

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7093 PCB ANRS 14-02 Rehabilitation of Petroleum Contamination Sites
SPONSOR(S): Agriculture & Natural Resources Subcommittee; Rooney, Jr.
TIED BILLS: **IDEN./SIM. BILLS:** SB 1582

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Agriculture & Natural Resources Subcommittee	12 Y, 0 N	Moore	Blalock
1) Agriculture & Natural Resources Appropriations Subcommittee	12 Y, 0 N	Helpling	Massengale
2) State Affairs Committee			

SUMMARY ANALYSIS

Petroleum is stored in thousands of underground and aboveground storage tank systems throughout Florida. Releases of petroleum into the environment may occur as a result of accidental spills, storage tank system leaks, or poor maintenance practices. These discharges pose a significant threat to groundwater quality, and Florida relies on groundwater for 90 percent of its drinking water. The Department of Environmental Protection (Department or DEP) is responsible for regulating these storage tank systems.

In 1986, the Legislature enacted the State Underground Petroleum Environmental Response Act (SUPER Act) to address the pollution problems caused by leaking underground petroleum storage systems. The SUPER Act led to the creation of the Petroleum Restoration Program (Restoration Program), which establishes the requirements and procedures for cleaning up contaminated land, as well as the circumstances under which the state will pay for the cleanup. The SUPER Act gave site owners two options for having their sites rehabilitated through the Restoration Program: site owners could either conduct the rehabilitation themselves and receive reimbursement from the state or have the state conduct the cleanup in priority order.

In 1996, the Legislature made substantial revisions to the Restoration Program as a result of an Attorney General report documenting abuse, inefficiencies, and fraud within the program. This legislation phased out the reimbursement format of funding assistance and created the Preapproval Program, which requires all state-funded site rehabilitation to be preapproved by the Department and based on templated costs.

As of February 2014, there are approximately 17,300 sites eligible for state funding. Of these, approximately 7,300 have been rehabilitated and closed, approximately 3,100 are currently undergoing some phase of rehabilitation, and approximately 6,900 await rehabilitation.

The general procurement laws of the state regulate state agency competitive solicitation of commodities and services. Without an explicit exemption, the Department is required to comply with these laws when procuring contracts for petroleum rehabilitation tasks. In addition, the law directs the Department to adopt rules governing procurement for pollution response action contracts, which include petroleum site rehabilitation contracts.

The proposed committee bill (PCB) repeals the Preapproval Program and relocates certain provisions that continue to be necessary. Thus, the Department will no longer preapprove site rehabilitation work based on templated costs. Instead, the bill requires all site rehabilitation work to be competitively procured pursuant to chapter 287, F.S., or rules adopted by the Department. Although it appears the Department was already required to competitively bid rehabilitation projects, the bill emphasizes that all work must now be procured through a competitive process. The PCB requires the Department's rules to specify that only vendors who meet the minimum qualifications in current law may submit responses on a competitive solicitation or perform site rehabilitation work.

The bill also repeals the reimbursement program, which has been obsolete since 1996, and changes the name of the Preapproved Advanced Cleanup program to the Advanced Cleanup program.

The bill does not appear to have a direct fiscal impact on state government, local governments, or the private sector.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h7093a.ANRAS

DATE: 3/25/2014

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Petroleum Restoration Program

Petroleum is stored in thousands of underground and aboveground storage tank systems throughout Florida. Releases of petroleum into the environment may occur as a result of accidental spills, storage tank system leaks, or poor maintenance practices.¹ These discharges pose a significant threat to groundwater quality, and Florida relies on groundwater for 90 percent of its drinking water.² The identification and cleanup of petroleum contamination is particularly challenging due to Florida's diverse geology, diverse water systems, and the complex dynamics between contaminants and the environment.³

In 1983, Florida began enacting legislation to regulate underground and aboveground storage tank systems in an effort to protect Florida's groundwater from past and future petroleum releases.⁴ The Department of Environmental Protection (Department or DEP) is responsible for regulating these storage tank systems. In 1986, the Legislature enacted the State Underground Petroleum Environmental Response Act (SUPER Act) to address the pollution problems caused by leaking underground petroleum storage systems.⁵ The SUPER Act authorized the Department to establish criteria for the prioritization, assessment and cleanup, and reimbursement for cleanup of contaminated areas, which led to the creation of the Petroleum Restoration Program (Restoration Program). The Restoration Program establishes the requirements and procedures for cleaning up contaminated land as well as the circumstances under which the state will pay for the cleanup.

Site Rehabilitation

Florida law requires land contaminated by petroleum to be cleaned up, or rehabilitated, so that the concentration of each contaminant in the ground is below a certain level.⁶ These levels are known as Cleanup Target Levels (CTLs).⁷ Once the CTLs for a contaminated site⁸ have been attained, rehabilitation is complete and the site may be closed. When a site is closed, no further cleanup action is required unless the contaminant levels increase above the CTLs or another discharge occurs.⁹

State Funding Assistance for Rehabilitation

The average cost to rehabilitate a site is approximately \$300,000, but some sites may cost millions of dollars to rehabilitate.¹⁰ Under Florida law, an owner of contaminated land (site owner) is responsible for rehabilitating the land unless the site owner can show that the contamination resulted from the activities of a previous owner or other third party (responsible party), who is then responsible.¹¹ Over the years, different eligibility programs have been implemented to provide state financial assistance to certain site owners and responsible parties for site rehabilitation. To receive rehabilitation funding assistance, a site must qualify under one of these programs, which are outlined in the following table:

¹ DEP, GUIDE TO FLORIDA'S PETROLEUM CLEANUP PROGRAM 1 (2002).

² *Id.*

³ *Id.*

⁴ Chapter 83-310, L.O.F.

⁵ Chapter 86-159, L.O.F.

⁶ Section 376.3071(5)(b)3., F.S.

⁷ *Id.*

⁸ A "site" is any contiguous land, sediment, surface water, or groundwater area upon or into which a discharge of petroleum or petroleum products has occurred or for which evidence exists that such a discharge has occurred. The site is the full extent of the contamination, regardless of property boundaries. DEP BUREAU OF PETROLEUM STORAGE SYSTEMS, PETROLEUM CLEANUP PREAPPROVAL PROGRAM STANDARD OPERATING PROCEDURES 2 (2012).

⁹ DEP, GUIDE TO FLORIDA'S PETROLEUM CLEANUP PROGRAM 24 (2002).

¹⁰ DEP, GUIDE TO FLORIDA'S PETROLEUM CLEANUP PROGRAM 26 (2002).

¹¹ Section 376.308, F.S.

TABLE 1: STATE-ASSISTED PETROLEUM CLEANUP ELIGIBILITY PROGRAMS		
PROGRAM NAME	PROGRAM DATES	PROGRAM DESCRIPTION
Early Detection Incentive Program (EDI) s. 376.3071(9), F.S.	Discharges must have been reported between July 1, 1986, and December 31, 1988, to be eligible	<ul style="list-style-type: none"> • First state-assisted cleanup program • 100 percent state funding for cleanup if site owners reported releases • Originally gave site owners the option of conducting cleanup themselves and receiving reimbursement from the state or having the state conduct the cleanup in priority order • Reimbursement option was phased out, so all cleanups are now conducted by the state
Petroleum Liability and Restoration Insurance Program (PLRIP) s. 376.3072, F.S.	Discharges must have been reported between January 1, 1989, and December 31, 1998, to be eligible	<ul style="list-style-type: none"> • Required facilities to purchase third party liability insurance to be eligible • Provides varying amountsof state-funded site restoration coverage¹²
Abandoned Tank Restoration Program (ATRP) s. 376.305(6), F.S.	Applications must have been submitted between June 1, 1990, and June 30, 1996 ¹³	Provides 100 percent state funding for cleanup, less deductible, at facilities that had out-of-service or abandoned tanks as of March 1990
Innocent Victim Petroleum Storage System Restoration Program s. 376.30715, F.S.	The application period began on July 1, 2005, and remains open	Provides 100 percent state funding for a site acquired before July 1, 1990, that ceased operating as a petroleum storage or retail business before January 1, 1985
Petroleum Cleanup Participation Program (PCPP) s. 376.3071(13), F.S.	PCPP began on July 1, 1996, and accepted applications until December 31, 1998	<ul style="list-style-type: none"> • Created to provide financial assistance for sites that had missed all previous opportunities • Only discharges that occurred before 1995 were eligible • Site owner or responsible party must pay 25 percent of cleanup costs¹⁴ • Originally had a \$300,000 cap on the amount of coverage, which was raised to \$400,000 beginning July 1, 2008

TABLE 1: STATE-ASSISTED PETROLEUM CLEANUP ELIGIBILITY PROGRAMS		
PROGRAM NAME	PROGRAM DATES	PROGRAM DESCRIPTION

¹² The PLRIP initially provided \$1M worth of site restoration coverage to eligible sites. In 1994, the state began phasing out the Department's participation in the restoration insurance program by reducing the amount of restoration coverage provided. For discharges reported from January 1, 1994, to December 31, 1996, coverage was limited to \$300,000. For discharges reported from January 1, 1997, to December 31, 1998, coverage was limited to \$150,000. Section 376.3072(2)(d)2.c.-d., F.S. In 2008, the Legislature raised the coverage for all PLRIP sites as follows: sites with \$1M in coverage were raised to \$1.2M, sites with \$300,000 in coverage were raised to \$400,000, and sites with \$150,000 in coverage were raised to \$300,000. Chapter 2008-127, s. 3, at 6, L.O.F.

¹³ The ATRP originally had a one-year application period, but the deadline was extended. The deadline is now waived indefinitely for site owners who are financially unable to pay for the closure of abandoned tanks. Section 376.305(6)(b), F.S.

¹⁴ The 25 percent copay requirement can be reduced or eliminated if the site owner and all responsible parties demonstrate that they are financially unable to comply. Section 376.3071(13)(c), F.S.

Consent Order (aka “Hardship” or “Indigent”)	This program began in 1986 and remains open	<ul style="list-style-type: none"> • Created to provide financial assistance under certain circumstances for sites that the Department initiates an enforcement action to clean up • An agreement is formed whereby the Department conducts the cleanup and the site owner or responsible party pays for a portion of the costs
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As of February 2014, there are approximately 17,300 sites eligible for state funding through one of the above programs. Of these, approximately 7,300 have been rehabilitated and closed, approximately 3,100 are currently undergoing some phase of rehabilitation, and approximately 6,900 await rehabilitation.

Inland Protection Trust Fund

To fund the cleanup of contaminated sites, the SUPER Act created the Inland Protection Trust Fund (IPTF).¹⁵ The IPTF is funded by an excise tax per barrel on petroleum and petroleum products in or imported into the state.¹⁶ The amount of the excise tax per barrel is determined by a formula, which is dependent upon the unobligated balance of the IPTF.¹⁷ Each year, approximately \$200 million is deposited into the IPTF, and about \$125 million is available for site rehabilitation.

Funding for rehabilitation of a site is based on a relative risk scoring system. Each funding-eligible site receives a numeric score based on the threat the site contamination poses to the environment or to human health, safety, or welfare.¹⁸ Sites currently in the Restoration Program range in score from five to 115 points, with a score of 115 representing a substantial threat and a score of five representing a very low threat. Sites are rehabilitated in priority order beginning with the highest score, with funding based on available budget.¹⁹ The Department sets the priority score funding threshold, which is the minimum score a site must be assigned to receive restoration funding at a particular point in time. The threshold is periodically raised or lowered depending on the Restoration Program’s current budget, projected expenditures for the remainder of the fiscal year, and the next fiscal year’s anticipated budget.²⁰ Currently, the threshold is set at 46 points.

Preapproval Program

When enacted in 1986, the SUPER Act gave site owners two options for having their sites rehabilitated through the Restoration Program: site owners could either conduct the rehabilitation themselves and receive reimbursement from the state or have the state conduct the cleanup in priority order.²¹ However, the reimbursement program proved to be costly and resulted in a backlog of unpaid claims amounting to \$551.5 million.²²

In 1996, the Legislature made substantial revisions to the Restoration Program as a result of an Attorney General report documenting abuse, inefficiencies, and fraud within the program. This legislation phased out the reimbursement format of funding assistance and created the current Preapproval Program, which requires all state-funded site rehabilitation to be conducted on a preapproved basis.²³ Thus, contractors may only be paid for site rehabilitation tasks if the scope of work was approved in writing by the Department before the work was conducted.²⁴ The legislation also

¹⁵ Section 376.3071(3)-(4), F.S.

¹⁶ Sections 206.9935(3) and 376.3071(6), F.S.

¹⁷ The amount of the excise tax per barrel is based on the following formula: 30 cents if the unobligated balance is between \$100 million and \$150 million; 60 cents if the unobligated balance is between \$50 million and \$100 million; and 80 cents if the unobligated balance is \$50 million or less. Section 206.9935(3), F.S.

¹⁸ Chapter 62-771.100, F.A.C.

¹⁹ Chapter 62-771.300, F.A.C.

²⁰ DEP BUREAU OF PETROLEUM STORAGE SYSTEMS, PETROLEUM CLEANUP PREAPPROVAL PROGRAM STANDARD OPERATING PROCEDURES 19-20 (2012).

²¹ DEP, GUIDE TO FLORIDA’S PETROLEUM CLEANUP PROGRAM 2 (2002).

²² DEP BUREAU OF PETROLEUM STORAGE SYSTEMS, PETROLEUM CONTAMINATION CLEANUP AND DISCHARGE PREVENTION PROGRAMS 17 (2012).

²³ Chapter 96-277, s. 5, L.O.F.

²⁴ *Id.*

directed the Department to adopt uniform scopes of work with templated labor and equipment costs to establish the type of work and expenditures that are allowed for preapproved site rehabilitation tasks.²⁵

The Preapproval Program is not an eligibility program that allows a site to receive state funding for rehabilitation. Rather, it is the process the Department uses to conduct site rehabilitation. All sites in the Preapproval Program must qualify for state rehabilitation funding through one of the eligibility programs previously described in Table 1.

Contractor Selection

Under the Preapproval Program, a site owner or responsible party may select any contractor to conduct the rehabilitation of a site as long as the contractor:

- Meets all certification and license requirements imposed by law;
- Complies with applicable Occupational Safety and Health Administration regulations;
- Maintains workers' compensation insurance for all employees;
- Maintains comprehensive general and automobile liability insurance;
- Maintains professional liability insurance;
- Has submitted a sworn statement on public entity crimes; and
- Has the capacity to perform or supervise the majority of the work at a site.²⁶

If a site owner or responsible party does not select a contractor by filling out a Contractor Designation Form (CDF), the Department assigns a state contractor to conduct rehabilitation of the site.²⁷ A site owner or responsible party may submit a new CDF designating a new contractor at any time, but may not switch contractors more than twice in any 12-month period.²⁸

Determining Rehabilitation Costs

There are three existing methods for developing a cost estimate for rehabilitation tasks: 1) fixed-cost templates, 2) time and materials, and 3) performance-based cleanup.

Fixed-Cost Templates

Pursuant to the law, the Department developed fixed costs for many common petroleum rehabilitation expenses.²⁹ Maximum compensation schedules were established to set fixed prices for commonly used non-labor items, such as lab analyses and equipment rentals.³⁰ The Department also created fixed cost templates that outline the fixed prices for packaged equipment kits and defined scopes of work.³¹ These templated costs are based on fixed rates for labor and the maximum compensation schedules.³² The fixed template amounts are paid to the contractor regardless of the actual cost of the work as long as the specified item was provided or scope of work was completed.³³ If a contractor wishes to increase the scope of work after a work order has been executed, he or she must provide justification for the extra work.³⁴ The extra work must be approved by the Department before the contractor commences work.³⁵ A reduction in the scope of work does not have to be preapproved and is instead handled when an invoice is submitted after completion of the work.³⁶

Time and Materials

²⁵ *Id.*

²⁶ Section 376.30711(2)(c), F.S.

²⁷ DEP BUREAU OF PETROLEUM STORAGE SYSTEMS, PETROLEUM CLEANUP PREAPPROVAL PROGRAM STANDARD OPERATING PROCEDURES 24 (2012).

²⁸ *Id.* at 25.

²⁹ Section 376.3071(2)(e), F.S.

³⁰ *Id.* at 50.

³¹ *Id.*

³² *Id.* at 69

³³ *Id.* at 52.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

Time and materials estimating is used only for scopes of work for which there are no fixed cost templates.³⁷ This method is commonly used for more complex rehabilitation work, such as remedial action constructions and deep well installations.³⁸ Under this method, costs for specific scopes of work are determined using the same standardized labor and equipment rates that the Department uses to determine the fixed cost templates.³⁹

Performance-Based Cleanup

Contractors who develop cost proposals using the fixed-cost template or time and materials approach are paid as long as the work outlined in the work order is completed, regardless of whether the work actually reduces the site's level of contamination.⁴⁰ In contrast, payment for work completed under the performance-based cleanup (PBC) approach is based upon measured progress toward reaching the rehabilitation goal.⁴¹ Under this method, a contractor guarantees complete rehabilitation of a site for a price agreed upon by the Department and the contractor.⁴² Contractors are not required to pursue rehabilitation using PBC, but are encouraged to do so for sites having certain factors that make them suitable for PBC.⁴³

Subcontractor Selection and Cost

Contractors may hire subcontractors to provide certain services or products for rehabilitation of a site, so long as the subcontractors meet the same requirements listed above for contractors under "Contractor Selection." For services or products that are not covered by the fixed-cost templates or the maximum compensation schedule, prices for subcontractor work must be provided by the contractor in the proposal.⁴⁴ If the subcontractor cost is equal to or greater than \$2,500, three written quotes are required.⁴⁵ The contractor must select the lowest bidder to complete the work unless there is good cause for not giving the work to that bidder, such as prior poor performance.⁴⁶ For costs less than \$2,500, only one written quote is required.⁴⁷ To account for the time and effort required to obtain a subcontractor, a contractor receives a fee, which is included in the total cost of the contract with the Department, that is equal to 10 percent of the subcontractor cost.⁴⁸

Expediting Site Rehabilitation

As described above, eligible contaminated sites typically receive state rehabilitation funding in priority order based on their numeric score. However, there are some programs that allow sites to receive funding for rehabilitation or site closure out of priority score order, as long as the sites are eligible under one of the programs in Table 1. Two of these programs are Preapproved Advanced Cleanup and Low Scored Site Initiative.

Preapproved Advanced Cleanup

Preapproved Advanced Cleanup (PAC) was created in 1996 to allow an eligible site to receive state rehabilitation funding even if the site's priority score does not fall within the threshold currently being funded.⁴⁹ The purpose of PAC was to facilitate property transactions or public works projects on contaminated sites.⁵⁰ To participate in PAC, a site must be eligible for state rehabilitation funding under the Early Detection Incentive Program (EDI), the Petroleum Liability and Restoration Insurance

³⁷ *Id.* at 56.

³⁸ *Id.* at 57.

³⁹ *Id.* at 69.

⁴⁰ *Id.* at 59.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 60.

⁴⁴ *Id.* at 75.

⁴⁵ *Id.* at 76.

⁴⁶ *Id.* at 78.

⁴⁷ *Id.* at 76.

⁴⁸ *Id.* at 53.

⁴⁹ Section 376.30713(1), F.S.

⁵⁰ *Id.*

Program (PLRIP), the Abandoned Tank Restoration Program (ATRP), the Innocent Victim Petroleum Storage System Restoration Program (Innocent Victim), or the Petroleum Cleanup Participation Program (PCPP).⁵¹

To apply for PAC, a site owner or responsible party must bid a cost share of the total site rehabilitation.⁵² The cost share must be at least 25 percent of the total cost of rehabilitation.⁵³ For PCPP sites, the cost share must be at least 25 percent of the state's share of the rehabilitation, as the site owner or responsible party is already required to pay for 25 percent of the total cost of rehabilitation to be eligible for PCPP.⁵⁴ In years when the Department runs a bid cycle, bids may be accepted in two windows of May 1 through June 30 and November 1 through December 31.⁵⁵ Bids are awarded based solely on the proposed cost-share percentage and not the estimated dollar amount of that share.⁵⁶ The Department may enter into PAC contracts for a total of up to \$15 million per fiscal year,⁵⁷ and no more than \$5 million per fiscal year may be preapproved for rehabilitation work at an individual facility.⁵⁸

Low Scored Site Initiative

The Low Scored Site Initiative (LSSI) was created to expedite the assessment and closure of sites that contain minimal contamination and that are not a threat to human health or the environment. To participate in the program, a site owner or responsible party must demonstrate that the following criteria are met:

- Upon assessment, the site retains a priority ranking score of 29 points or less;
- No excessively contaminated soil exists onsite;
- A minimum of six months of groundwater monitoring indicates that the plume is shrinking or stable;
- The remaining contamination resulting from petroleum products does not adversely affect adjacent surface waters;
- The area of groundwater contamination is less than one-quarter acre and is confined to the source property boundary; and
- Soils onsite found between the land surface and two feet below the land surface must meet the soil cleanup target levels (SCTLs) established by the Department unless human exposure is limited by appropriate institutional or engineering controls.⁵⁹

An assessment is conducted to determine whether the above criteria are met.⁶⁰ The state pays the assessment costs for sites eligible for funding under EDI, ATRP, Innocent Victim, PLRIP, or PCPP.⁶¹ Funding for LSSI is limited to \$10 million per fiscal year, which may only be used to fund site assessments.⁶² Each site has a funding cap of \$30,000, and each site owner or responsible party is limited to 10 eligible sites per fiscal year.⁶³ Funds are allocated on a first-come, first-served basis.⁶⁴ Sites not eligible for state rehabilitation funding may still qualify for closure under LSSI if an assessment reveals that the above criteria are met, but the state will not pay for the assessment.⁶⁵

If the assessment shows the above criteria are met, there are three options for site closure:

⁵¹ For PCPP sites, PAC is only available if the 25 percent copay requirement of PCPP has not been reduced or eliminated. Section 376.30713(1)(d), F.S.

⁵² Section 376.30713(2)(a), F.S.

⁵³ *Id.*

⁵⁴ Section 376.30713(1)(d)-(2)(a), F.S.

⁵⁵ Section 376.30713(2)(a), F.S.; DEP BUREAU OF PETROLEUM STORAGE SYSTEMS, PETROLEUM CLEANUP PREAPPROVAL PROGRAM STANDARD OPERATING PROCEDURES 7 (2012).

⁵⁶ Section 376.30713(2)(b), F.S.; DEP BUREAU OF PETROLEUM STORAGE SYSTEMS, PETROLEUM CLEANUP PREAPPROVAL PROGRAM STANDARD OPERATING PROCEDURES 7 (2012).

⁵⁷ Section 376.30713(4), F.S.

⁵⁸ A "facility" includes, but is not limited to, "multiple site facilities such as airports, port facilities, and terminal facilities even though such enterprises may be treated as separate facilities for other purposes under this chapter." Section 376.30713(4), F.S.

⁵⁹ Section 376.3071(11)(b)1., F.S.

⁶⁰ DEP PETROLEUM RESTORATION PROGRAM, PROCEDURAL AND TECHNICAL GUIDANCE FOR THE LOW-SCORED SITE INITIATIVE 9 (2013).

⁶¹ *Id.* at 3.

⁶² Section 376.3071(11)(b)3.c., F.S.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1-2.

- If no contamination is detected during the assessment, the Department may issue a site rehabilitation completion order.⁶⁶
- If the assessment demonstrates that minimal contamination exists onsite, but the above criteria are met, the Department may issue an LSSI no further action administrative order. This determination acknowledges that the contamination is not a threat to human health or the environment.⁶⁷
- If soil between the land surface and two feet below the land surface exceeds SCTLs, but the above criteria are otherwise met, the Department may issue a site rehabilitation completion order with conditions. This determination requires that institutional and/or engineering controls be put in place to prevent human or environmental exposure to the contamination. The state is not authorized to fund such controls.⁶⁸

If at any time data collected during the assessment indicate that the above criteria for closure will not be met, assessment activities will be terminated.⁶⁹ LSSI funding will be discontinued if it is determined at any point that a closure cannot be accomplished within the \$30,000 funding limit, unless the site owner or responsible party is willing to contribute funds to the assessment work.⁷⁰ A site determined to be ineligible for LSSI funding retains its current program eligibility and will receive rehabilitation funding in priority order.

Procurement

Chapter 287, F.S., regulates state agency⁷¹ procurement of commodities and services. Without an explicit exemption, the Department is required to comply with this chapter when procuring contracts for petroleum rehabilitation tasks.

Depending on the cost and characteristics of the needed goods or services, agencies may use a variety of procurement methods, including:

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposal, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.⁷²

For contracts for commodities or services in excess of \$35,000, agencies must use a competitive solicitation process.⁷³ Competitive solicitation means "the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement."⁷⁴ Certain contractual services and commodities are not subject to competitive solicitation requirements.⁷⁵

⁶⁶ Section 376.3071(11)(b)2., F.S.

⁶⁷ *Id.*

⁶⁸ DEP PETROLEUM RESTORATION PROGRAM, PROCEDURAL AND TECHNICAL GUIDANCE FOR THE LOW-SCORED SITE INITIATIVE 3 (2013).

⁶⁹ *Id.* at 11.

⁷⁰ *Id.*

⁷¹ Section 287.012(1), F.S., defines agency as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. 'Agency' does not include the university and college boards of trustees or the state universities and colleges."

⁷² Section 287.057, F.S.

⁷³ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

⁷⁴ Section 287.012(6), F.S.

⁷⁵ Section 287.057(3)(f), F.S.

In addition, s. 287.0595, F.S., directs the Department to adopt rules governing procurement for pollution response action contracts. The term “response action” includes any activity performed to rehabilitate a petroleum-contaminated site.⁷⁶ In the rules, the Department must establish procedures for:

- Determining the qualifications of responsible potential vendors prior to advertisement for and receipt of bids, proposals, or replies for pollution response action contracts, including procedures for the rejection of unqualified vendors;
- Awarding such contracts to the lowest responsible and responsive vendor,⁷⁷ as well as procedures to be followed in cases in which the Department declares a valid emergency to exist that would necessitate the waiver of the rules governing the awarding of such contracts to the lowest responsible and responsive vendor;
- Payment of contracts;
- Negotiating contracts, modifying contract documents, and establishing terms and conditions of contracts.⁷⁸

Inspector General Review

In 2012, during a review of the Department’s divisions, districts, and programs, questions arose concerning the effectiveness and efficiency of the Restoration Program. As a result, Secretary Herschel T. Vinyard, Jr., requested that his Inspector General review the Restoration Program and identify areas needing improvement. In a memo to Secretary Vinyard, the Inspector General identified the current contractor selection process as one such area. Specifically, the Inspector General stated:

The structure of the current program allows for the site owner/responsible party to designate the remediation contractor for their site. As long as the Department funds costs for work that can be easily manipulated and changed by outside parties, program funds are exposed to risk of waste or elevated costs. If the Department controlled the process of bid solicitation and designation of contractors, the opportunity for contractor manipulation would be greatly reduced.

2013 Legislation

For the 2013-14 fiscal year, the Legislature appropriated \$125 million to the Restoration Program. Due in part to the concerns raised in the Inspector General’s memo, however, that appropriation was limited by Specific Appropriation 1668 of the Fiscal Year 2013-14 General Appropriations Act in Senate Bill 1500 (proviso) and Section 29 of Senate Bill 1502 (implementing bill). The proviso appropriated up to \$50 million, available immediately, to the Department to fund payments for preapproved task assignments, contracts, and work orders approved by the Department before June 30, 2013, or to address an imminent environmental threat. The remaining \$75 million was placed in reserve until the Department submitted a plan to the Legislative Budget Commission (LBC) detailing how the Department would improve the effectiveness and efficiency of the Restoration Program. The plan was required to include a strategy for developing a competitive procurement process for selecting rehabilitation contractors pursuant to chapter 287, F.S. The implementing bill stipulated that after June 30, 2013, the Department could only enter into contracts that had been competitively procured. In addition, the proviso prohibited the funds in reserve from being released after January 1, 2014, unless the Department had adopted rules to implement the competitive procurement process.

On September 12, 2013, the Department presented its plan to improve the Restoration Program’s effectiveness and efficiency to the LBC. In the plan, the Department indicated an intent to:

- Implement competitive procurement procedures by developing a pool of qualified contractors through an invitation to negotiate process consistent with ss. 287.056, 287.057, and 287.0595, F.S.;

⁷⁶ See ss. 287.0595(1)(b) and 376.301(39), F.S.

⁷⁷ A “responsible vendor” is defined as “a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance.” Section 287.012(24), F.S. A “responsive vendor” is defined as “a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation.” Section 287.012(26), F.S.

⁷⁸ Section 287.0595(1), F.S.

- Create performance expectations for the contractors and procedures for evaluating their performance on an ongoing basis; and
- Reduce costs by ending its practice of purchasing rehabilitation equipment.

The LBC approved the plan unanimously.

To further comply with the proviso, the Department initiated rulemaking. On October 4, 2013, the Department filed a Notice of Proposed Rule in the Florida Administrative Register. The rules were filed for adoption with the Secretary of State on December 27, 2013. Some of the rules became effective on January 16, 2014, but two of the rules require ratification by the Legislature before they can become effective.⁷⁹

Effect of Proposed Changes

The proposed bill repeals s. 376.30711, F.S., which establishes the Preapproval Program, and relocates certain provisions that continue to be necessary. Thus, the Department will no longer preapprove site rehabilitation work based on templated costs. Instead, the bill requires all site rehabilitation work to be competitively procured pursuant to chapter 287, F.S., or rules adopted by the Department under s. 376.3071, F.S., or s. 287.0595, F.S. Although the Department was already required to competitively bid rehabilitation projects, the bill emphasizes that all work must now be procured through a competitive process.

The bill requires the Department's rules to specify that only vendors who meet the minimum qualifications in current law may submit responses on a competitive solicitation for site rehabilitation work. The rules must also include procedures for the rejection of vendors not meeting the minimum qualifications on the opening of a competitive solicitation, as well as requirements for a vendor to maintain its qualifications in order to enter contracts or perform rehabilitation work.

In addition, the bill repeals s. 376.3071(12), F.S., which establishes the reimbursement program. The reimbursement program has been obsolete since 1996.

Lastly, the bill changes the name of the Preapproved Advanced Cleanup program to the Advanced Cleanup program.

B. SECTION DIRECTORY:

Section 1 amends s. 376.301, F.S., conforming cross references.

Section 2 amends s. 376.302, F.S., conforming cross references.

Section 3 amends s. 376.305, F.S., conforming cross references.

Section 4 amends s. 376.3071, F.S., requiring petroleum site rehabilitation work to be competitively procured; repealing an obsolete reimbursement program.

Section 5 repeals s. 376.30711, F.S., relating to preapproved petroleum site rehabilitation.

Section 6 amends s. 376.30713, F.S., changing program name; conforming cross references.

Section 7 amends s. 376.30714, F.S., conforming cross references.

Section 8 amends s. 376.3072, F.S., conforming cross references.

Section 9 amends s. 376.3073, F.S., conforming cross references.

Section 10 amends s. 376.3075, F.S., conforming cross references.

⁷⁹ The two rules requiring legislative ratification are chapters 62-772.300 and 62-772.400, F.A.C.

Section 11 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill's modifications of the cleanup program will not impact Inland Protection Trust Fund revenues or how the Legislature appropriates those funds.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.