

Florida Department of Environmental Protection

Memorandum

TO: Petroleum Cleanup Program Personnel, Contracted Local
County Programs, District Storage Tank Personnel, Contractors
and Interested Parties

FROM: Jorge R. Caspary, P.G., Director *J.R.C.*
Division of Waste Management

DATE: June 6, 2011

SUBJECT: Department Selection of Cleanup Contractor for Consent Order
& Final Judgment Sites Using State Funds

The Bureau of Petroleum Storage Systems (BPSS) intends to continue its long standing practice of selecting state clean up contractors to conduct all site rehabilitation work performed pursuant to a Consent Order or final judgment (collectively referred to as COs) issued by the FDEP or State court unless the order or judgment clearly and specifically grants an entity or individual the opportunity to select the contractor. For the following reasons, among others, such practice will continue:

1. By definition, discharges associated with COs are not eligible for a cleanup program (ATRP/IVP, EDI, FPLRIP, & PCPP) funded by the Inland Protection Trust Fund (ITPF), therefore, neither property owners nor those otherwise responsible for the cleanup are authorized to designate a contractor to perform under preapproval. See ss. 376.3071(1) and 5(a), F.S.
2. Because those facilities and discharges under a CO are not eligible for an IPTF program the parties subject to the CO are not associated with the same rights (such as the state funding is associated with the discharge regardless of property transfers - COs are not associated with the property, rather COs are tied to the person) or protections (from third party suits, for example) as IPTF program eligible discharges. Therefore, if there is a real property sale after the CO is issued or if a condition required of the CO isn't fully completed, then the state's offer to evaluate and, if necessary, conduct clean up is typically withdrawn by the terms of

the CO. The FDEP must evaluate compliance with the CO or whether the appropriate entity still holds title to the property to determine whether to conduct any work on the property.

3. Unlike a discharge eligible under an IPTF program, any funds expended under a CO from the IPTF must be pursued under the IPTF cost recovery provision which is restated in the COs themselves. See ss. 376.3071(7), F.S. The Department evaluates whether a successful cost recovery is likely. See ss. 376.3071(4)(f), F.S. During a cost recovery case against the CO respondent (often the property owner), the clean up contractor would be one of the FDEP witnesses called to testify regarding the work performed and the costs FDEP incurred. To ask a contractor selected by the party against whom the DEP has filed suit to testify to support the costs the DEP has incurred is a conflict of interest – and the primary reason that OGC has for years strongly encouraged the BPSS to only use the FDEP state clean up contractors to conduct work at CO facilities.

If some State-funded CO cleanups are actively and timely being implemented by a privately selected Preapproval contractor as of the date of this memo, such work may continue by those privately selected contractors until such time as the contractor fails to perform (as defined by the preapproval program SOP), at which time the Department shall select the replacement contractor pursuant to the above. Similarly, if such work is suspended because the priority score or available funding are deemed insufficient to continue, the Department shall select the contractor if cleanup work is reinstated at a later date.