CONTAMINATED SOILS FORUM
POLICY SUB-COMMITTEE
FOCUS GROUP ON NEED FOR UNIFORM POLICY

A. HOW DID WE GET HERE?

The Petroleum Cleanup Program

- In the 1996 general legislative session, a substantial overhaul of the petroleum contamination cleanup program was adopted. As part of the revisions to Chapter 376, Florida Statutes, the legislature directed DEP to incorporate Risk Based Corrective Action ("RBCA") principles into its petroleum contamination cleanup rule to the maximum extent feasible. Section 376.3071(5)(b), Fla. Stat.

- The 1996 legislature also directed DEP to adopt appropriate soil cleanup target levels. (SCTLs) The legislature mandated that for the top two feet of soil the SCTLs be based upon consideration of calculations using a lifetime cancer risk level of 1×10^{-6}; a hazard index of 1 or less; the best achievable detection limits; or the naturally occurring background concentration.

- The legislature required that leachability-based SCTLs be based upon protection of the groundwater. The legislature required that source removal and other cost-effective alternatives that are technologically feasible shall be considered in achieving the leachability SCTLs.

- DEP implemented the statutory revisions to Chapter 376, Fla. Statutes through a major revision to the petroleum cleanup rule, Chapter 62-770, F.A.C. The revised rule established SCTLs based upon the cancer risk and hazard index mandated by the legislature. These numerical values were incorporated as Table II to the petroleum cleanup rule. The SCTLs establish numerical cleanup target levels for an extensive laundry list of potential contaminants of concern.

- The SCTLs established in Table II of Chapter 62-770, F.A.C. separately address both residential scenario cleanups and industrial scenario cleanups. The SCTLs include both "direct exposure" levels (applicable in the top two feet of soils) and "leachability based" levels dependent on the classification of the potentially impacted ground or surface waters.

The Brownfields Program

- In the 1997 the legislature adopted the Brownfields Redevelopment Act to encourage the voluntary cleanup of contaminated properties designated as Brownfields by local governments.

- As in the petroleum cleanup area, the legislature directed DEP to incorporate RBCA principles and to adopt appropriate soil cleanup target levels. (SCTLs) The legislature again mandated that for the top two feet of soil the SCTLs be based upon consideration of calculations using a lifetime cancer risk level of 1×10^{-6}; a hazard index of 1 or less; the best achievable detection limits; or the naturally occurring background concentration.

- The legislature again required that leachability-based SCTLs be based upon protection of the groundwater. The legislature required that source removal and other cost-effective alternatives that are technologically feasible shall be considered in achieving the leachability SCTLs.

- DEP implemented the Brownfields Redevelopment Act through adoption of Chapter 62-785, F.A.C. The Brownfields Cleanup rule established SCTLs based upon the cancer risk and hazard index mandated by the legislature. These numerical values were incorporated as Table II to the Brownfields rule.

- The SCTLs adopted and incorporated into the Brownfields Rule were essentially the same as the numerical values previously adopted as part of the revised Petroleum Contamination Cleanup Rule. However, due to the time that had passed between adoption of Chapter 62-770 and the adoption Chapter 62-785, some of the numeric values changed as a result of changes in the underlying scientific assumptions regarding some chemicals of concern.

The Dry Cleaning Solvent Contamination Program

- In the 1998 general session, the legislature adopted amendments to the state's dry cleaning solvent cleanup program.

- As in the petroleum and Brownfields cleanup areas, the legislature directed DEP to adopt appropriate soil cleanup target levels. (SCTLs) Once again, the legislature mandated that for the top two feet of soil the SCTLs be based upon consideration of calculations using a lifetime cancer risk level of 1×10^{-6}; a hazard index of 1 or less; the best achievable detection limits; or the naturally occurring background concentration.

- As in the petroleum cleanup and Brownfields programs, the legislature again required that leachability-based SCTLs be based upon protection of the groundwater. The legislature required that source removal and other cost-effective alternatives that are technologically feasible shall be considered in achieving the leachability SCTLs.

- DEP has initiated rule making to adopt a Dry Cleaning Solvent Cleanup Criteria Rule (Proposed Chapter, 62-782, F.A.C.). The workshop draft of the rule

proposes the same SCTLs previously adopted during the Brownfields rule adoption, although limited only to the dry cleaning contaminants of concern.

B. A PLEA FOR CONSISTENCY: THE MEETING OF THE ENVIRONMENTAL REGULATION COMMISSION

- During the meeting of the Environmental Regulation Commission on April 30, 1998 regarding the Brownfields rule, commentors from the Department, regulated industry, and environmental groups all expressed a need to have uniform and consistent SCTLs that would apply in the program areas where the legislature had specifically directed that DEP develop SCLTs using the cancer risk calculation of 1 x 10^{-6} or health hazard index of 1 or less.

- Environmental groups also noted the need to periodically update the SCTLs and to take into account additive and synergistic effects of contaminants as directed by the legislature.

C. RECOMMENDATION: DEP SHOULD IMMEDIATELY ADOPT A UNIFIED TABLE OF SOIL CLEANUP TARGET LEVELS.

- There is no serious dispute that DEP currently has the clear legislative authority to adopt SCTLs to apply to the Petroleum Cleanup, Brownfields Cleanup, and Dry Cleaning Solvent Cleanup Programs (hereafter referred to as "the three designated program areas").

- The direct exposure default SCTLs in each of the three designated program areas were developed using the same legislatively mandated "standard", i.e. a lifetime cancer risk level of 1 x 10^{-6}; a health hazard index of 1 or less; or the best achievable detection limit. The leachability based numbers were derived using the same assumptions for protection of the underlying groundwater (dependent upon the ground or surface water classification) from leaching impacts.

- The assumptions used in deriving the numerical SCTLs in the three designated program areas are likely to change with developing science. Therefore there is a need to periodically review and update, as necessary, the currently promulgated SCTLs.

- There currently exist minor differences between the SCTLs adopted for the petroleum cleanup program and the SCTLs adopted for the Brownfields program. These minor differences are solely due to the passage of time, and emerging science, between the dates of the two rule adoption proceedings.

- Differences in established SCTLs for different program areas is likely to lead to confusion and uneven application of cleanup requirements.

- The Department, the regulated community, and the affected public, would benefit from having a single uniform set of SCTLs that apply to the three designated program areas.
- A single uniform set of SCTLs could be periodically updated (e.g., every 3 years) to keep pace with emerging science and resulting changes in assumptions underlying the calculation of the default SCTLs.

- Therefore, it is recommended that DEP immediately promulgate a separate rule chapter which establishes the Table of SCTLs. The rule chapter would make clear that it is not intended to establish ambient clean soil standards, and that the Table of SCTLs applies to cleanup of contaminated soils only to the extent that the Table is expressly adopted and incorporated by reference by another rule chapter.

D. MOVING BEYOND THE BOUNDARIES; EXTENSION OF THE UNIFORM SCTLs TO OTHER PROGRAM AREAS

- Once DEP has adopted a uniform set of SCTLs to apply to the three designated program areas, the question becomes whether it is advisable to apply the same SCTLs to other program areas administered by DEP. If so, does DEP have the statutory authority to require that the SCTLs be achieved in other program areas?

- Other programs administered by DEP where SCTLs might be immediately considered include permits for Soil Treatment Facilities, general ground water contamination cleanup cases, RCRA closure cases, and CERCLA or Superfund Cleanup cases.

Soil Treatment Facilities

- DEP currently regulates Soil Thermal Treatment Facilities pursuant to Chapter 62-775, F.A.C. As a result of recent litigation, DEP has committed to development of a rule that applies a uniform set of standards to all soil treatment facilities, regardless of the treatment technology employed. DEP has held several workshops aimed at developing a Soil Treatment Facility Rule.

- In the current drafts of the Soil Treatment Rule, DEP has adopted the same set of SCTLs used in the Brownfields program as the levels which must be achieved by a treatment facility in order to be eligible for unrestricted use or disposal of the treated contaminated soils.

- It is logical, and will promote consistency in application of rules, for the proposed Soil Treatment Rule to adopt and incorporate the uniform set of SCTLs as the "default" values which must be met by a facility that is issued a permit by DEP to treat contaminated soils removed from petroleum cleanup, Brownfields, and dry cleaning sites.

Ground Water Cleanup Cases

- DEP, through its enforcement program, currently requires contamination assessment and cleanup at sites that do not fall within the three designated program areas. These sites typically involve industrial waste discharges or accidental releases which have resulted in actual or potential impact to soils, ground water, and/or surface water.

- Some commentors and interested parties have questioned the statutory authority of DEP to require that specific SCTLs be met in a general ground water contamination cleanup case. The statutory authority argument is further discussed in Section E below.

- Rule 62-522.700 F.A.C. governs DEP required corrective actions for ground water contamination cases. This promulgated rule provides a bare bones outline of required contamination assessment and cleanup requirements. It does not specifically address the need to assess or remediate contaminated soils.

- Under its Model Corrective Actions for Contamination Site Cases, DEP does require a more thorough and detailed contamination assessment and remedial action. The Model Corrective Actions require that areas of contaminated soils which may serve as a continuing source of leaching to ground water (or surface waters) be assessed and treated or removed. The introduction to the Model Corrective Actions states: *"Note: The Corrective Actions for Contamination Site Cases is to be used for sites where contamination of the groundwater, surface water, soils or sediments is known or documented by data or where the probability of finding such contamination is so high that implementation of the Preliminary Contamination Assessment Actions is an unnecessary action."*

- The Model Corrective Actions specifically address the establishment of risk based soil cleanup target levels for the cleanup.

- As a practical matter, DEP typically applies the same SCTLs in general ground water contamination cleanup cases as established for the three designated programs. In other words, DEP has historically used the 1×10^{-6} cancer risk, or health hazard index of 1 or less, in determining SCTLs in connection with a ground water (or surface water) cleanup case.

RCRA Cleanups

- Cleanup of facilities or sites contaminated with hazardous wastes is governed by the RCRA closure permit process.

- Under RCRA, contaminated soils could be removed as part of a "risk based clean closure" process. The remediation levels to be achieved in a clean closure are determined by the state administering the RCRA program.

- In Florida the remediation levels to be achieved for approval of a clean closure proposal are the same numeric SCTLs that have been adopted for the three designated program areas.

- If a site is not "clean closed", then the RCRA permit process will establish the remediation levels to be achieved for contaminated soils, and the terms and conditions for contamination containment, leachate control and collection, and ground water monitoring.

- If a clean closure is not achieved the RCRA closure permit process is both lengthy and expensive.

CERCLA Cleanups

- CERCLA or federal Superfund cleanups could also be potentially impacted if Florida adopts a unified set of "soil cleanup target levels."

- Currently, EPA establishes remediation goals for Superfund sites based upon the Remedial Investigation/Feasibility Study (RI/FS) process, that ultimately results in the promulgation of a Record of Decision ("ROD"). This process provides opportunity for public participation and comment during the selection of the remediation goals.

- CERCLA regulations require that EPA consider state regulations which establish standards for site cleanup. In CERCLA jargon, these state requirements are known as Applicable or Relevant and Appropriate Requirements. ("ARARs").

- In the absence of chemical-specific ARARs for soils, EPA will allow a site specific remediation goal to be established using a range of risk from 1×10^{-4} to 1×10^{-6}. (the greater the risk of human exposure, the higher the remediation goal is likely to be established.)

- If DEP adopts a unified Table of SCTLs, these could be considered ARARs for purposes of establishing the cleanup target levels at CERCLA sites.

- From the standpoint of consistency, it would be sound policy to require that a Superfund site be held to the same SCTLs as a petroleum cleanup, Brownfields, or dry cleaning site.

E. STATUTORY AUTHORITY AND THE TOMOKA DECISION

- It is well settled law that a state Agency may only promulgate rules based upon a delegation of authority from the legislature. It has been said that Agencies may not make new laws, but can only implement the laws enacted by the Legislature, based upon a specific delegation of authority to act.

- Over the years, a debate has raged over the level of specificity required in a statutory delegation of power to the Agency. Some court decisions held that a general grant of rule making power was sufficient, and a rule would be valid so long as it was "rationally related" to the enabling legislation, and was not arbitrary or capricious.

- In the 1996 legislative session, amendments were made to the Administrative Procedure Act to specifically address the question of what level of specificity would be required for Agency rulemaking. Section 120.536, Florida Statutes was enacted and provides that:

> (1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

- The meaning of this statutory change to the Administrative Procedures Act was tested in the recent case of St. Johns River Water Management District v. Consolidated-Tomoka Land Co. 23 FLW 1787 (Fla. First DCA, July 29, 1998)

- The Tomoka case involved Water Management District rules which designated certain hydrologic basins within which more stringent permit requirements would apply. Consolidated-Tomoka Land Company challenged the rules claiming that, while Water Management District had the general authority to issue permits, it did not have specific authority to carve out hydrologic basins where more stringent permit requirements would apply.

- The Court rejected Consolidated-Tomoko's argument that the Agency must have detailed and specific statutory authority to adopt rules under the APA revisions.

The Court concluded that***: "the proper test to determine whether a rule is a valid exercise of delegated authority is a functional test based on the nature of the power and duty at issue and not the level of detail in the language of the enabling statute. The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated statutory authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented."***

- There is no question that DEP has the specific and detailed legislative authority to adopt SCTLs applicable in the three designated program areas (Petroleum Cleanup, Brownfields Cleanup, Dry Cleaning Solvent Cleanup).

- Some commentors have suggested that DEP lacks the statutory authority to adopts SCTLs in any program area outside of the three designated programs.

- Other commentors believe that establishment of SCTLs for contamination cleanup sites, other than the three designated programs, fall within the "range of powers that the Legislature has granted to the Agency". Establishment of SCTLs to apply to contamination sites is "directly within the class of powers and duties the legislature has granted" to DEP. According to these commentors, DEP has the sufficient statutory authority, under the Tomoka standard, to promulgate a uniform set of SCTLs that should apply to all contamination cleanup sites.

- DEP has the power to establish rules, including but not limited to…removal or disposal standards to implement the intent of Sections 376.30-376.319, Florida Statutes (pertaining in general to protection of the public and environment from the results of spills, discharges, and escapes of pollutants and hazardous substances). See Section 376.303, Florida Statutes.

- DEP has the power and duty to adopt, modify, and repeal regulations to carry out the intents and purposes of Chapter 403, Florida Statutes (pertaining to protection of air and water resources). See Section 403.061, Florida Statutes.

- DEP has the power and duty to adopt, repeal or amend rules pertaining to disposal of solid and hazardous wastes in the state. See Section 403.704, Florida Statutes.

- In the event the Contaminated Soils Forum determines that additional statutory authority is necessary for DEP to apply the uniform SCTLs to program areas other than the three designated program areas, then additional authority could be sought to specifically authorize DEP to establish SCTLs for "non-program" sites, using the same underlying risk-based calculations that were used for the development of SCTLs at Brownfields, Petroleum Cleanup, and Dry Cleaning Solvent sites.

F. EXPANDING THE BOUNDARIES FURTHER: AIMING TOWARDS UNIVERSAL SCTLs APPLICABLE TO DISPOSAL, USE OR RE-USE OF ALL SOIL AND SOIL LIKE MATERIALS.

- As a practical matter DEP has already applied, or has proposed to apply, the same uniform SCTLs in the program areas discussed above (Soil Treatment Facilities, Model Corrective Actions for Contamination Sites, RCRA cleanup, and CERCLA cleanup.). The DEP's current non-rule policies and practices in these areas should probably be formally adopted in Department rules. The promulgation of the uniform SCTLs as a separate rule chapter will facilitate the adoption of these SCTLs on a program specific basis.

- Some commentors have proposed that the uniform SCTLs should also serve as the basis for defining acceptable risk levels for decisions regarding the disposal, use or re-use of other soil and soil like materials that are regulated by the Department. Such materials include (but are not limited to):

  - Combustor and incinerator ash
  - Recovered Screen Materials (RSM) from Construction & Demolition Debris Facilities.
  - Compost.
  - Dredged spoils and sediment.
  - Domestic Wastewater Residuals (sludge)
  - Other industrial by-products and sludges.

- Some may question the DEP's statutory authority to adopt these risk based SCTL values as "standards" to apply to use and re-use decisions.

- Others may argue that adoption of such stringent levels will act as an impediment to the beneficial use or re-use of such materials.

- On the other hand, from the standpoint of regulatory consistency, it would be reasonable to apply the same risk based numeric standards to decisions regarding appropriate and acceptable risks to the public from the disposal, use or re-use of soil-like materials.

G. CONCLUSION

- DEP should move forward with promulgation of the risk based SCTLs currently incorporated in Chapters 62-770 and 62-785 into a separate rule chapter that will be uniform and can be periodically updated to keep pace with emerging science. This separate rule chapter would not establish ambient soil standards and would apply only if adopted and incorporated by reference in another rule chapter of the Department.

- DEP should adopt and incorporate by reference the uniform SCTLs for the three designated program areas: Petroleum Cleanup, Brownfields, and Dry Cleaning Solvent Cleanup.

- DEP should adopt and incorporate the uniform SCTLs in other program areas as determined appropriate. In the short term, DEP should consider adopting the uniform SCTLs for the Soil Treatment Facility rule, general Contamination Site Cleanups, RCRA closure, and CERCLA cleanups under state oversight.

- In the longer term, DEP should continue to evaluate whether the uniform SCTLs can serve as the basis for establishing risk based standards applicable to disposal, use or re-use of soils and soil like materials.