

Florida Department of
Environmental Protection

Memorandum

TO: BPSS Team Leaders
Local Program Managers
Preapproval Site Managers
District coordinators
Compliance managers
Compliance staff
Kellie Scott, OGC

FROM: Michael E. Ashey, Chief *MRA 2/12/07*
Bureau of Petroleum Storage Systems

DATE: February 15, 2007

RE: Guidance for the Determination of Subsequently Discovered Discharges at Sites with Preexisting Eligible Petroleum Discharges Pursuant to Section 376.30716, Florida Statutes

Introduction

In June of 2006, the Florida Legislature promulgated Section 376.30716, Florida Statutes (Fla. Stat.), titled "Cleanup of certain sites". This new legislation creates a presumption that a "subsequently discovered discharge" reported on or after July 1, 2005 is part of an eligible discharge for the purposes of state cleanup funding.

This guidance document is intended to provide guidance relating to how the Department will review sites where this new legislation could potentially apply. For the purposes of this legislation, and this legislation only, the terms "exclusion zone" and "subsequently discovered discharge" have been defined.

The "**exclusion zone**" is defined as the subsurface area within 10 feet of an underground storage tank, integral piping, and dispenser, and the area between the underground storage tank and dispenser. It should be noted that this definition does not apply to the standard petroleum cleanup preapproval program use of exclusion zone (within 3 feet of the storage tank system) when performing assessment and cleanup activities.

A "**subsequently discovered discharge**" is defined as a discharge or suspected discharge that is discovered on or after July 1, 2005, at a site eligible for state funding under Sections 376.305 (ATRP), 376.3071 (EDI & PCPP), or 376.3072 (PLRIP), Fla. Stat.

Section 376.30716(2), Fla. Stat., states: "As noted in s. 376.30714, it may be difficult to distinguish between a discharge of petroleum products from a petroleum storage system which is

eligible for state funding and a discharge reported after December 31, 1998, which is not eligible for state funding. Until the secondary containment upgrade of underground storage tanks, as required by rule 62-761, Florida Administrative Code, is completed at a site, a subsequently discovered discharge at the site is presumed to be part of the original discharge that qualifies for state funding.”

The presumption that a “subsequently discovered discharge” is part of an eligible discharge, for state cleanup funding purposes, **does not apply** if:

- (1) The Department presents competent and substantial evidence demonstrating that the “subsequently discovered discharge” occurred from a source that is independent and separate from the discharge that is eligible for state funding. Please note that the term “competent and substantial evidence” is a very high burden of proof. Examples which would meet this standard include, but are not limited to, documented physical evidence such as a hole in a tank or pipe, or a failed joint or connection, or detection of specific contaminants that have not been previously detected at the site in association with the eligible discharge(s).
- (2) All petroleum storage system(s) have been upgraded to secondary containment in accordance with Chapter 62-761, Florida Administrative Code (F.A.C.).
- (3) Newly discovered free product is found outside the “exclusion zone” (as defined in this legislation).
- (4) Concentrations of existing petroleum contaminants outside the “exclusion zone” (as defined by the legislation) have increased by 1,000 percent or more. This increase is based on all of the available data, both historical and current data. The increase could be in any individual petroleum constituent (e.g., benzene, MTBE, etc.).
- (5) The site has received a Site Rehabilitation Completion Order (SRCO) or No Further Action (NFA) Order for the eligible discharges located on the site. If there is more than one program eligible discharge at the site all the discharges must have an SRCO or NFA for the presumption not to apply.

Applicability

If the Department cannot present competent and substantial evidence that a new discharge occurred, a “subsequently discovered discharge” must still meet all the below listed criteria in order to be presumed to be part of the eligible discharge for state cleanup funding purposes:

- (1) The facility currently has underground storage tanks.
- (2) All petroleum storage system(s) have **not** been upgraded to secondary containment as required in Chapter 62-761, F.A.C., prior to discovery of the “subsequently discovered discharge”.

- (3) The facility currently has a program eligible discharge that has not received a SRCO or NFA (i.e., eligible under EDI, ATRP, PLRIP, or PCPP);
- (4) The “subsequently discovered discharge” was first discovered on or after July 1, 2005.
- (5) No new free product is discovered outside the “exclusion zone” (as defined by this legislation). Please note that, for determining whether the presumption applies, if no wells exist outside the “exclusion zone” to detect new free product, the Department cannot compel the responsible party to install them.
- (6) Concentrations of specific petroleum contaminants outside the “exclusion zone” (as defined by this legislation) have not exceeded 1,000 percent or more of the historical concentrations. Please note that, for the purposes of determining whether the presumption applies, the Department cannot compel the responsible party to sample existing wells as part of a closure assessment.

Review Procedures

The following review procedures should be used when addressing whether a “subsequently discovered discharge” is presumed to be part of the original eligible discharge at a site for state cleanup funding purposes. See flow chart on specifics for review responsibilities.

If the “subsequently discovered discharge” **meets all** of the criteria listed in items (1) through (6), in the applicability section of this memorandum, please note the determination in a memo to the file and in a letter to the responsible party or in response to a request letter from the responsible party or their cleanup contractor. This determination does not alleviate the requirement of reporting **all** incidents or discharges in accordance with Department rules and to provide the Department a copy of **all** results associated with storage tank and piping tightness tests regardless of the results.

If the “subsequent discovered discharge” does **not** meet all of the criteria listed in items (1) through (6) in the applicability section of this memorandum, the discharge shall be deemed as a new discharge and the responsible party shall file a DRF and proceed to clean up the discharge in accordance with Chapter 62-770, F.A.C. Section 376.30714, Fla. Stat., site rehabilitation funding allocation agreements may also apply.

Even if the Section 376.30716, Fla. Stat., presumption does not apply to a site, the responsible party still has the ability to present evidence establishing that the “subsequently discovered discharge” is part of the original program eligible discharge at the site.

This legislation does not modify or increase any funding caps associated with any program eligible discharge(s) at the site. Therefore, the responsible party will still be financially responsible for any costs exceeding any applicable funding cap.

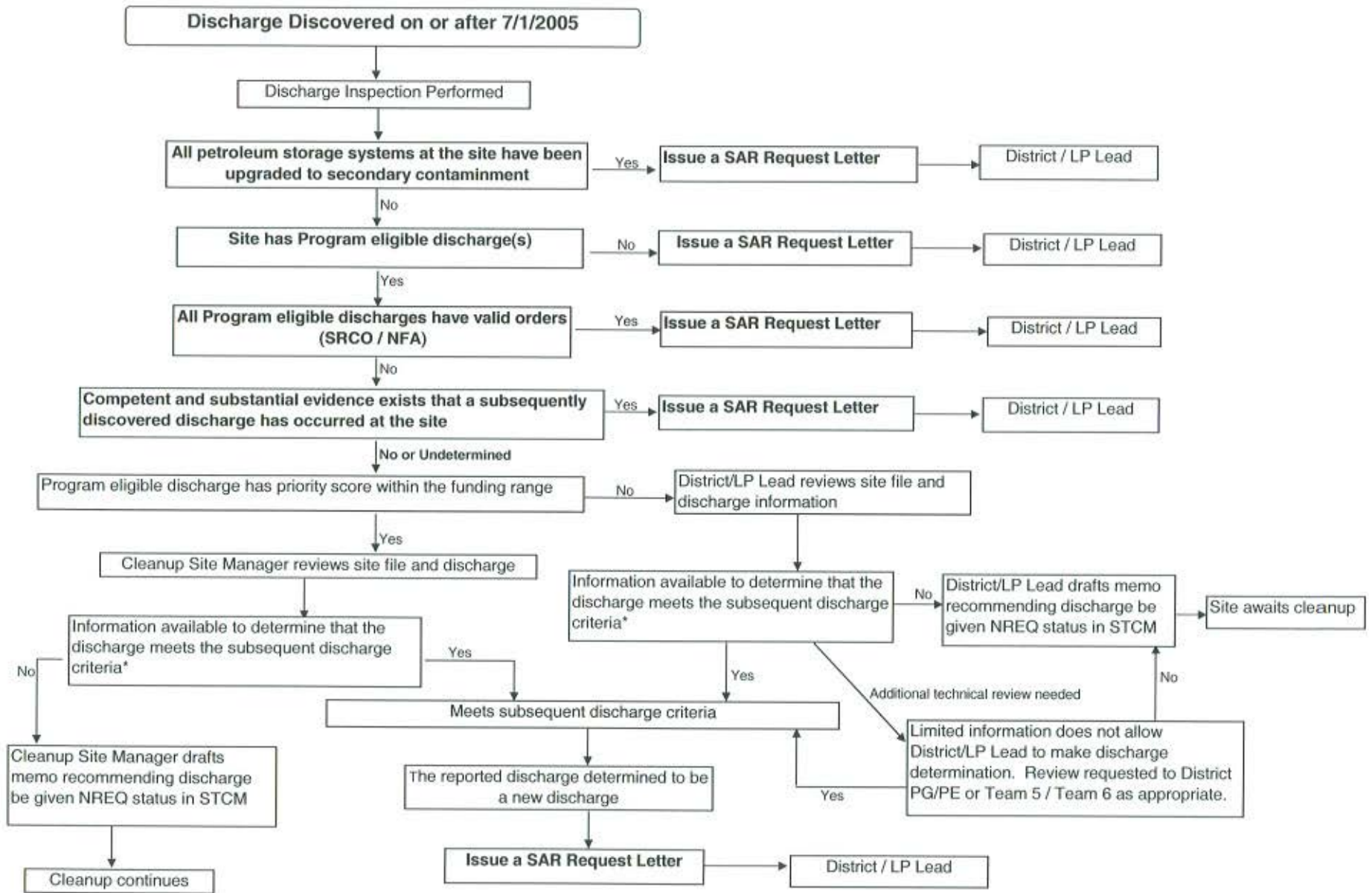
Closure Activities

Section 376.30716(3), Fla. Stat., prohibits the Department from requiring soil or groundwater sampling as part of a closure report or assessment for any site having an eligible discharge under EDI, ATRP, FPLRIP or PCPP that has not received a SRCO or NFA for all program eligible discharges. This prohibition is only applicable during storage tank closure activities and does not apply when rescinding a SRCO or NFA Order.

Reporting Requirements

Section 367.30716(4), Fla. Stat., also stipulates that regardless of whether the presumption specified in the legislation applies, a responsible party or facility owner or operator shall report **all** incidents and discharges in accordance with Department rules and provide to the Department a copy of **all** results associated with storage tank and piping tightness tests regardless of the results.

Guidance for Determination of Subsequently Discovered Discharges at Sites with Preexisting Eligible Petroleum Discharges (Section 376.30716, F.S.)



*The subsequent discharge criteria pursuant to Section 376-30716, Fla. Stat. are:

- 1) The Department presents competent and substantial evidence that a subsequently discovered discharge occurred from a source that is independent and separate from the discharge that qualifies for state funding.
- 2) The site has newly discovered free product outside the exclusion zone.
- 3) The site has an increase in the concentration of existing petroleum contaminants outside the exclusion zone of 1,000 percent or greater.

Activities in red will be performed by the contracted compliance inspector or District personnel, at the discretion of the District Tanks Program Supervisor

Florida Department of
Environmental Protection

Memorandum

TO: Lewis J. Cornman, Jr.
Environmental Manager (Eligibility Coordinator)

THROUGH: *Name*
Title

FROM: *Name*
Title

DATE: *Date*

SUBJECT: Cleanup Status Change Request for a Subsequently Discovered Discharge pursuant to Section 376.30716 Florida Statutes.

Please change the cleanup status in STCM/PCT for the *(insert discharge date)* discharge from contamination cleanup required (R) to (N) no cleanup required (NREQ). This facility has a previous *(insert name of program)* eligible discharge dated *(insert date)*. The *(insert discharge date)* is a subsequently discovered discharge as defined in 376.30716, F.S., and is presumed to be part of the eligible discharge that qualified for state funding.