

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 697 Petroleum Restoration Program

**SPONSOR(S):** State Affairs Committee; Agriculture & Natural Resources Appropriations Subcommittee; Agriculture and Natural Resources Subcommittee; and Grant

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 100

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	12 Y, 0 N, As CS	Gregory	Harrington
2) Agriculture & Natural Resources Appropriations Subcommittee	13 Y, 0 N, As CS	Helping	Massengale
3) State Affairs Committee	17 Y, 0 N, As CS	Gregory	Camechis

### 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. The Petroleum Restoration Program within the Department of Environmental Protection (DEP) establishes the requirements and procedures for cleaning up contaminated land, as well as the circumstances under which the state will pay for the cleanup. Under the Restoration Program, eligible contaminated sites are rehabilitated by the state in priority order.

The bill makes numerous changes to various state-assisted petroleum cleanup eligibility programs. Specifically, the bill:

- Reopens and changes the eligibility criteria of the Abandoned Tank Restoration Program (ATRP) to allow more contaminated sites to receive state funding assistance;
- Specifies that sites participating in the Petroleum Cleanup Participation Program (PCPP) are not eligible for the ATRP;
- Removes the exclusion for ATRP eligibility for sites that are owned by a person who had knowledge of the polluting condition when title was acquired;
- Directs DEP to make efficiency and productivity a priority in the administration of the petroleum restoration program and encourages DEP to contract for private services;
- Increases the funding available to Low-Score Site Initiative (LSSI) sites and allows more activities to receive funding under LSSI;
- Reopens the Petroleum Cleanup Participation Program (PCPP) to allow more contaminated sites to receive state funding assistance;
- Reduces the minimum number of sites that a facility owner or operator may bundle in order to be eligible for performance-based contracts to from 20 sites to 5 sites under the Advanced Cleanup Program;
- Increases the amount DEP may contract for advanced cleanup work from \$15 million to \$25 million;
- Provides that a property owner that enters into a voluntary cost-share agreement with other property owners to bundle sites is not subject to agency term contractor assignment; and
- Removes the expiration date related to the use of the Inland Protection Trust fund for program deductibles, copayments, and limited contamination assessment reports that otherwise would be paid by another state agency for state-funded petroleum contamination site rehabilitation.

The bill appears to have a significant fiscal impact on state government, an indeterminate positive fiscal impact on the private sector, and no fiscal impact on local government.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Petroleum Restoration Programs**

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.<sup>1</sup> These discharges pose a significant threat to groundwater quality, the source of 90 percent of Florida's drinking water.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> The Department of Environmental Protection (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.<sup>5</sup> The SUPER Act authorized DEP to establish criteria for the prioritization, assessment and cleanup, and reimbursement for cleanup of contaminated areas. This led to the creation of the Petroleum Restoration Program (Restoration Program).<sup>6</sup> 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.<sup>7</sup>

#### **State Funding Assistance for Rehabilitation**

The average cost to rehabilitate a site is approximately \$233,000,<sup>8</sup> but some sites may cost millions of dollars to rehabilitate. An owner of contaminated land or the person who caused the discharge 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.<sup>9</sup> Over the years, DEP has implemented different eligibility programs 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, outlined below:

<b>State-Assisted Petroleum Cleanup Eligibility Programs</b>		
<b>PROGRAM NAME</b>	<b>PROGRAM DATES</b>	<b>PROGRAM DESCRIPTION</b>
<b>Early Detection Incentive Program (EDI)</b>  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"><li>• First state-assisted cleanup program</li><li>• 100 percent state funding for cleanup if site owners reported releases</li><li>• 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</li><li>• Reimbursement option was phased out, so all cleanups are now conducted by the state</li></ul>
<b>Petroleum Liability</b>	Discharges must	<ul style="list-style-type: none"><li>• Required facilities to purchase third party liability</li></ul>

<sup>1</sup> DEP, Guide to Florida's Petroleum Cleanup Program, 1 (2002).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Chapter 83-310, Laws of Fla.

<sup>5</sup> Chapter 86-159, Laws of Fla.

<sup>6</sup> Samuel J. Morely, *Florida's New Petroleum Contamination Reimbursement Program*, 70 Fla. B.J. 24 (1996).

<sup>7</sup> DEP, *Petroleum Restoration Program*, <http://www.dep.state.fl.us/Waste/categories/pcp/default.htm> (last visited December 7, 2015).

<sup>8</sup> DEP, Agency Analysis of 2016 House Bill 697, p. 5 (December 15, 2015).

<sup>9</sup> Section 376.308, F.S.

<b>State-Assisted Petroleum Cleanup Eligibility Programs</b>		
<b>PROGRAM NAME</b>	<b>PROGRAM DATES</b>	<b>PROGRAM DESCRIPTION</b>
<b>and Restoration Insurance Program (PLRIP)</b> s. 376.3072, F.S.	have been reported between January 1, 1989, and December 31, 1998, to be eligible	insurance to be eligible <ul style="list-style-type: none"> <li>Provides varying amounts of state-funded site restoration coverage<sup>10</sup></li> </ul>
<b>Abandoned Tank Restoration Program (ATRP)</b> s. 376.305(6), F.S.	Applications must have been submitted between June 1, 1990, and June 30, 1996	Provides 100 percent state funding for cleanup, less deductible, at facilities that had out-of-service or abandoned tanks as of March 1990
<b>Innocent Victim Petroleum Storage System Restoration Program</b> 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
<b>Petroleum Cleanup Participation Program (PCPP)</b> 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"> <li>Created to provide financial assistance for sites that had missed all previous opportunities</li> <li>Only discharges that occurred before 1995 were eligible</li> <li>Site owner or responsible party must pay 25 percent of cleanup costs</li> <li>Originally had a \$300,000 cap on the amount of coverage, which was raised to \$400,000 beginning July 1, 2008</li> </ul>
<b>Consent Order (aka "Hardship" or "Indigent")</b> s. 376.3071(7)(c), F.S.	This program began in 1986 and remains open	<ul style="list-style-type: none"> <li>Created to provide financial assistance under certain circumstances for sites that DEP initiates an enforcement action to clean up</li> <li>An agreement is formed whereby DEP conducts the cleanup and the site owner or responsible party pays for a portion of the costs</li> </ul>

As of October 2015, 19,128 sites are eligible for state funding through one of the above programs.<sup>11</sup> Of these, approximately 8,603 have been rehabilitated and closed, approximately 5,576 are currently undergoing some phase of rehabilitation, and approximately 4,949 await rehabilitation.<sup>12</sup>

## **Inland Protection Trust Fund**

### Present Situation

To fund the cleanup of contaminated sites, the SUPER Act created the Inland Protection Trust Fund (IPTF).<sup>13</sup> An excise tax per barrel on petroleum and petroleum products in or imported into the state funds the IPTF.<sup>14</sup> The amount of the excise tax per barrel is determined by a formula that is dependent

<sup>10</sup> 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.

<sup>11</sup> DEP, Agency Analysis of 2016 House Bill 697, p. 3 (December 15, 2015).

<sup>12</sup> Id.

<sup>13</sup> Section 376.3071(3)-(4), F.S.

<sup>14</sup> Sections 206.9935(3) and 376.3071(7), F.S.

upon the unobligated balance of the IPTF.<sup>15</sup> Each year, approximately \$200 million from the excise tax is deposited into the IPTF to fund restoration of petroleum contaminated sites.<sup>16</sup>

Funding for rehabilitation of a site is based on a relative risk scoring system.<sup>17</sup> 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.<sup>18</sup> Sites currently in the Restoration Program range in score from 5 to 115 points. A score of 115 represents a substantial threat and a score of 5 represents a very low threat.<sup>19</sup> Sites are rehabilitated in priority order beginning with the highest score, with funding based on available budget.<sup>20</sup> DEP 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. Currently, the threshold is set at 30 points.<sup>21</sup>

Section 376.3071(4)(q), F.S., allows the trust fund to be used for program deductibles, copayments, and limited contamination assessment reports that otherwise would be paid by another state agency for state-funded petroleum contamination site rehabilitation. This provision expires on July 1, 2016.

### Effect of Proposed Changes

The bill directs DEP to make efficiency and productivity a priority in the administration of the petroleum restoration program and encourages DEP to contract for private services.

The bill removes the expiration date in s. 376.3071(4)(q), F.S. Thus, DEP may continue to use the trust fund for program deductibles, copayments, and limited contamination assessment reports that otherwise would be paid by another state agency for state-funded petroleum contamination site rehabilitation.

Further, the bill specifies that issuance of a site rehabilitation completion order under the program's cleanup criteria and low-score site initiative does not alter a site's eligibility for state-funded remediation if DEP determines that site conditions are not protective of human health.

Lastly, the bill relaxes the prohibition that institutional controls may not be acquired with moneys from the trust fund. The bill authorizes DEP to pay for costs associated with a professional land survey, specific purpose survey, and the cost associated with obtaining a title report and recording fees.

## **Abandoned Tank Restoration Program**

### Present Situation

The Legislature created the ATRP in 1990 to address the problem of out-of-service or abandoned tanks that had contamination associated with previous operation.<sup>22</sup> The original program had a one-year application period. The Legislature extended the application deadline to participate in the program to 1992, 1994, and finally in 1996 the deadline was waived indefinitely for owners financially unable to comply with tank closure.<sup>23</sup> To be included in the program:

- Applicants must have submitted an application to DEP by June 30, 1996, unless the owner of the site cannot financially comply with DEP's closure rule;

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<sup>15</sup> 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.

<sup>16</sup> DEP Agency Analysis of 2016 House Bill 697, p. 3 (December 15, 2015).

<sup>17</sup> Section 376.3071(5)(a), F.S.

<sup>18</sup> Chapter 62-771.100, F.A.C.

<sup>19</sup> DEP Agency Analysis of 2016 House Bill 697, p. 3 (December 15, 2015).

<sup>20</sup> Chapter 62-771.300(3), F.A.C.

<sup>21</sup> DEP, *Petroleum Restoration Program*, <http://www.dep.state.fl.us/waste/categories/pcp/default.htm> (last visited December 7, 2015).

<sup>22</sup> DEP, *Abandoned Tank Restoration >> Petroleum Cleanup Program*,

<http://www.dep.state.fl.us/waste/categories/pcp/pages/atrp.htm>, (last visited December 9, 2015).

<sup>23</sup> *Id.*

- Owner or operator of the petroleum storage system when it was in service must have ceased conducting business involving consumption, use, or sale of petroleum products at that facility on or before March 1, 1990;
- The site must not be otherwise eligible for the ECI, Consent Order, or PLRIP cleanup programs;
- The site must have been closed pursuant to DEP's petroleum storage tank regulations, unless DEP determines the owner of the facility cannot financially comply with the closure rules;
- The site must be eligible for site rehabilitation funding in s. 376.3071, F.S.;
- The site must not be:
  - Owned by the Federal Government;
  - Contaminated by pollutants that are not petroleum products;
  - A site where DEP has been denied site access; and
  - Be owned by an individual who had knowledge of the polluting condition when title was acquired, unless the person acquired title to the site after issuance of a notice of site eligibility by DEP.<sup>24</sup>

There are 4,084 ATRP eligible discharges. The ATRP has helped remediate 2,138.<sup>25</sup>

### Effect of Proposed Changes

The bill changes several portions of the eligibility requirements for ATRP. Specifically, the bill:

- Reopens the ATRP by deleting the application date, June 30, 1996, that limited participation in the program by amending ss. 376.305(6)(a)1. and 376.305(6)(b), F.S.
- Removes prohibition for sites eligible for rehabilitation under s. 376.3071, F.S., from participating in the ATRP by amending s. 376.305(6)(a)3., F.S. This change would allow EDI program sites and Consent Order sites to participate in ATRP.
- Provides that a site is not eligible for ATRP if it is eligible for cleanup under s. 376.3071(13), F.S., PCPP, based on discharge reports received by DEP before January 1, 1995, or a written report of contamination submitted to DEP on or before December 31, 1998.
- Allows sites where the owner had knowledge of polluting condition prior to acquisition of the property to participate in ATRP by repealing s. 376.305(6)(d)4., F.S. The bill also removes the reference to a defense from liability under s. 376.308(1)(c), F.S., that site owners who acquired title to property after July 1, 1992, demonstrate that they undertook all appropriate inquiry into the previous ownership and use of the property when seeking inclusion in the program.

DEP estimates these changes would create 20 new abandoned tank-related remediation activities per year.<sup>26</sup>

## **Low Score Site Initiative**

### Present Situation

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 cleanup programs. The Legislature created the Low Scored Site Initiative (LSSI) 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 LSSI, 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 contamination plume is shrinking or stable;
- The remaining contamination resulting from petroleum products does not adversely affect adjacent surface waters;

<sup>24</sup> Section 376.305(6), F.S.; rule 62-769.800(3), F.A.C.

<sup>25</sup> DEP, Agency Analysis of 2016 House Bill 697, p. 3 (December 15, 2015).

<sup>26</sup> DEP, Agency Analysis of 2016 House Bill 697, p. 5 (December 15, 2015).

- 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 established by DEP unless human exposure is limited by appropriate institutional or engineering controls.<sup>27</sup>

An assessment is conducted to determine whether the above criteria are met.<sup>28</sup> DEP may pay the assessment costs for sites eligible for funding under EDI, ATRP, Innocent Victim, PLRIP, or PCPP.<sup>29</sup> DEP may only spend \$10 million per fiscal year for LSSI.<sup>30</sup> These funds may only be used to fund site assessments.<sup>31</sup> Each site may only receive up to \$30,000, that can include six months of ground water monitoring.<sup>32</sup> Each site owner or responsible party is limited to 10 eligible sites per fiscal year.<sup>33</sup> Site assessment must be completed within six months.<sup>34</sup> Funds are allocated on a first-come, first-served basis.<sup>35</sup> 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 DEP will not pay for the assessment.<sup>36</sup>

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

- If no contamination is detected during the assessment, DEP may issue a site rehabilitation completion order;<sup>37</sup>
- If the assessment demonstrates that minimal contamination exists onsite, but the above criteria are met, DEP 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;<sup>38</sup> or
- If soil between the land surface and two feet below the land surface exceeds soil cleanup target levels, but the above criteria are otherwise met, DEP 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.<sup>39</sup> DEP is not authorized to fund such controls.<sup>40</sup>

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.<sup>41</sup> 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.<sup>42</sup> A site determined to be ineligible for LSSI funding retains its current program eligibility and will receive rehabilitation funding in priority order.

### Effect of Proposed Changes

The bill changes numerous aspects of the LSSI program. Specifically the bill:

- Requires a responsible party to submit a No Further Action proposal that demonstrates the current eligibility criteria by amending s. 376.3071(12)(b)1., F.S.;

<sup>27</sup> Section 376.3071(12)(b)1., F.S.

<sup>28</sup> DEP, Petroleum Restoration Program, *Procedural and Technical Guidance for the Low-Scored Site Initiative*, p. 9 (2013) available at: <http://www.dep.state.fl.us/waste/categories/pcp/pages/screening.htm> (last visited December 9, 2015).

<sup>29</sup> Id. at 3.

<sup>30</sup> Section 376.3071(12)(b)3., F.S.

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id.

<sup>35</sup> Id.

<sup>36</sup> DEP, Petroleum Restoration Program, *Procedural and Technical Guidance for the Low-Scored Site Initiative*, p. 1-2 (2013) available at: <http://www.dep.state.fl.us/waste/categories/pcp/pages/screening.htm> (last visited December 9, 2015).

<sup>37</sup> Section 376.3071(12)(b)2., F.S.

<sup>38</sup> Id.

<sup>39</sup> DEP, Petroleum Restoration Program, *Procedural and Technical Guidance for the Low-Scored Site Initiative*, p. 3 (2013) available at: <http://www.dep.state.fl.us/waste/categories/pcp/pages/screening.htm> (last visited December 9, 2015).

<sup>40</sup> Section 376.3071(12)(b)3.a., F.S.

<sup>41</sup> DEP, Petroleum Restoration Program, *Procedural and Technical Guidance for the Low-Scored Site Initiative*, p. 11 (2013) available at: <http://www.dep.state.fl.us/waste/categories/pcp/pages/screening.htm> (last visited December 9, 2015).

<sup>42</sup> Id.

- Requires a responsible party who wishes to participate in the LSSI to provide evidence of authorization from the property owner by amending ss. 376.3071(12)(b)1. and 376.3071(12)(b)3.a. and d., F.S.;
- Requires DEP to issue a site rehabilitation completion order that incorporates the No Further Action proposal submitted by the property owner or responsible party if the eligibility criteria are met by amending s. 376.3071(12)(b)2., F.S., and creating s. 376.3071(12)(b)4., F.S.;
- Revises the criteria that a responsible party must demonstrate to participate in LSSI by repealing s. 376.3071(12)(b)1.a. through f., F.S. and creating s. 376.3071(12)(b)4., F.S. The criteria is revised as follows:
  - Provides a more specific standard for the prohibition on the presence of excessively contaminated soil on the site. Specifically, soil saturated with petroleum or petroleum products, or soil that causes a total corrected hydrocarbon measurement of 500 parts per million (ppm) or higher for Gasoline Analytical Group or 50 ppm or higher for Kerosene Analytical Group, as defined by DEP rule, must not exist onsite as a result of a release of petroleum products;
  - Requires that a minimum of 12 months, rather than 6 months, of groundwater monitoring indicates that the contamination plume is shrinking;
  - Specifies that the requirement that contamination remaining at the site does not adversely affect adjacent surface waters includes the effects of those waters on human health and the environment;
  - Removes the requirement that the area of groundwater contamination is less than one-quarter acre;
  - Restricts contaminated sites eligible for LSSI to areas that contain petroleum products' chemicals of concern that:
    - Are confined to the source property boundaries of the real property on which the discharge originated; or
    - Have migrated from the source property onto or beneath a transportation facility for which DEP has approved, and the governmental entity owning the transportation facility has agreed to institutional controls. The bill provides that this does not impose any legal liability on the transportation facility owner, obligate such owner to engage in remediation, or waive such owner's right to recovery costs for damages; and
  - Adds a requirement that the groundwater contamination containing the petroleum products' chemicals of concern is not a threat to any permitted potable water supply well;
- Provides that a site rehabilitation completion order acknowledges that minimal contamination exists onsite and that such contamination is not a threat to the public health, safety, or welfare, water resources, or the environment. If the DEP determines that a discharge for which a site rehabilitation completion order was issued pursuant to LSSI may pose a threat to the public health, safety, or welfare, water resources, or the environment, then the issuance of the site rehabilitation completion order does not alter eligibility for state-funded rehabilitation that would otherwise apply;
- Increases funding limit per site from \$30,000 to \$35,000 by amending s. 376.3071(12)(b)3.a., F.S.;
- Authorizes responsible parties to submit limited remediation plans and to receive funding assistance for 12 months of limited remediation, not solely assessment and monitoring, by amending s. 376.3071(12)(b)3.a., F.S.;
- Increases the amount of time DEP may use funding to pay for groundwater monitoring from 6 months to 12 months by amending s. 376.3071(12)(b)3.a., F.S.;
- Allows DEP to use funding to pay for land surveys and title reports and recording fees associated with institutional controls by amending s. 376.3071(12)(b)3.a., F.S.;
- Authorizes DEP to approve an additional \$35,000 for limited remediation where needed to achieve "No Further Action" by adding s. 376.3071(12)(b)3.b., F.S.;
- Extends the time period for work to be complete from 6 months to 15 months by amending s. 376.3071(12)(b)3.c., F.S. DEP may extend the completion deadline an additional 12 months if groundwater monitoring is necessary; and

- Increases the amount DEP may use for LSSI from \$10 million to \$15 million per fiscal year by amending s. 376.3071(12)(b)3.d., F.S.

## Petroleum Cleanup Participation Program

### Present Situation

In 1996, the Legislature created PCPP to implement a cost-sharing cleanup program to provide rehabilitation funding assistance for all property contaminated by discharges of petroleum or petroleum products that occurred before January 1, 1995.<sup>43</sup> Sites reported after December 31, 1998, are not eligible for the program.<sup>44</sup> Further the following sites are not eligible for PCPP:

- Sites where DEP has been denied access;
- Sites owned or operated by the federal government;
- Sites identified by the Environmental Protection Agency to be on or qualify for the National Priority List under Superfund; and
- Site that are eligible under ATRP, EDI, or PLRIP.<sup>45</sup>

DEP ranks PCPP program sites based on human health and safety risks.<sup>46</sup> When funds become available to clean up the site based on that priority ranking, DEP will notify the owner in writing.<sup>47</sup> The owner, operator, or person otherwise responsible for site rehabilitation must then prepare and provide DEP a limited contamination assessment report sufficient to determine the extent of the contamination and cleanup.<sup>48</sup> After selecting a certified petroleum rehabilitation contractor to clean up the site, the owner must enter into a preapproved site rehabilitation agreement with DEP.<sup>49</sup> Sites qualifying for the program are eligible for up to \$400,000 of site rehabilitation funding.<sup>50</sup> The owner, operator, or person responsible must agree to pay a 25 percent copayment.<sup>51</sup> The copayment percentage may be reduced or eliminated if the owner or responsible party demonstrates an inability to pay.<sup>52</sup>

Florida contains 2,152 PCPP eligible discharges.<sup>53</sup> The program has helped remediate 768.<sup>54</sup>

### Effect of Proposed Changes

The bill changes several aspects of PCPP. Specifically, the bill:

- Specifies that DEP must implement a cost-sharing program to provide funding assistance for all property contaminated by discharges of petroleum or petroleum products from a petroleum storage system by amending s. 376.3071(13), F.S. Thus, petroleum discharges for sources other than a petroleum storage system cannot receive funding assistance under PCPP;
- Allows an owner or operator to apply for PCPP regardless of whether ownership of the contaminated site has changed by amending s. 376.3071(13)(a)2., F.S.;
- Reopens PCPP by removing the requirement that sites must have been reported to DEP by December 31, 1998, to be eligible for participation by amending s. 376.3071(13)(a)2., F.S.; and
- Authorizes DEP to approve supplemental funding of up to \$100,000 for additional remediation and monitoring at PCPP sites if such remediation and monitoring is necessary to achieve a determination of “No Further Action” by amending s. 376.3071(13)(c), F.S.

<sup>43</sup> Section 376.3071(13), F.S.

<sup>44</sup> Section 376.3071(13)(a)2., F.S.

<sup>45</sup> Section 376.3071(13)(g), F.S.

<sup>46</sup> Rule 62-771.100(4), F.A.C.

<sup>47</sup> DEP, *Petroleum Cleanup Participation Program*, <http://www.dep.state.fl.us/waste/categories/pcp/pages/pcpp.htm>, (last visited December 9, 2015).

<sup>48</sup> Section 376.3071(13)(c), F.S.

<sup>49</sup> Id.; DEP, *Petroleum Cleanup Participation Program*, <http://www.dep.state.fl.us/waste/categories/pcp/pages/pcpp.htm>, (last visited December 9, 2015).

<sup>50</sup> Section 376.3071(13)(b), F.S.

<sup>51</sup> Section 376.3071(13)(c), F.S.

<sup>52</sup> Id.

<sup>53</sup> DEP Agency Analysis of 2016 House Bill 697, p. 3 (December 15, 2015).

<sup>54</sup> Id.



## Advanced Cleanup

### Present Situation

The Legislature created Advanced Cleanup (formerly known as Preapproved Advanced Cleanup) 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.<sup>55</sup> The purpose of creating Advanced Cleanup was to facilitate property transactions or public works projects on contaminated sites.<sup>56</sup> To participate in Advanced Cleanup, a site must be eligible for state rehabilitation funding under EDI, PLRIP, ATRP, the Innocent Victim program, or PCPP.<sup>57</sup>

To apply for Advanced Cleanup, a site owner or responsible party must bid a cost share of the total site rehabilitation.<sup>58</sup> The cost share must be at least 25 percent of the total cost of rehabilitation.<sup>59</sup> 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.<sup>60</sup> Alternatively, an applicant may use a commitment to pay, a demonstrated cost savings to DEP, or both to meet this requirement if the application proposes a performance-based contract for the cleanup of 20 or more sites.<sup>61</sup>

In years when DEP runs a bid cycle, bids may be accepted in two windows of May 1 through June 30 and November 1 through December 31.<sup>62</sup> DEP accepts bids awarded based solely on the proposed highest cost-share percentage and not the estimated dollar amount of that share.<sup>63</sup> DEP may enter into Advanced Cleanup contracts for a total of up to \$15 million per fiscal year,<sup>64</sup> and no more than \$5 million per fiscal year may be approved for rehabilitation work at an individual site.<sup>65</sup> DEP has received applications totaling \$22.8 million during Fiscal Year 2014-15.<sup>66</sup> The average cost share proposed to be borne by the applicant has been 35 percent (the program requires a minimum of 25 percent) or \$8 million.<sup>67</sup>

### Effect of Proposed Changes

The bill makes several changes to the Advanced Cleanup Program. Specifically the bill:

- Reduces the minimum number of sites that a facility owner or operator may bundle to demonstrate a cost savings in order to be eligible for performance-based contracts from 20 sites to 5 sites by amending s. 376.30713(2)(a)1.a., F.S.;
- Requires individual sites to submit an application for advanced cleanup in one of two formats to meet cost share requirement. The formats include:
  - Applications proposing that DEP enter into a performance-based contract may use a commitment to pay, a demonstrated cost savings to DEP, or both to meet requirements; or
  - Applications relying on a demonstrated cost savings to DEP must establish and provide a 25 percent cost savings to DEP for cleanup of the site under the application compared to the cost of cleanup of the same site using the current rates provided to DEP by the proposed agency term contractor. The applicant must work with the agency term contractor to demonstrate the cost savings;

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<sup>55</sup> Section 376.30713(2), F.S.

<sup>56</sup> Section 376.30713(1), F.S.

<sup>57</sup> For PCPP sites, Advanced Cleanup is only available if the 25 percent copay requirement of PCPP has not been reduced or eliminated. Section 376.30713(1)(d), F.S.

<sup>58</sup> Section 376.30713(2)(a), F.S.

<sup>59</sup> Id.

<sup>60</sup> Section 376.30713(1)(d)-(2)(a), F.S.

<sup>61</sup> Section 376.30713(2)(a)1., F.S.

<sup>62</sup> Section 376.30713(2)(a), F.S.

<sup>63</sup> Section 376.30713(2)(b), F.S.

<sup>64</sup> Section 376.30713(4), F.S.

<sup>65</sup> 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.

<sup>66</sup> DEP Agency Analysis of 2016 House Bill 697, p. 3 (December 15, 2015).

<sup>67</sup> Id.

- Requires a contractor to have a site access agreement from the property owner(s) and evidence of authorization as part of the advanced cleanup application. The agreement must be in the form of a DEP site access agreement approved by DEP that does not violate state law concerning required elements of an advanced cleanup application;
- Increases the amount that DEP may contract for advanced cleanup work from \$15 million to \$25 million by amending s. 376.30713(4), F.S.; and
- 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 by amending s. 376.30713(4), F.S. The bill further provides that a property owner that enters into a voluntary cost-share agreement with other property owners to bundle sites is not subject to agency term contractor assignment. DEP may terminate, or amend, the voluntary cost share agreement if the application fails to submit an application to bundle any site, not already covered by an advance cleanup contract, under such voluntary cost-share agreement within a subsequent open application period during which it is eligible to participate. This provision will extend the period of time listed sites will be remediated because they are not subject to the agency term contractor assignment.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 376.305, F.S., relating to the Abandoned Tank Restoration Program.

**Section 2.** Amends s. 376.3071, F.S., relating to the Inland Protection Trust Fund.

**Section 3.** Amends s. 376.30713, F.S., relating to advanced cleanup.

**Section 4.** Provides and effective date of July 1, 2016.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

The bill appears to have a significant fiscal impact on the state. A breakdown of the impact is discussed below.

Section 1. Abandoned Tank Restoration Program

The bill reopens the ATRP by deleting the application date, June 30, 1996, that limited participation in the program. The removal of the application deadline could potentially allow a number of additional sites into the ATRP. DEP estimates changes to this program would create 20 new abandoned tank related remediation activities per year. The average cost to remediate a discharge is \$233,000. Given the assumption of 20 new discharges per year, the total estimated annual cost would be \$233,000 x 20 = \$4.66 million per year.<sup>68</sup>

Section 2. Inland Protection Trust Fund

The bill makes permanent the authorization to use the trust fund for program deductibles, copayments, and limited contamination assessment reports that otherwise would be paid by another state agency for state-funded petroleum contamination site rehabilitation. This provision is currently set to expire on July 1, 2016.

The bill relaxes the prohibition that institutional controls may not be acquired with moneys from the trust fund. The bill authorizes DEP to pay for costs associated with a professional land survey,

<sup>68</sup> DEP Agency Analysis of 2016 Senate Bill 100, p. 4 (October 5, 2015).

specific purpose survey, and the costs associated with obtaining a title report and recording fees. DEP estimates that this change may result in \$7.6 million in savings by encouraging more sites to participate in LSSI.<sup>69</sup>

### Section 2. Low-Risk Site Initiative

The bill increases from \$30,000 to \$35,000 the amount of funds DEP may approve for performing site assessment, limited remediation, and 6 months of groundwater monitoring for LSSI sites. On average, DEP handles 300 LSSI sites per year. According to DEP, this increase would cost approximately \$1.5 million annually, or \$6 million for the remaining four year anticipated life of the LSSI program. These costs may be offset due to the increased site closure opportunities provided by the proposed changes to the LSSI program.<sup>70</sup>

Further, the bill provides up to an additional \$35,000 for limited remediation where needed to achieve a no further action determination at LSSI sites. DEP estimates that the total cost would be \$10.5 million for the remaining four year anticipated life of the LSSI program.<sup>71</sup>

### Section 2. Petroleum Cleanup Participation Program

The bill eliminates the reporting deadline for PCPP eligible discharges that provided that sites reported to DEP after December 31, 1998, are not eligible for the program. DEP estimates this change will have a fiscal impact of approximately \$930,000 per year. This fiscal impact represents the annual cost as amortized over the life of the program. DEP's estimate assumes four new sites per year will apply for the program with an average cost of \$233,000 to remediate a site. DEP's estimate assumes 64 additional sites may qualify for the program. The total cost to remediate the sites that did not participate from 1999 to 2015 will be approximately \$14.9 million.<sup>72</sup>

The bill also authorizes DEP to approve supplemental funding of up to \$100,000 for additional remediation and monitoring if such remediation and monitoring is necessary to achieve a determination of "No Further Action." DEP estimates this change could have a fiscal impact between approximately \$1.35 million and \$13.5 million over the life of the program depending on the number of newly reported discharged at PCPP facilities.<sup>73</sup>

### Section 3. Advanced Cleanup

The bill reduces the minimum number of sites that a facility owner or operator may bundle to demonstrate a cost savings in order to be eligible for performance-based contracts in the Advanced Cleanup Program from 20 sites to 5 sites. According to DEP, the current process of bundling sites and implementing cleanups under a performance-based contract has resulted in an average cost savings ranging between 25 percent and 40 percent. The decrease in the number of sites needed for a bundle in conjunction with raising the amount of funds available may result in pushing the average cost savings closer to 25 percent. Concurrently, there may be a positive indeterminate fiscal impact realized because the number of sites being rehabilitated at a discounted price would increase.<sup>74</sup>

## B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

### 1. Revenues:

None.

### 2. Expenditures:

None.

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<sup>69</sup> DEP, SB 100 Barcode 334112-222728 Analysis Chart from DEP, available upon request from the State Affair Committee.

<sup>70</sup> DEP Agency Analysis of 2016 Senate Bill 100, p. 5 (October 5, 2015).

<sup>71</sup> Id.

<sup>72</sup> Id.

<sup>73</sup> DEP, SB 100 Barcode 334112-222728 Analysis Chart from DEP, available upon request from the State Affair Committee.

<sup>74</sup> DEP Agency Analysis of 2016 Senate Bill 100, p. 5 (October 5, 2015).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Overall Restoration Funding Availability

The bill appears to have an indeterminate positive fiscal impact on the private sector because more sites contaminated with petroleum will be eligible to receive financial assistance to facilitate cleanup and more funding will be available to pay for the cleanup.

Section 3. Advanced Cleanup

The bill reduces the minimum number of sites that a facility owner or operator may bundle to demonstrate a cost savings in order to be eligible for performance-based contracts in the Advanced Cleanup Program from 20 sites to 5 sites. This may positively impact contaminated site owners by providing an opportunity for more property owners to participate in the program.

D. FISCAL COMMENTS:

The bill expands the number of sites eligible for petroleum site cleanup and allows DEP to increase spending on the LSSI projects. These modifications will not require an increase in funding. However, expanding the program and increasing the amount DEP may spend will result in fewer funds available for more sites. These modifications will delay the termination of state-funded petroleum cleanup. An estimated extension in program funding is not available at this time.

In Fiscal Year 2015-2016, \$125,000,000 from the IPTF was appropriated for petroleum site cleanup. The Fiscal Year 2016-2017 House proposed General Appropriations Act includes \$110,000,000 from the IPTF for petroleum site cleanup.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

DEP possess sufficient rulemaking authority to update its various petroleum cleanup rules to reflect the new requirements of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 26, 2016, the Agriculture & Natural Resources Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The proposed committee substitute:

- Removed an amendment to s. 376.305(6)(a)2., F.S., that would have required applicants for ATRP to have ceased using the petroleum storage system to conduct business involving consumption, use, or sale of petroleum products on or before March 1, 1990, rather than the facility as a whole;
- Removed amendments to s. 376.3071(6), F.S., relating to petroleum cleanup contracting and contractors selection requirements;

- Removed an amendment to s. 376.3071(12)(b)3.d., F.S., that would have only permitted an agency term contractor to participate in LSSI;
- Removed an amendment to s. 376.3071(12)(b)3.e., F.S., that would have required DEP to grant completed LSSI properties a priority 2 scoring status for ongoing assessment or remedial activity or, based on funding, assign additional cleanup directly to the selected agency term contractor;
- Revised the criteria that a responsible party must demonstrate to participate in LSSI by repealing s. 376.3071(12)(b)1.a. through f., F.S. and creating s. 376.3071(12)(b)4., F.S.;
- Removed an amendment to s. 376.3071(13)(b), F.S., that would have increased funding for PCPP sites from \$400,000 to \$500,000;
- Reduced the minimum number of sites that a facility owner or operator may bundle to demonstrate a cost savings in order to be eligible for performance-based contracts from 20 sites to 10 sites, rather than 5, by amending s. 376.30713(2)(a)1.a., F.S.;
- Removed an amendment to s. 376.30713(2)(a)1.b., F.S., that would have allowed Advanced Cleanup applicants proposing to enter into a performance-based contract for an individual site with DEP to use a commitment to pay, a demonstrated cost savings to DEP, or both to meet the cost-share requirement; and
- Removed amendments to s. 376.3072, F.S., relating to the Florida Liability and Restoration Insurance Program.

On February 9, 2016, the Agriculture & Natural Resources Appropriations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment removed the expiration date related to the use of the Inland Protection Trust fund for program deductibles, copayments, and limited contamination assessment reports that otherwise would be paid by another state agency for state-funded petroleum contamination site rehabilitation.

On February 18, 2016, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment:

- Directed DEP to make efficiency and productivity a priority in the administration of the petroleum restoration program and encouraged DEP to contract for private services;
- Provided that a site rehabilitation order does not alter a site's eligibility for state-funded remediation if DEP determines that site conditions are not protective of human health;
- Relaxed the prohibition that institutional controls may not be acquired with moneys from the trust fund by authorizing costs associated with a professional land survey, specific purpose survey, a title report, and recording fees;
- Restored the name LSSI rather than the "Low-Risk Site Initiative;"
- Modified the LSSI eligibility criteria;
- Authorized DEP to approve costs for up to 12 months, rather than 6 months, of groundwater monitoring under LSSI;
- Extended the time limit to 15 months, rather than 12 months, for state funded assessment and limited remediation work to be completed under LSSI;
- Authorized DEP to approve supplemental funding for PCPP sites up to \$100,000 for additional remediation and monitoring if it will lead to a determination of "No Further Action;"
- Authorized applicants to aggregate 5 or more sites, rather than 10, to demonstrate cost savings for the advanced cleanup program;
- Modified the advanced cleanup cost share criteria;
- Required that that a contractor must have a site access agreement from the property owner(s) and evidence of authorization as part of the advanced cleanup application. Such agreements must be in the form of a "DEP site access agreement" or a similar agreement; and
- Authorized DEP to amend, not just terminate, a voluntary cost-share agreement with a property owner or responsible party who fails to submit an application to bundle a site.

This analysis is drafted to the committee substitute as approved by the State Affairs Committee.