

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 Appropriations Subcommittee on General Government

BILL: CS/SB 314

INTRODUCER: Environmental Preservation and Conservation Committee and Senator Simpson

SUBJECT: Petroleum Restoration Program

DATE: April 7, 2015 REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 314 revises certain provisions of the Petroleum Restoration program. Specifically, the bill:

- Expands the eligibility requirements of the Abandoned Tanks Restoration Program (ATRP);
- Removes the provision that a property owner must provide evidence that he or she had a complete understanding of the previous ownership and use of the property prior to acquiring the property;
- Allows a property owner to approve the use of risk-based corrective action (RBCA) principles in remediating a discharge;
- Requires site owners or the responsible party to approve conditional site closures, site closures with institutional or engineering controls, or work stoppages;
- Requires the Department of Environmental Protection (DEP) to establish in rule a procedure to process invoices that are less than \$500,000 per task;
- Allows the DEP to negotiate a contract based on the best available rate from a pool of three agency term contractors selected by the site owner or operator;
- Requires the agency term contractor and the property owner or responsible party to submit a sworn affidavit to the DEP that neither party has solicited, offered, accepted, paid, or received any compensation, remuneration, or gift of any kind in exchange for selection of the agency term contractor;
- Requires the agency term contractor to disclose a conflict of interest or potential conflict of interest to the DEP;

- Allows a site to qualify for the low-scored site initiative (LSSI) program when the source boundary is greater than one-quarter acre and located below a state road or a state road's right-of-way;
- Increases the funding for the source removal, site assessment, supplemental site assessment, and groundwater monitoring of a site in the LSSI from \$30,000 to \$35,000 in order to achieve No Further Action status or a site rehabilitation completion order;
- Specifies that only agency term contractors may participate in the LSSI;
- Requires that sites completed in the LSSI must be granted priority two scoring status for ongoing assessment or remedial activity;
- Requires that all work in the LSSI must be completed within nine months;
- Authorizes an additional six months of groundwater monitoring if the DEP determines that additional groundwater monitoring is warranted;
- Expands the Petroleum Cleanup Participation Program (PCPP) by eliminating the reporting deadline and increasing the state's funding cap from \$400,000 to \$1 million;
- Decreases the number of sites that may be bundled and eligible to compete for performance based contracts under the Advanced Cleanup Program (ACP) from 20 to 10;
- Increases the annual funding cap from \$15 million to \$25 million for the Advanced Cleanup Program (ACP); and
- Allows a property owner or responsible party to enter into a voluntary cost share agreement for bundling multiple sites and specifies the sites are not subject to the agency term contractor assignment pursuant to rule.

The bill has a significant fiscal impact on the Petroleum Restoration program within the DEP that includes the following:

- Expanding the Petroleum Clean Participation Program by increasing the state's funding cap is estimated to cost the state between \$146 million and \$857 million;
- Changes to the low-scored site initiative activities are estimated to cost the state approximately \$18.9 million;
- The property owner's ability to prohibit the use of Risk-Based Corrective Action (RBCA) to remediate a discharge will have an indeterminate negative fiscal impact to the DEP;
- Decreasing the number of sites that must be bundled to participate in the advanced cleanup program would result in an indeterminate decreased costs savings for the program;
- Amending the eligibility requirements for the Abandoned Tanks Restoration Program (ATRP) and allowing property owners the ability to prohibit the use of risk-based corrective action principles in remediating a discharge, will have an indeterminate negative fiscal impact to the DEP; and
- Increasing the threshold for processing invoices that are required to use the MyFloridaMarketPlace (MFMP) to \$500,000 per task, will have an indeterminate negative fiscal impact to the DEP.

Senate Bill 2500, the Senate's Fiscal Year 2015-2016 General Appropriations Bill, provides \$110 million from the Inland Protection Trust Fund within the DEP for the Petroleum Tanks Cleanup program, in addition to base operational funding. The bill would significantly increase program costs that are not included in the current appropriation provided in SB 2500.

This bill is effective July 1, 2015.

II. Present Situation:

Restoration of Petroleum Contaminated Sites

The Division of Waste Management within the Department of Environmental Protection (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

As of February 25, 2015, 8,378 discharges have been closed since the program began in 1986. There are approximately 5,011 discharges undergoing some phase of remediation and 5,074 discharges that are waiting for remediation. Site rehabilitation funding is based on the 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. The DEP is currently funding the remediation of discharges that score 30 or above. The total number of sites that are currently eligible for state funding varies as sites are closed out and new sites are added to the program.³

State Underground Petroleum Environmental Response Act

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, which is funded by a tax on petroleum products imported or produced in Florida, and serves as a repository for the various petroleum contamination cleanup programs. The SUPER Act established the Early Detection Incentive Program (EDI), which provided site owners with the option of conducting the cleanup themselves and then receiving reimbursement from the Inland Protection Trust Fund, or having the state conduct the cleanup in priority order.⁴

Petroleum Liability Insurance Program

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.⁵ The program was revised in 1989 and renamed to the Petroleum Liability Insurance and Restoration Program (PLIRP). The PLIRP allowed eligible petroleum facilities to purchase \$1 million in pollution

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. 9, 2015).

³ DEP, *Senate Bill 314 Agency Analysis*, 3, (Jan. 20, 2015) (on file with the Senate Committee on Environmental Preservation and Conservation).

⁴ Section 376.3071, F.S.

⁵ Section 376.3072, F.S.

liability protection from a state contracted insurer and provided \$1 million worth of site restoration coverage through reimbursement or state-funded cleanup.⁶

Abandoned Tank Restoration Program

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 was subsequently extended to 1992, then 1994. In 1996, the Legislature waived the deadline indefinitely for owners who are unable to pay for the closure of abandoned tanks. To be eligible for the ATRP, applicants must certify that the petroleum system has not stored petroleum products for consumption, use, or sale since March 1, 1990.⁷ There are currently 4,084 eligible ATRP discharges and 2,078 discharges have been remediated.⁸

The Reimbursement Program

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,⁹ which was funded by increasing the excise tax on petroleum and petroleum products.¹⁰ 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 Inland Protection Trust Fund. By 1996, over 18,000 petroleum sites had been identified as contaminated and the program had accumulated \$551.5 million in outstanding reimbursement claims.¹¹

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.¹²

Petroleum Preapproval Program

The Petroleum Preapproval Program was implemented by the Legislature in 1996 in order to address the backlog of reimbursement applications and excessive costs to the Inland Protection Trust Fund (IPTF).¹³ The program required state-funded cleanup 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 correction action (RBCA) principles in the cleanup criteria rule. The DEP preapproved all cleanup costs for performance based contracts using competitive bid procedures or negotiated contracts.

⁶ Chapter 89-188, Laws of Fla.

⁷ Section 376.305, F.S.

⁸ DEP, *Senate Bill 314 Agency Analysis*, 3, (Jan. 20, 2015) (on file with the Senate Committee on Environmental Preservation and Conservation).

⁹ The term "cleanup sites" includes contaminated sites that are being remediated by the state or the property owner.

¹⁰ Chapter 92-30, Laws of Fla.

¹¹ Comm. on Environmental Preservation and Conservation, the Florida Senate, *Underground Petroleum Storage Tank Cleanup Program*, (Interim Report 2005-153) (Nov. 2004).

¹² Chapter 95-2, Laws of Fla.

¹³ Chapter 96-277, s. 6, Laws of Fla.

Advanced Cleanup Program

The Advanced Cleanup Program (ACP) 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 ACP 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.¹⁴

Section 376.30713(4), F.S., authorizes the DEP to enter into advanced cleanup 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.¹⁵ 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.¹⁶

Petroleum Cleanup Participation Program

The Petroleum Cleanup Participation Program (PCPP) was also created in 1996 for sites that had missed the opportunity for state funding assistance but had reported contamination before 1995. Responsible parties in the PCPP cost share in the cleanup and prepare a limited scope assessment at their expense. Sites that qualify for this program are eligible for \$400,000 in rehabilitation funding and the owner, operator, or responsible party is required to pay 25 percent of the costs. The copayment amount may be reduced depending on the financial ability of the owner, operator, or responsible party.¹⁷ There are currently 1,727 PCPP eligible discharges.¹⁸

Revisions to the Petroleum Restoration Program

The Petroleum Restoration Program was amended in 1999 by HB 2151 to provide up to \$5 million in funding for certain source removal activities in advance of the priority ranking. The DEP was directed to select five low-scoring sites in the petroleum preapproval program for an innovative pilot program. The measure also extended the ACP beyond October 1, 1999.

Section 376.30714, F.S., was created in HB 2151 to address contamination on a site with eligible discharges (reported by December 31, 1998) and ineligible discharges (reported on or after January 1, 1999). Discharges that are reported on or after January 1, 1998, are not only ineligible for state funding, but are also not eligible for the PLIRP. The inability to scientifically distinguish old discharges from new discharges results in eligible and ineligible discharges at a single location. The measure authorizes the DEP to address such instances through negotiated site rehabilitation agreements. The site rehabilitation agreements include a Limited Contamination Assessment Report; the allocation of funding between the state and the responsible party, owner, or operator; the proof of financial responsibility of the owner, operator,

¹⁴ Section 376.30713, F.S.

¹⁵ Section 376.30713(4), F.S.

¹⁶ Section 376.30713(2), F.S.

¹⁷ Section 376.3071(13), F.S.

¹⁸ DEP, *Senate Bill 314 Agency Analysis*, 3, (Jan. 20, 2015) (on file with the Senate Committee on Environmental Preservation and Conservation).

or responsible party; and the establishment of the cleanup priority of the site. Any discharges reported by December 31, 1998, remain subject to the program requirements for which it is eligible.

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

- All of Florida's underground petroleum storage tanks be upgraded prior to January 1, 2010;
- The DEP to establish a process to uniformly encumber funds appropriated for the petroleum preapproval 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 (DOT) 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 ten sites per fiscal year per owner for source removal associated with the underground petroleum storage system upgrade;
- Limited funding for interim source removal activities at the DOT projects to up to ten percent of the total source removal costs and funds may only be used for soil assessment, soil screening, soil removal, backfill material, treatment or disposal of contaminated soil, and dewatering;
- Limited funding of \$1 million per fiscal year for the DOT projects, and \$10 million per fiscal year for underground petroleum storage system upgrade projects;
- Repeal of funding provisions by June 30, 2008;
- Availability of the Preapproved Advanced Cleanup Participation Program for discharges that are eligible for restoration funding under the PCPP provided the applicants includes a cost-sharing commitment in addition to the 25 percent copayment requirement for the PCPP; and
- An extension of the life of the Inland Protection Financing Corporation from 2011 to 2025, and that the corporation issue notes and bonds, and pay for large-scale cleanups such as ports, airports, and terminal facilities that are eligible for state funding.¹⁹

Low-Scored Site Initiative

The Low-Scored Site Initiative (LSSI) was created in 2010 to allow property owners with low scoring sites to voluntarily participate the Petroleum Restoration program. To qualify for the LSSI, the following site conditions are required:

- A priority score of 29 or less;
- Excessively contaminated soil from petroleum products is not present;
- Six months of groundwater monitoring that demonstrate the plume is shrinking or stable;
- Adjacent surface water, including its effects on human health and the environment, is not affected;
- The area containing the contamination must be less than one-quarter acre and confined to the source property boundaries; and
- Soil contamination subject to human exposure at the surface and two feet below the land surface meets the appropriate cleanup target levels.

¹⁹ Sections 376.3071, 376.30713, 376.3075, and 376.30715, F.S.

A property that qualifies for state funding may receive up to \$30,000 to conduct a site assessment and six months of groundwater monitoring. Funding for the LSSI is limited to \$10 million for a fiscal year and is made available on a first come, first served basis. A property owner that chooses to participate in the LSSI is limited to ten sites per fiscal year.

Once the LSSI criteria in s. 376.3071(12)(b)1., F.S., is confirmed for a site, the DEP must issue either a No Further Action, indicating the contamination is minimal and of no risk, or a site rehabilitation completion order, indicating there is no contamination remaining.

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, 2014.²⁰

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. In addition, no funds could be released after January 1, 2014, unless the DEP adopted rules to implement ss. 376.3071, 376.30711, and 376.30713, F.S. The DEP's plan was approved by the LBC on September 12, 2013, and rules were adopted on December 27, 2013.²¹ The remaining \$75 million in appropriation was released in March 2014.²²

In 2014, the Legislature passed CS/HB 7093 to substantially amend the Petroleum Restoration program by repealing the Petroleum Preapproval program in s. 376.30711, F.S., deleting obsolete provisions related to the reimbursement program, requiring competitive procurement procedures for clean-up contracts, and revising clean-up contractor qualifications.

Section s. 376.3071, F.S., was amended to include the following:

- State-funded cleanup sites are funded pursuant to the provisions of the Petroleum Restoration program in ss. 376.3071, F.S., 376.305(6), 376.3072, and 376.3070, F.S.;
- A facility owner must abate the source of discharge for a release that occurred after March 29, 1995, and notify the DEP if free product is present;
- Clean-up contracts for contamination sites in the Petroleum Rehabilitation program must be procured pursuant to the competitive procurement requirements in chapter 287, F.S., or the rules adopted under ss. 376.3071 and 287.0595, F.S., and invoices must be paid pursuant to s. 215.422, F.S.;
- Site assessment and remediation contractors must certify to the DEP that they:

²⁰ Chapter 2013-41, s. 29, Laws of Fla.

²¹ The Statement of Estimated Regulatory Cost (SERC) prepared by the DEP to implement Rules 62-772.300 and 62-772.400, F.A.C determined the rules required ratification by the legislature. The majority of the cost requirements outlined by the DEP in the SERC were costs already incurred by contractors as the cost to conduct business. However, the existing requirements were being restated in rule, thereby requiring legislative ratification during the 2014 Legislative Session (ch. 2014-149, Laws of Fla).

²² Chapter 2013-40, Laws of Fla.

- Comply with applicable Occupational Safety and Health Administration regulations;
- Maintain workers compensation insurance;
- Maintain comprehensive general liability and comprehensive automobile liability insurance;
- Maintain professional liability insurance;
- Have the capacity to perform or directly supervise the majority of the rehabilitation work pursuant to s. 489.113(9), F.S.
- The rules implementing s. 376.3071, F.S., must:
 - Specify that only qualified contractors may submit responses on competitive solicitation;
 - Include procedures for rejection of vendors that do not meet the minimum qualifications; and
 - Include the requirements from the vendor to maintain its qualification.
- A site owner or operator, or its designee, is prohibited from receiving remuneration in cash or in kind, directly or indirectly from a contractor performing site cleanup activities; and
- Allows the DEP to seek recovery of overpayment as a result of the findings of an audit.

Section 376.30713, F.S., was amended to allow an applicant to participate in the advanced cleanup program under a performance-based contract for the cleanup of at least 20 sites. The applicant must commit to pay 25 percent or more of the costs of cleanup. In order to meet the requirements of the cost-share agreement, the applicant may commit to pay, demonstrate a cost savings to the state, or use 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.

Competitive Solicitation of Contractual Services

Prior to 2014, the DEP did not regularly use competitive bid procedures or negotiated contract procedures under ch. 287, F.S., even though the DEP was authorized to use them.

State agencies that competitively solicit contractual services are subject to the provisions in s. 287.057, F.S., which include:

- For contractual services that exceed \$35,000, the competitive solicitation must:
 - Be available to all vendors;
 - Include the time and date for the receipt of bids, proposals, 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;
 - Be subject to the invitation to bid process when the agency is able to define the scope of work and establish the specifications of the services needed;
 - Be subject to the request for proposal process when the purpose of the services needed can be defined and the agency can identify the deliverables; and
 - Be subject to 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.
- Requiring contractual services that exceed the \$35,000 threshold to 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.²³

Agency Term Contracts

Rule 62-772, F.A.C., directs the DEP to enter into multiple agency term contracts to retain contractors to conduct petroleum site rehabilitation services for a specific task assignment.²⁴ The agency term contract specifies that all site rehabilitation activities that cost more than \$195,000 will be procured by quotes from all eligible agency term contractors in the region where the site is located. For site rehabilitation activities that cost less than \$195,000, the DEP will directly assign the task to an agency term contractor using the Relative Capacity Index (RCI) algorithm. The RCI provides an unbiased, cost effective mechanism for assigning tasks to the agency term contractors.²⁵ As of March 2014, the DEP has competitively procured 70 agency term contractors that are divided into three regions around the state.

Performance Based Contracts

The DEP may issue performance based contracts to approved agency term contracts for sites that may be remediated in an aggressive, cost effective, efficient manner. Performance based contracts are negotiated based on quotes for the total cost of cleanup, technology and design, remediation milestones, site closure options, time to complete remediation, and the total cost paid for the completion of each milestone. Performance based contracts are considered for:

- Sites procured through RCI assignment in which the current agency term contractor would like to continue through a performance based contracts;
- Sites that are unassigned or require RCI assignment;
- Sites that have been in natural attenuation monitoring for over four years that show minimal progress toward closure;
- Bundled sites based on phase and/or location; and
- Sites with a restrictive funding cap amount.²⁶

MyFloridaMarketPlace

The Department of Management Services established a statewide electronic registration and procurement system called MyFloridaMarketPlace (MFMP). Pursuant to s. 287.057(23), F.S., a one percent transaction fee is charged to all vendors in order to utilize the system.²⁷

²³ See s. 287.057, F.S.

²⁴ Chapter 62-772.200(b), F.A.C., defines an agency “term contract” as “an agreement between the DEP and a vendor whereby the vendor agrees to provide an indefinite quantity of commodities or contractual services, on an indefinite delivery schedule, over a specified period of time.”

²⁵ The DEP, Agency Term Contractor Selection Process, *RCI flow chart*, available at http://www.dep.state.fl.us/waste/quick_topics/publications/pss/pcp/RCI_final_19Dec14.pdf (Mar. 9, 2015).

²⁶ The DEP, Performance Based Cleanup-General Information, available at http://www.dep.state.fl.us/waste/quick_topics/publications/pss/pcp/announcements/NOIPP-PBC-Info-Sheet.docx (last visited Mar. 9, 2015).

²⁷ See Rules 60A-1.030, 60A-1.031, and 60A-1.032, F.A.C.

Risk Based Corrective Action (RBCA)

Section 376.3071, F.S., was amended in 1996 to require the DEP to adopt rules for RBCA principles for the rehabilitation of contaminated petroleum sites. The RBCA process uses a tiered approach that couples site assessment and response actions with human health, public safety, and environmental risk assessment to determine the extent and urgency of corrective action used in remediating contaminated sites. Alternative cleanup target levels,²⁸ institutional²⁹ and engineering controls,³⁰ and remediation by natural attenuation³¹ are RBCA strategies used on a case-by-case basis and allow the DEP to use cost-effective and effective remediation measures in lieu of conventional cleanup technologies. RBCA is endorsed by the U.S. Environmental Protection Agency and is implemented in all 50 states for the remediation of contaminated sites.³²

The use of RBCA has expanded to the state's dry cleaning site remediation program under s. 376.3078, F.S., the brownfields program under s. 376.81, F.S., and all other contaminated sites under s. 376.30701 F.S. The RBCA provisions in s. 376.30701, F.S., do not include the petroleum restoration, brownfields, and dry cleaning programs because they are subject to their own RBCA provisions in statute.

The Florida RBCA process includes the following components:

- The one in one million cancer risk for carcinogenic constituents;
- A hazard index of one for non-carcinogenic constituents in the development of cleanup target levels for groundwater, surface water, and soil;
- Relocating a compliance point away from the contamination source area to the edge of the plume or property boundary to allow for natural attenuation; and
- Eliminating or minimizing human exposure to the contamination site by using institutional and engineering controls.

Funding and Improvements to the Petroleum Restoration Program

The Petroleum Restoration program was appropriated \$110 million for the 2014-2015 fiscal year. The DEP reports that as of March 9, 2015, approximately \$30 million has been invoiced and the balance remaining is approximately \$80 million. The DEP expects to invoice

²⁸ Section 37.301(7), F.S., defines "cleanup target levels" as "the concentration for each contaminant identified by an applicable analytical test method, in the medium of concern, at which a site rehabilitation program is deemed complete."

²⁹ Section 376.301(21), F.S., defines "institutional control" as "the restriction on use or access to a site to eliminate or minimize exposure to petroleum products' chemical of concern, dry cleaning solvents, or other contaminants. Such restrictions may include, but are not limited to, deed restrictions, restrictive covenants, or conservation easements."

³⁰ Section 376.301(16), F.S., defines "engineering controls" as "modifications to a site to reduce or eliminate the potential for exposure to petroleum products' chemicals of concern, dry cleaning solvents, or other contaminants. Such modifications may include, but are not limited to, physical or hydraulic control measures, capping, point of use treatments, or slurry walls."

³¹ Section 376.301(24), F.S., defines "natural attenuation" as a "verifiable approach to site rehabilitation that allows natural processes to contain the spread of contamination and reduce the concentrations of contaminants in contaminated groundwater and soil. Natural attenuation processes may include the following: sorption, biodegradation, chemical reactions with subsurface materials, diffusion, dispersion, and volatilization."

³² EPA, *Use of Risk-Based Decision-Making in UST Corrective Action Programs*, OSWER Directive 9610.17 (Mar., 1995) <http://epa.gov/swerust1/directiv/od961017.htm> (last visited Mar. 9, 2015).

approximately \$30 million by the end of the current fiscal year and \$50 million will be certified forward to 2015-2016 fiscal year.

The state has realized an overall costs savings since the Petroleum Restoration program was transitioned to the competitive procurement requirements in ch. 287, F.S., or the rules adopted under ss. 376.3071 and 287.0595, F.S. The site assessment and engineering design costs are 10 percent less, the groundwater monitoring costs are 19 percent less, and operation and maintenance costs of remedial systems are 11 percent less. The average cost savings for the remediation of discharges in the Advanced Cleanup Program is 32.7 percent.

The DEP reports that 99.9 percent of high risk exposure facilities are in active remediation or assessment, and 100 percent of facilities in the moderate risk category are in active remediation or assessment. The DEP also reports that the average procurement time under the new system is three to five weeks, which is comparable to processing time prior to the system overhaul.

III. Effect of Proposed Changes:

Section 1 amends s. 376.305, F.S., to expand the Abandoned Tank Restoration Program (ATRP) program by removing the reporting deadline, which currently separates eligible from ineligible sites. The expansion of the program will provide state funding eligibility for remediation of a large but indeterminate number of discharges.

The bill removes the provision that a property owner of a site in the ATRP must provide evidence that he or she had a complete understanding of the use of the property prior to acquisition.

Section 2 amends s. 376.3071, F.S., to allow a property owner to prohibit the use of risk-based corrective action (RBCA) principles established in rule when remediating a discharge. The provision prohibits the DEP from being able to use cost effective remediation efforts, including natural attenuation, for discharges that pose little to no risk, and will expand the cleanup efforts to discharges that did not previously warrant such efforts.

The bill requires site owners or the responsible party to approve a conditional closure, a closure with institutional or engineering controls that require deed restrictions, or a work stoppage not due to insufficient funds.

The bill requires the DEP to establish a procedure to process invoices that are less than \$500,000 per task, including the direct assignment of tasks. The bill allows invoices that are at least \$500,000 to be processed pursuant to ch. 287, F.S. The elimination of the MyFloridaMarketPlace (MFMP) may result in decreased competition among agency term contractors and increase costs to the state as the majority of task assignments are less than \$500,000.

The bill allows a site owner or operator not participating in a cost sharing program to select three agency term contractors from which the DEP selects one based on the best value to the state. Currently, owners or operators that cost share at least 25 percent for the cleanup of discharges eligible for the advanced cleanup program or Petroleum Participation Cleanup Program (PCPP) are able to select their own contractor.

The bill requires the agency term contractor and the property owner or responsible party to submit a sworn affidavit to the DEP that neither party has solicited, offered, accepted, paid, or received any compensation, remuneration, or gift of any kind in exchange for selection of the agency term contractor. The provision will cause a delay in remediating a site if the DEP is unable to obtain an affidavit prior to the commencement of cleanup activities.

The bill also requires the agency term contractor to disclose any conflict of interest to the DEP, and allows the DEP to terminate a contract if it determines there is a potential conflict of interest. The provision will cause a delay in remediation if the DEP is unable to obtain the required information prior to the commencement of cleanup activities, or if the DEP has to terminate a contract if a conflict of interest is uncovered.

The bill allows properties that have a contamination area greater than one-quarter acre and located below a state road or a state road's right-of-way to participate in the low-scored site initiative (LSSI), which will increase the number of sites that qualify for state funding.

The bill increases the funding limit for source removal, site assessments, and six months of groundwater monitoring for LSSI sites from \$30,000 to \$35,000 in order to achieve No Further Action status or to receive a site rehabilitation completion order. The bill also authorizes the DEP to approve an additional \$35,000 for the interim source removal of a site in the LSSI in order to achieve No Further Action status or receive a site rehabilitation completion order. The DEP may approve an additional \$35,000 for a supplemental site assessment for sites assessed before July 1, 2015, in order to achieve No Further Action status or a site rehabilitation completion order.

The bill specifies that only agency term contractors may participate in the LSSI. It also requires sites that qualify for ongoing assessment or remedial activity to be granted priority two scoring status. All work must be completed nine months after assessment begins. The bill allows the DEP to authorize an additional six months of monitoring if the supplemental site assessment determines that additional groundwater monitoring is warranted.

The bill expands the PCPP by removing the application deadline for the program, which required owners or operators of a property to report a discharge to the state by December 31, 1998, for contamination discovered at an inactive site after December 31, 1994. The bill increases the maximum amount the state may be required to pay for PCPP eligible discharges from \$400,000 to \$1 million.

Section 3 amends s. 376.30713, F.S., to revise the provisions of the Advanced Cleanup program. The bill allows more owners, operators, or responsible parties to participate in the Advanced Cleanup program by decreasing the number of sites that may be bundled and eligible to compete for performance based contracts from 20 to 10. To account for the additional participation in the program, the annual allocation is increased from \$15 million to \$25 million.

The bill allows a property owner or responsible party to enter into a voluntary cost share agreement for bundling multiple sites and to provide a list of the sites to be included in future bundles. The sites that will be included in a future bundle are not subject to agency term contractor assignment pursuant to rule. The DEP may terminate the voluntary cost share

agreement if the application to bundle multiple sites is not submitted during the open application period. This provision will extend the period of time listed sites will be remediated because they are not subject to the agency term contractor assignment.

Section 4 provides an effective date of July 1, 2015.

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:

There may be a positive fiscal impact to the contractors as the limit to use the eQuote system to competitively procure contracts is increased from \$195,000 to \$500,000. The Department of Environmental Protection (DEP) estimates 80 to 90 percent of all tasks assignments are less than \$500,000.³³

The requirement for the DEP to adopt rules and implement a new system for issuing task assignments and processing invoices will cause a delays in invoicing and the issuance of new work, resulting in a negative fiscal impact to the private sector.³⁴

Property owners that participate in the Petroleum Cleanup Participation Program (PCPP) may experience a cost increase as the cost share amount will increase from 25 percent of up to \$400,000 to 25 percent of up to \$1 million.

³³ DEP, *Senate Bill 314 Agency Analysis*, 6, (Jan. 20, 2015) (on file with the Senate Committee on Environmental Preservation and Conservation).

³⁴ *Id.*

C. Government Sector Impact:

The increased threshold for processing invoices and the direct assignment of tasks from \$195,000 to \$500,000 to utilize the MyFloridaMarketPlace (MFMP), will likely result in decreased competition between agency term contractors and increased costs to the DEP.³⁵

The amended eligibility requirements for the Abandoned Tank Restoration Program (ATRP) will have an indeterminate negative fiscal impact to the state. The number of abandoned tanks that may qualify for state funding is unknown; therefore, the cost estimate to rehabilitate discharges of additional abandoned tanks is unknown. The cost to remediate each discharge is approximately \$233,000.³⁶

The property owner's ability to prohibit the use of Risk-Based Corrective Action (RBCA) to remediate a discharge will have a significant negative fiscal impact to the state. The RBCA principles allow the state to use a cost effective scientific approach to contamination remediation. The inability to use these principles will allow properties with contamination that did not previously warrant cleanup to be remediated.

The increase of funding for site assessment and groundwater monitoring for sites in the low-scored site initiative (LSSI) program from \$30,000 to \$35,000 will have a negligible cost increase to the DEP.

The DEP estimates the interim source removal provision for the low-scored site initiative (LSSI) will cost approximately \$10.5 million. The calculation is based on 25 percent of the sites in the LSSIs qualifying for source removal.

The DEP estimates that 20 percent of the 1,200 sites that have participated in the (LSSI) program since its inception in 2010 will reenter the program based on the increased funding level. The cost to remediate, assess, and monitor the sites is estimated to be \$8.4 million.

The DEP estimates that increasing the state's funding obligation for the current Petroleum Cleanup Participation Program (PCPP) discharges from \$400,000 to \$1 million could cost the state between \$146 million and \$857 million. The cost estimate of \$146 million assumes that 17 percent of 1,727 PCPP eligible discharges (or 294 discharges) cost approximately \$496,000 to remediate. The \$860 million estimate assumes that all 1,727 PCPP eligible discharges will cost \$496,000.³⁷ The bill also expands the eligibility requirements of the PCPP, adding an unknown number of discharges to the program. The number of potential new discharges in addition to the 1,727 discharges that currently qualify is unknown; therefore, the overall cost of the increased funding cap and the increased eligibility will have an unknown negative fiscal impact to the DEP.

³⁵ *Id.*

³⁶ *Id.* at 5.

³⁷ *Id.* at 6.

In addition, the state's costs may increase by decreasing the number of sites that must be bundled to participate in the advanced cleanup program. The state has previously realized a cost savings of 25 to 40 percent with this program. According to the DEP, the bill may decrease the average cost savings by 25 percent.³⁸

Senate Bill 2500, the Senate's General Appropriations Bill for Fiscal Year 2015-2016, provides \$110 million from the Inland Protection Trust Fund within the DEP for the Petroleum Tanks Cleanup program, in addition to base operational funding. CS/SB 314 significantly increases costs for the program. The estimated increased cost is indeterminate.

VI. Technical Deficiencies:

On lines 356 and 364 of the bill, the term "completed" is used. The language in the bill is not clear as it may be interpreted to mean the completion of cleanup when the intent is to identify assessments that have been completed.

On line 368 of the bill the term "approval" is used as point of reference for the nine-month time limit; however, the bill does not make it clear what is being approved. This may cause confusion as to what action triggers the nine month time limit.

VII. Related Issues:

It is not clear in the bill what the term "work stoppage" is referring to as the Department of Environmental Protection (DEP) has not defined this term.

The bill requires a property owner or responsible party to approve a conditional closure, which is incorporated in Rule 62-780.680, F.A.C. The provision may create conflict when considering institutional or engineering controls if the site owner is a different entity than the responsible party. This could lead to a disagreement between the two parties that the DEP may not have the ability to effectively resolve.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 376.305, 376.3071, and 376.30713.

IX. Additional Information:

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

CS by Environmental Preservation and Conservation on March 11, 2015:

- Expands the Abandoned Tank Restoration Program (ATRP) by removing the June 30, 1996, reporting deadline;

³⁸ *Id* at 7.

- Removes the provision that a property owner of a site in the ATRP must provide evidence that he or she had a complete understanding of ownership and use of the property prior to acquisition;
- Deletes the requirement for the Department of Environmental Protection (DEP) to establish standards and criteria for benzene in specific situations;
- Allows a property owner to approve the use of Risk-Based Correction Action (RBCA) principles in remediating a discharge;
- Requires a site owner to approve work stoppages;
- Deletes the requirement for current and future operations and management of remediation systems to be performance based contracts;
- Allows the DEP to negotiate a contract based on the best available rate from a pool of three agency term contractors selected by the property owner or responsible party;
- Deletes the provision that allows a property owner to select a contractor if the amount of the cost share and the discount off the normal rate totals at least five percent of the value of the contract;
- Requires the agency term contractor and the property owner or responsible party to submit a sworn affidavit to the DEP that neither party has solicited, offered, accepted, paid, or received any compensation, remuneration, or gift of any kind in exchange for selection of the agency term contractor;
- Requires the agency term contractor to disclose any conflict of interest to the DEP and allows the DEP to terminate a contract if the DEP determines there is a potential conflict of interest;
- Allows a site to qualify for the low-scored site initiative (LSSI) if the source boundary is greater than one-quarter acre and located below a state road or a state road's right-of-way;
- Increases the funding for the site assessment and six months of groundwater monitoring for a site in the LSSI from \$30,000 to \$35,000;
- Authorizes the DEP to approve an additional \$35,000 for interim source removal of a site in the LSSI in order to achieve No Further Action status or receive a site rehabilitation completion order;
- Authorizes the DEP to approve an additional \$35,000 for a supplemental site assessment for sites assessed before July 1, 2015, in order to achieve No Further Action status or receive a site rehabilitation completion order;
- Specifies that only agency term contractors may participate in the LSSI;
- Requires that sites completed in the LSSI must be granted priority two scoring status for ongoing assessment or remedial activity;
- Requires that all work in the LSSI must be completed nine months after the DEP approval;
- Allows the DEP to authorize an additional six months of groundwater monitoring if the supplemental site assessment determines it is warranted;
- Removes the requirement that a discharge must have occurred before January 1, 1999, to qualify for the (Petroleum Cleanup Participation Program (PCPP));
- Allows a property owner or responsible party to enter into a voluntary cost share agreement for bundling multiple sites and to provide a list of the sites to be included in future bundles;

- Specifies sites that are to be included in a future Advanced Cleanup Program bundle are not subject to the agency term contractor assignment pursuant to rule; and
- Allows the DEP to terminate the voluntary cost share agreement if the application to bundle multiple sites is not submitted during the open application period.

B. Amendments:

None.