CHAPTER 2008-127

House Bill No. 961

An act relating to cleanup of sites contaminated by petroleum; amending s. 376.3071, F.S.; increasing public funding for the restoration of certain sites contaminated by petroleum; providing criteria for the sites eligible for additional funds; prohibiting reimbursements for expenses incurred outside the petroleum cleanup preapproved site rehabilitation program administered by the Department of Environmental Protection; amending s. 376.30711, F.S.; providing requirements concerning preapproved site rehabilitation agreements that govern submittal of invoices to the department and payment of subcontractors; providing that an exemption from requirements concerning payments to subcontractors and suppliers does not apply to payments associated with such preapproved agreements; amending s. 376.3072, F.S., relating to the Florida Petroleum Liability and Restoration Insurance Program; increasing the amount of funds available under the insurance program for certain incidents or discharges; providing criteria for the sites eligible for additional funds; prohibiting reimbursements for expenses incurred outside the petroleum cleanup preapproved site rehabilitation program administered by the Department of Environmental Protection; providing an effective date.

WHEREAS, ss. 376.3071 and 376.3072, Florida Statutes, provide restoration funding assistance for the cleanup of petroleum discharges at facilities that are regulated by the petroleum storage tank rules of the Department of Environmental Protection, and

WHEREAS, ss. 376.3071(13) and 376.3072, Florida Statutes, establish caps for restoration funding assistance, with complete phase out of assistance for new discharges beginning January 1, 1995, or January 1, 1999, and

WHEREAS, restoration funding assistance established under ss. 376.3071(13) and 376.3072, Florida Statutes, has been eroded in part by inflation, and

WHEREAS, repeated changes in funding levels for restoration assistance due to s. 376.30711, Florida Statutes, caused erosion in part of restoration funding assistance because of the necessity to resample sites where funding was restored, and

WHEREAS, the inability to assign restoration funding to sites having low priority-ranking scores established under s. 376.3071(5), Florida Statutes, has allowed contamination at some sites to migrate, thereby resulting in more expensive remediation of such sites, and

WHEREAS, the Legislature intends to increase restoration funding assistance caps established under ss. 376.3071(13) and 376.3072, Florida Statutes, to compensate for the reduction in funding due to the erosion of restoration funding assistance, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (b) of subsection (13) of section 376.3071, Florida Statutes, is amended to read:

376.3071 Inland Protection Trust Fund; creation; purposes; funding.—

(13) PETROLEUM CLEANUP PARTICIPATION PROGRAM.—To encourage detection, reporting, and cleanup of contamination caused by discharges of petroleum or petroleum products, the department shall, within the guidelines established in this subsection, implement a cost-sharing cleanup program to provide rehabilitation funding assistance for all property contaminated by discharges of petroleum or petroleum products occurring before January 1, 1995, subject to a copayment provided for in a preapproved site rehabilitation agreement. Eligibility shall be subject to an annual appropriation from the Inland Protection Trust Fund. Additionally, funding for eligible sites shall be contingent upon annual appropriation in subsequent years. Such continued state funding shall not be deemed an entitlement or a vested right under this subsection. Eligibility in the program shall be notwithstanding any other provision of law, consent order, order, judgment, or ordinance to the contrary.

(b) Subject to annual appropriation from the Inland Protection Trust Fund, sites meeting the criteria of this subsection are eligible for up to $400,000 ~~$300,000~~ of site rehabilitation funding assistance in priority order pursuant to subsection (5) and s. 376.30711. Sites meeting the criteria of this subsection for which a site rehabilitation completion order was issued prior to June 1, 2008, do not qualify for the 2008 increase in site rehabilitation funding assistance and are bound by the pre-June 1, 2008, limits. Sites meeting the criteria of this subsection for which a site rehabilitation completion order was not issued prior to June 1, 2008, regardless of whether or not they have previously transitioned to nonstate-funded cleanup status, may continue state-funded cleanup pursuant to s. 376.30711 until a site rehabilitation completion order is issued or the increased site rehabilitation funding assistance limit is reached, whichever occurs first. At no time shall expenses incurred outside the preapproved site rehabilitation program under s. 376.30711 be reimbursable.

Section 2. Subsection (5) of section 376.30711, Florida Statutes, is amended to read:

376.30711 Preapproved site rehabilitation, effective March 29, 1995.—

(5)(a) Any person who performs the conditions of a preapproved site rehabilitation agreement, pursuant to the provisions of this section and s. 376.3071(5), may file invoices with the department for payment within the schedule and for the services described in the preapproved site rehabilitation agreement. Such invoices for payment must be submitted to the department on forms provided by the department, together with evidence documenting that preapproved activities were conducted or completed in accordance with the preapproved authorization. Provided there are sufficient unencumbered funds available in the Inland Protection Trust Fund which have been appropriated for expenditure by the Legislature and provided all of the

terms of the preapproved site rehabilitation agreement have been met, invoices for payment shall be paid consistent with the provisions of s. 215.422. After an applicant has submitted its invoices to the department and before payment is made, the contractor may assign its right to payment to any other person, without recourse of the assignee or assignor to the state, and in such cases the assignee shall be paid consistent with the provisions of s. 215.422. Prior notice of the assignment and assignment information shall be made to the department, which notice shall be signed and notarized by the assigning party. The department shall not have the authority to regulate private financial transactions by which an applicant seeks to account for working capital or the time value of money, unless charges associated with such transactions are added as a separate charge in an invoice.

(b) The contractor shall submit an invoice to the department within 30 days after the date of the department's written acceptance of each interim deliverable or written approval of the final deliverable specified in a preapproved site rehabilitation agreement.

(c)~~(b)~~ Payments shall be made by the department based on the terms of a contract for site rehabilitation work. The department may, based on its experience and the past performance and concerns regarding a contractor, retain up to 25 percent of the contracted amount or use performance bonds to assure performance. The amount of retainage or performance bond or bonds, as well as the terms and conditions, shall be a part of the site-specific performance-based contract.

(d) Contractors or persons to which the contractor has assigned its right to payment pursuant to paragraph (a) shall make prompt payment to subcontractors and suppliers for their costs associated with a preapproved site rehabilitation agreement pursuant to s. 287.0585(1).

(e) The exemption in s. 287.0585(2) shall not apply to payments associated with a preapproved site rehabilitation agreement.

(f)~~(c)~~ The department shall provide certification within 30 days after notification from a contractor that the terms of the contract for site rehabilitation work have been completed. Failure of the department to do so shall not constitute a default certification of completion. The department also may withhold payment if the validity or accuracy of the contractor's invoices or supporting documents is in question.

(g)~~(d)~~ Nothing in this section shall be construed to authorize payment to any person for costs of contaminated soil treatment or disposal that does not meet the applicable rules of this state for such treatment or disposal, including all general permitting, state air emission standards, monitoring, sampling, and reporting rules more specifically described in department rules.

(h)~~(e)~~ If any contractor fails to perform, as determined by the department, contractual duties for site rehabilitation program tasks, the department shall terminate the contractor's eligibility for participation in the program.

(i)~~(f)~~ The contractor responsible for conducting site rehabilitation shall keep and preserve suitable records in accordance with the provisions of s. 376.3071(12)(e).

Section 3. Paragraphs (a), (d), and (e) of subsection (2) of section 376.3072, Florida Statutes, are amended to read:

376.3072 Florida Petroleum Liability and Restoration Insurance Program.—

(2)(a) Any owner or operator of a petroleum storage system may become an insured in the restoration insurance program at a facility provided:

1. A site at which an incident has occurred shall be eligible for restoration if the insured is a participant in the third-party liability insurance program or otherwise meets applicable financial responsibility requirements. After July 1, 1993, the insured must also provide the required excess insurance coverage or self-insurance for restoration to achieve the financial responsibility requirements of 40 C.F.R. s. 280.97, subpart H, not covered by paragraph (d).

2. A site which had a discharge reported prior to January 1, 1989, for which notice was given pursuant to s. 376.3071(9) or (12), and which is ineligible for the third-party liability insurance program solely due to that discharge shall be eligible for participation in the restoration program for any incident occurring on or after January 1, 1989, in accordance with subsection (3). Restoration funding for an eligible contaminated site will be provided without participation in the third-party liability insurance program until the site is restored as required by the department or until the department determines that the site does not require restoration.

3. Notwithstanding paragraph (b), a site where an application is filed with the department prior to January 1, 1995, where the owner is a small business under s. 288.703(1), a state community college with less than 2,500 FTE, a religious institution as defined by s. 212.08(7)(m), a charitable institution as defined by s. 212.08(7)(p), or a county or municipality with a population of less than 50,000, shall be eligible for up to $400,000 ~~$300,000~~ of eligible restoration costs, less a deductible of $10,000 for small businesses, eligible community colleges, and religious or charitable institutions, and $30,000 for eligible counties and municipalities, provided that:

a. Except as provided in sub-subparagraph e., the facility was in compliance with department rules at the time of the discharge.

b. The owner or operator has, upon discovery of a discharge, promptly reported the discharge to the department, and drained and removed the system from service, if necessary.

c. The owner or operator has not intentionally caused or concealed a discharge or disabled leak detection equipment.

d. The owner or operator proceeds to complete initial remedial action as defined by department rules.

e. The owner or operator, if required and if it has not already done so, applies for third-party liability coverage for the facility within 30 days of receipt of an eligibility order issued by the department pursuant to this provision.

However, the department may consider in-kind services from eligible counties and municipalities in lieu of the $30,000 deductible. The cost of conducting initial remedial action as defined by department rules shall be an eligible restoration cost pursuant to this provision.

4.a. By January 1, 1997, facilities at sites with existing contamination shall be required to have methods of release detection to be eligible for restoration insurance coverage for new discharges subject to department rules for secondary containment. Annual storage system testing, in conjunction with inventory control, shall be considered to be a method of release detection until the later of December 22, 1998, or 10 years after the date of installation or the last upgrade. Other methods of release detection for storage tanks which meet such requirement are:

(I) Interstitial monitoring of tank and integral piping secondary containment systems;

(II) Automatic tank gauging systems; or

(III) A statistical inventory reconciliation system with a tank test every 3 years.

b. For pressurized integral piping systems, the owner or operator must use:

(I) An automatic in-line leak detector with flow restriction meeting the requirements of department rules used in conjunction with an annual tightness or pressure test; or

(II) An automatic in-line leak detector with electronic flow shut-off meeting the requirements of department rules.

c. For suction integral piping systems, the owner or operator must use:

(I) A single check valve installed directly below the suction pump, provided there are no other valves between the dispenser and the tank; or

(II) An annual tightness test or other approved test.

d. Owners of facilities with existing contamination that install internal release detection systems in accordance with sub-subparagraph a. shall permanently close their external groundwater and vapor monitoring wells in accordance with department rules by December 31, 1998. Upon installation of the internal release detection system, these wells shall be secured and taken out of service until permanent closure.

e. Facilities with vapor levels of contamination meeting the requirements of or below the concentrations specified in the performance standards

for release detection methods specified in department rules may continue to use vapor monitoring wells for release detection.

f. The department may approve other methods of release detection for storage tanks and integral piping which have at least the same capability to detect a new release as the methods specified in this subparagraph.

(d)1. With respect to eligible incidents reported to the department prior to July 1, 1992, the restoration insurance program shall provide up to $1.2 ~~$1~~ million of restoration for each incident and shall have an annual aggregate limit of $2 million of restoration per facility.

2. For any site at which a discharge is reported on or after July 1, 1992, and for which restoration coverage is requested, the department shall pay for restoration in accordance with the following schedule:

a. For discharges reported to the department from July 1, 1992, to June 30, 1993, the department shall pay up to $1.2 ~~$1~~ million of eligible restoration costs, less a $1,000 deductible per incident.

b. For discharges reported to the department from July 1, 1993, to December 31, 1993, the department shall pay up to $1.2 ~~$1~~ million of eligible restoration costs, less a $5,000 deductible per incident. However, if, prior to the date the discharge is reported and by September 1, 1993, the owner or operator can demonstrate financial responsibility in effect in accordance with 40 C.F.R. s. 280.97, subpart H, for coverage under sub-subparagraph c., the deductible will be $500. The $500 deductible shall apply for a period of 1 ~~one~~ year from the effective date of a policy or other form of financial responsibility obtained and in effect by September 1, 1993.

c. For discharges reported to the department from January 1, 1994, to December 31, 1996, the department shall pay up to $400,000 ~~$300,000~~ of eligible restoration costs, less a deductible of $10,000.

d. For discharges reported to the department from January 1, 1997, to December 31, 1998, the department shall pay up to $300,000 ~~$150,000~~ of eligible restoration costs, less a deductible of $10,000.

e. Beginning January 1, 1999, no restoration coverage shall be provided.

f. In addition, a supplemental deductible shall be added as follows:

(I) A supplemental deductible of $5,000 if the owner or operator fails to report a suspected release within 1 working day after discovery.

(II) A supplemental deductible of $10,000 if the owner or operator, within 3 days after discovery of an actual new discharge, fails to take steps to test or empty the storage system and complete such activity within 7 days.

(III) A supplemental deductible of $25,000 if the owner or operator, after testing or emptying the storage system, fails to proceed within 24 hours thereafter to abate the known source of the discharge or to begin free product removal relating to an actual new discharge and fails to complete abatement within 72 hours, although free product recovery may be ongoing.

(e) The following are not eligible to participate in the Petroleum Liability and Restoration Insurance Program:

1. Sites owned or operated by the Federal Government during the time the facility was in operation.

2. Sites where the owner or operator has denied the department reasonable site access.

3. Any third-party claims relating to damages caused by discharges discovered prior to January 1, 1989.

4. Any incidents discovered prior to January 1, 1989, are not eligible to participate in the restoration insurance program. However, this exclusion shall not be construed to prevent a new incident at the same location from participation in the restoration insurance program if the owner or operator is otherwise eligible. This exclusion shall not affect eligibility for participation in the EDI program.

Sites meeting the criteria of this subsection for which a site rehabilitation completion order was issued prior to June 1, 2008, do not qualify for the 2008 increase in site rehabilitation funding assistance and are bound by the pre-June 1, 2008, limits. Sites meeting the criteria of this subsection for which a site rehabilitation completion order was not issued prior to June 1, 2008, regardless of whether or not they have previously transitioned to nonstate-funded cleanup status, may continue state-funded cleanup pursuant to s. 376.30711 until a site rehabilitation completion order is issued or the increased site rehabilitation funding assistance limit is reached, whichever occurs first. At no time shall expenses incurred outside the preapproved site rehabilitation program under s. 376.30711 be reimbursable.

Section 4. The act shall take effect July 1, 2008.

Approved by the Governor June 10, 2008.

Filed in Office Secretary of State June 10, 2008.