regulatory (SERC) for Rules 62-772.300 and 62-772.400, F.A.C., and determined the rules triggered a statutory threshold requiring ratification. The SERC for Rule 62-772.300, F.A.C., estimates the cost for contractors to maintain business licensure, safety compliance, workers compensation insurance, comprehensive automobile insurance, and general and professional liability insurance is approximately \$15.4 million per year. The cost estimate provided in the SERC is based on 225 contractors. As of March 2014, the number of agency term contractors is 70, decreasing the cost associated with Rule 62-772.300, F.A.C., to approximately \$4.8 million per year.²⁴

The SERC for Rule 62-772.400, F.A.C., estimates the cost incurred by contractors to assemble and submit bids, responses, replies, and quotes to the DEP as part of the competitive

²² Email from Pierce Schuessler, Legislative Affairs Director, DEP (Mar. 16, 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

²³ Section 120.541(2)(a)1.-3., F.S.

²⁴ DEP, *Statement of Estimated Regulatory Cost, Rule 62-772.300, F.A.C.*, 3 (on file with the Senate Committee on Environmental Preservation and Conservation).

procurement procedures and a one percent transaction fee for MyFloridaMarketPlace, to be approximately \$41 million per year.²⁵

The cost requirements outlined by the DEP in its new rules are already required of and incurred by contractors in order to conduct business pursuant to ss. 376.3071, 376.30711, and 376.30713, F.S.; however, the existing requirements are being restated in rule, thereby requiring ratification by the Legislature.

III. Effect of Proposed Changes:

The bill provides conforming language and makes technical changes to repeal the Petroleum Preapproval Program and requires the DEP to competitively procure contracts for the Petroleum Restoration Program.

Section 1 amends s. 376.3071, F.S., to affirm that the Petroleum Restoration Program be implemented in a manner that reduces costs and improves efficiencies for rehabilitation activities. The bill specifies that the Legislature intends to prioritize the cleanup of sites based on the threat of contamination to water resources and the environment, public health, safety, and welfare, and within the funding limits of the Inland Protection Trust Fund. The bill recognizes that when source removal is feasible and cost effective, it significantly reduces and eliminates the spread of contamination.

The bill specifies contracting and contractor selection requirements. It directs that state-funded cleanup sites are funded pursuant to the provisions of the Petroleum Restoration Program in ss. 376.3071, 376.305(6), 376.3072, and 376.3073, F.S. The bill requires a facility owner to abate the source of discharge for a release that occurred after March 29, 1995, and to notify the DEP if free product is present.

The bill requires the DEP to comply with competitive procurement requirements pursuant to ch. 287, F.S., or adopted rules.

Contractors that perform site assessments and remediation are required to certify to the DEP that they:

- Comply with applicable Occupational Safety and Health Administration regulations;
- Maintain workers compensation insurance for employees as required by the Florida Workers' Compensation Law;
- Maintain comprehensive general liability and comprehensive automobile liability insurance including:
 - Having minimum limits of \$1 million per occurrence; and
 - Having \$1 million per annual aggregate for personal injury, accidental death, and property damage;
- Maintain professional liability insurance of at least \$1 million per occurrence and \$1 million annual aggregate; and

²⁵ DEP, *Statement of Estimated Regulatory Cost, Rule 62-772.400, F.A.C.*, 3 (on file with the Senate Committee on Environmental Preservation and Conservation).

- Have the capacity to perform or directly supervise the majority of the rehabilitation work pursuant to s. 489.113(9), F.S.

The bill requires that the rules implementing this section must:

- Specify that only qualified contractors may submit responses on competitive solicitation;
- Include procedures for the rejection of vendors that do not meet the minimum qualifications; and
- Include requirements for the vendor to maintain its qualifications.

The bill provides procedures for invoicing and payments. Specifically, the bill:

- Requires invoices to be submitted on forms provided by the DEP;
- Requires contractors to provide evidence documenting the contracted services were provided;
- Requires invoices to be paid pursuant to s. 215.422, F.S., if there are sufficient unencumbered funds available;
- Allows a contractor to assign its right to payment to another person after the contractor has submitted an invoice and before payment is made;
- Specifies the assignee must be paid pursuant to s. 215.422, F.S.;
- Requires contractors to submit an invoice to the DEP within 30 days of the DEP's written acceptance of the interim deliverables or approval of the final deliverables;
- Allows the DEP to retain up to 25 percent of the contracted amount or use a performance bond as long as the terms are included in the contract;
- Specifies that the contractor, or the assignee, must make prompt payment to subcontractors and suppliers pursuant to s. 287.0585, F.S.;
- Specifies that the exemption provided in s. 287.0585(2), F.S., does not apply to payments associated with an approved contract;
- Allows the DEP to withhold payment if the validity or accuracy of the contractor's invoices or supporting documents is in question; and
- Does not authorize payment for the cost of contaminated soil treatment or disposal if the soil treatment or disposal does not meet the rules for general permitting, state air emissions standards, monitoring, sampling, and reporting rules as described by the DEP.

The bill specifies the DEP must terminate or suspend a contractor's eligibility for participation in the program if the contractor fails to perform its contractual duties. It also prohibits a site owner or operator, or its designee, from receiving remuneration in cash or in kind, directly or indirectly from a contract performing site cleanup activities. The bill clarifies that any action by the DEP to seek recovery of payments or overpayments to a contractor must be based on the law that existed at the time of payment or overpayment.

The bill deletes references to the preapproval program and obsolete provisions related to the reimbursement program and makes conforming and technical changes.

Section 2 repeals s. 376.30711, F.S., which provided contracting and contractor selection procedures for the preapproval program.

Section 3 amends s. 376.301, F.S., deletes the obsolete definitions of “backlog” and “person responsible for conducting site rehabilitation,” which were associated with the reimbursement program.

Sections 4-5 and 7-10 amend ss. 376.302, 376.305, 376.30714, 376.3072, 376.3073, 376.3075, F.S., respectively, to make conforming and technical changes to repeal the reimbursement program and the preapproval program.

Section 6 amends s. 376.30713, F.S., to allow an applicant to participate in the preapproved advanced cleanup program under a performance-based contract for the cleanup of at least 20 sites. The applicant must provide at least 25 percent of the costs of cleanup by paying, demonstrating cost savings to the DEP, or a combination of the two. The percentage of cost savings must be included in the application and compared to the cost of cleanup of the same sites using the current rates provided to the DEP by the agency term contractor. The DEP must determine if the cost savings demonstration is acceptable, which is not subject to ch. 120, F.S. The bill also makes conforming and technical changes to repeal the reimbursement program and the preapproval program.

Section 11 provides an effective date of July 1, 2014.

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:

Under PCS/SB 1582, the transition from a “preapproved contractor” approach to a competitive procurement system will have a positive and negative fiscal impact on the private sector. There will be costs to contractors associated with the requirements of submitting quotes and materials that meet the requirements of MyFloridaMarketPlace, including the one percent transaction fee. The utilization of competitive solicitation procedures are expected to reduce prices and potential profits. However, contractors that

maintain a positive performance record will be able to generate more work, which could offset the lower profit margins.²⁶

Generally, lower costs to rehabilitate sites will lead to greater efficiencies and the ability to clean up sites more cost effectively than in previous years. Individually, these costs may be negligible; however, in the aggregate and over time, the new program could lead to substantial savings.

The expansion of the preapproved advanced cleanup (PAC) program may benefit applicants with at least 20 sites that require cleanup. Conversely, because funding of this program is limited to \$15 million each fiscal year, such expansion may exhaust the funds available for applicants with less than 20 sites.

C. Government Sector Impact:

The bill may decrease DEP's cost of site rehabilitation due to the implementation of the competitive solicitation process. Since this process is in the early stage of implementation, the cost savings are indeterminate at this time.²⁷

In the PAC program, at least 25 percent in lower costs is required for applicants participating in a performance-based contract for the cleanup of at least 20 sites.

The department anticipates an increase in workload related to contracts and procurement in the Administrative section within the Petroleum Restoration Program. Currently, this section has 12 positions and an annual budget of \$886,103, with seven positions that work directly on contracts and procurement. According to the DEP, this is sufficient to handle the increased workload.

VI. Technical Deficiencies:

None.

VII. Related Issues:

CS/SB 1674, providing for legislative ratification of Rules 62-772.300 and 62-772.400, F.A.C., which relate to competitive bidding and contractor qualifications for the Petroleum Restoration Program, is pending. Failure to ratify the rules would prohibit the DEP from implementing the program after June 30, 2014.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 376.3071, 376.301, 376.302, 376.305, 376.30713, 376.30714, 376.3072, 376.3073, and 376.3075.

²⁶ *Supra* note 18, at 6.

²⁷ *Id.* DEP, *Senate Bill 1582 Agency Analysis*, 6 (Mar. 12, 2014) (on file with the Senate Committee on Environmental Preservation and Conservation).

This bill repeals section 376.30711 of the Florida Statutes.

IX. Additional Information:

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

Recommended CS by Appropriations Subcommittee on General Government on April 2, 2014:

- Authorizes the DEP to approve performance-based advanced cleanup contracts for at least 20 sites for applicants and requires that they demonstrate a proportional share of at least 25 percent of the cleanup costs;
- Requires competitive solicitations to adhere to the requirements in s. 287.055, F.S., relating to acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services.

- B. **Amendments:**

None.