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# **Contaminated Petroleum Sites in Florida**

**How the Florida, Department of Environmental  
Protection Administers Its Statutory Obligation  
to Clean Them Up**

**January 2018**

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The following report is the product of many hours spent reviewing records supplied by the Florida, Department of Environmental Protection, in response to multiple public records requests made under Chapter 119, Florida Statutes. In addition, we have been assisted by other people knowledgeable about the Petroleum Restoration Program, and people who identified parts of the program that seem to be have been taken in new, misguided, directions after Governor Scott took office. These concerns dovetailed with alarming directions that we have been seeing (and reported on) in this, and other programs, particularly in the area of enforcement. We present the following report in the hopes that it will begin the process of bringing about positive change to this program.

## Table of Contents

Executive Summary .....	2
I. The General Regulatory Framework .....	7
A. Government Help Provided to Remediate Contaminated Sites .....	8
B. Creation of the Inland Protection Trust Fund.....	9
C. Site Rehabilitation and Contract Procurement .....	10
II. FDEP Employees and Vendor Contracting .....	12
A. Pre-2014 Cleanup Rules.....	12
B. Targeting Employees and Contractors in Order to Change the Rules .....	12
C. The Outcome of the Investigations .....	15
III. The Weakening of the Inland Protection Trust Fund.....	18
IV. Scoring of Contaminated Sites and the Move to Close Springshed Sites.....	21
A. Scoring of Sites in General.....	21
B. Other Statutory Changes in 2014 .....	23
C. The Administrative Process of Site Cleanup and Closure .....	26
D. What Sites are Being Remediated? .....	28
E. What Tallevast Teaches Us .....	31
F. Public Notice .....	32
G. Identifying Those Mostly at Risk—Metropolitan vs. Rural .....	34

V. Springsheds ..... 35

VI. Cases Brought Against Big Oil..... 37

VII. Conclusion ..... 39

Executive Summary

The regulation of petroleum storage facilities in Florida is the responsibility of the Florida, Department of Environmental Protection (FDEP or Department). These facilities are now governed by a system of regulations that control both their daily operation, as well as the steps that must be taken by their owners when the storage tanks (Tanks) are closed or when a discharge of petroleum products into the environment occurs. In this paper, we examine the overall program, with a particular focus on the manner in which the FDEP has handled tanks that have been closed and that continue to be sources of pollution that can threaten Florida’s groundwater and surface water.

Underground and aboveground storage tanks are tanks that hold petroleum products, e.g. gasoline and diesel, that are sold to buyers and consumers. Florida, as most states, has faced the significant problem of how to handle these tanks when their owners either discontinue their use or simply abandon them. There are over [19,000](#) underground storage tanks and 25,000 aboveground storage tanks in Florida alone. Over time, the tanks succumb to the elements and begin leaking remaining petroleum products into the ground. This, in turn, compromises the surrounding groundwater and surface waters, as well as the soil in the vicinity of the contamination.

To address this contamination, the Legislature adopted, over time, five (5) separate state funded contamination cleanup programs that allowed site owners to register with the Department so that these sites would be placed on a registry for eventual remediation/cleanup using taxpayer dollars. Since most of the site owners had insufficient funds to pay for the restoration the Legislature created a trust fund, called the Inland Protection Trust Fund (IPTF) to pay for restoration activities. The Department is charged with the responsibility of administering the overall program, so that these state-funded contaminated sites are cleaned up. There are over [19,000](#) contaminated sites registered in the five state funded cleanup programs and in excess of 12,000 additional contaminated sites that are private party cleanups.

Based on multiple requests for records under Florida's public records law, Chapter 119, Florida Statutes, we examined various aspects of Florida's efforts to clean up contaminated sites, and to hold those accountable who have caused the pollution. What we found was that in the early days of the Scott administration, the FDEP's senior management embarked upon an effort to persuade the Legislature that there were multiple areas of malfeasance within Florida's petroleum cleanup program. Consequently, management claimed to Department employees that a criminal investigation was being conducted by the Florida, Department of Law Enforcement (FDLE) and that the investigation involved Department employees, as well as third party contractors who were seeking to secure contracts to restore contaminated sites. This, it turns out, was untrue. The FDLE has denied to *Florida* PEER that any such investigation existed. Furthermore, the Department's own Office of Inspector General (OIG) conducted multiple investigations into the program, as well as a thorough audit, and was unable to document any evidence of widespread mishandling of the program. The OIG did recommend that changes be made to the program, and these changes were largely adopted by the Florida Legislature.

Contaminated site restoration is funded through the IPTF, established under § 376.3071, Fla. Stat. The IPTF is the recipient of “. . . all penalties, judgments, recoveries, reimbursements, loans, and other fees and charges related to the implementation of this section and s. 376.3073 and the excise tax revenues levied, collected, and credited pursuant to ss. 206.9935(3) and 206.9945(1)(c).” See, § 376.3071(3), Fla. Stat. These resources are then used to investigate, assess and restore contaminated petroleum sites. Since 2011, the Legislature, with the Department’s approval, has consistently diverted millions of dollars from the IPTF, substantially weakening the ability of the Department to fully engage in needed restoration projects.

The petroleum cleanup process involves the evaluation of each contaminated site. Each site is then given a priority score based upon its proximity to health receptors such as drinking water wells. The higher the score the higher the threat to a drinking water well. The Legislature, through § 376.3071, Fla. Stat., has directed the Department to initiate the cleanup of sites based upon these scores. The sites with the highest scores are to be cleaned up first. The Legislature also acknowledged, however, that there was not enough money to pay for the cleanup of all sites. But rather than appropriating more money for the task so that the worst contamination would be remediated, the Legislature gave the Department the statutory authority to also restore sites that have the lowest priority scores.

Under the Scott administration, the Department has continued to engage in the process of closing contaminated sites, which is laudable. However, the sites that are being closed are the sites with the lowest scores, meaning that the more contaminated sites that pose a higher human health risk are not receiving the same attention. In fact, the median priority score for remediated sites has dropped every year since 2011. Therefore, the Department is using an approach that dedicates budget dollars to low-scored sites at the expense of high-scored sites.

The scoring process that is used by the Department has yielded interesting results in terms of perceived health risks in each of Florida's 67 counties. The Department's scoring system considers whether or not the public gets its drinking water from municipal systems (as opposed to private wells). The idea is that municipal systems mitigate the risk associated with petroleum contamination, since the public is drinking water that has been treated by municipal plants. Those who get their water supplies from private wells do not enjoy this same level of safety. Consequently, the data shows that the contamination from facilities in rural counties is typically higher (sometimes much higher) than the levels seen in communities who provide municipal water supplies to their residents.

Florida law, § 376.3072, Fla. Stat., does not require site owners and/or the Department to notify residents that they live in an area that is close to a contaminated petroleum site. Instead, the law requires that notice be given only to school boards in those cases in which the contamination exists on property owned by schools. Property owners and tenants are not entitled, by statute, to any notice. Property owners are entitled to direct notice only in those situations in which contamination remediation operations are expected to extend beyond the original property boundaries. By the same token, residents who live on, or own, property that is adjacent to such property receive no notice of the contamination, even if they have a drinking water well that may cause the underground contamination plume to migrate to that well due to its use. In addition, the statutes do not require that notice be given to other persons, e.g. tenants, who live on contaminated property.

Over the past few years the Governor has issued several announcements that he wants to restore Florida's springs. The Department has given similar announcements of steps designed to advance that initiative. This is indeed a worthwhile commitment. It is well known, that nutrient

pollution is the primary source of contamination to Florida's springs. What we found, however, is that the Department has also quietly engaged in a process of labeling certain petroleum contamination sites as being in springsheds. These sites are then being fast-tracked for remediation. The overwhelming majority of these sites, it turns out, are low-priority score sites that would otherwise not be prime candidates for rapid remediation. Further, some of the sites are in counties in which there are no known springs. Consequently, the basis (and motivation) for this aspect of the Department's administration of the petroleum cleanup program is questionable. In addition, not all contaminated sites in a springshed area are being cleaned up, which further questions the motivation of why some sites, but not other sites in a springshed area are being remediated.

The taxpayers in Florida have also subsidized (through the IPTF) the cleanup of petroleum contaminated sites that are owned or were owned and operated by major oil companies. Yet, since 2011, the Department learned that at least 3 major oil companies who had received these taxpayer funds had also submitted claims for reimbursement to their private insurers seeking reimbursement for monies that they had allegedly paid towards remediation of petroleum contaminated sites. The companies were Chevron, USA Inc., ConocoPhillips Company, and Sunoco, Inc. The Department did not refer these 3 cases to the Office of the Attorney General (or local State Attorneys) for criminal prosecution. Instead, the Department negotiated civil settlements with the companies to recover some of the lost revenue. In total, the Department settled for \$10,675,000.00 with these companies. The Department did not use its own Office of General Counsel to achieve this settlement. Instead, it retained the private law firm, Shutts & Bowen LLP, and paid them almost \$500,000 (apparently including expenses

provided for under the contract) for their work. Two of the 3 cases were resolved within 9 months of the firm receiving the cases.

#### I. The General Regulatory Framework

Under [§ 376.303\(1\)\(a\), Fla. Stat.](#), the FDEP is granted the authority to “[e]stablish rules, including, but not limited to, construction standards, permitting or registration of tanks, maintenance and installation standards, and removal or disposal standards, to implement the intent of ss. 376.30-376.317 and to regulate underground and aboveground facilities and their onsite integral piping systems...” In accordance with its statutory authority, the Department has adopted multiple administrative rules that govern both underground storage tanks systems ([62-761, F.A.C.](#)) and aboveground storage tank systems ([62-762, F.A.C.](#)). One of the critical issues facing the state has been the removal of old, inactive tanks that are nevertheless still discharging pollutants into the ground. In order to address these risks, the Legislature adopted [§ 376.305\(1\), Fla. Stat.](#), which requires that any discharges from these tanks be immediately contained by the person(s) responsible for the tanks. If the owner fails to immediately take steps to curtail such discharges, the Department is authorized to act on its own. [§ 376.305\(2\), Fla. Stat.](#)

One of the problems that the Department discovered decades ago was that there are thousands of underground storage tanks that once housed petroleum products, but which are no longer in use. Many, if not most of these tanks were on property whose owners once operated service stations. In many situations, the commercial enterprise no longer included the sale of gasoline or the facility no longer existed and the property was vacant with no structures, or in

some situations, the property had been abandoned. The tanks, however, had been left behind, in the ground, and were therefore susceptible to deterioration that resulted in the remaining petroleum products being discharged to the soil and eventually to nearby groundwater and surface water. This contaminated groundwater would then pose a danger to both the environment and the public who might come in contact with it and to drinking water wells in proximity to the contaminated ground water.

*A. Government Help Provided to Remediate Contaminated Sites*

The problem that these abandoned tanks presented to the State of Florida was serious. The first issue was who to hold liable for the contamination. In many instances, the property on which the tanks were buried was either abandoned, or the present owner was not the person(s) who initially installed or operated the tanks. This presented impediments on the FDEP's ability to remediate the contamination that was occurring. In response, the Florida Legislature created the Abandoned Tank Restoration Program (ATRP) that was designed to provide financial assistance to persons who owned tanks, but had not used them to store petroleum products since March 1, 1990. See, § 376.305(6)(a)2., Fla. Stat. If the applicant registered in the ATRP program the state assumed 100 percent of the cleanup liability. See, § 376.305(6)(b), Fla. Stat. The Legislature also enacted the early detection incentive program (EDI), which also provides for 100 percent state funding for the cleanup for applicants who registered in this program. To carry out the legislative mandate found in § 376.305, Fla. Stat., the Department adopted [62-769.800, F.A.C.](#), which is the governing rule concerning abandoned petroleum sites.

For persons who were not able to avail themselves of the Abandoned Tank Restoration Program, or the EDI program, e.g. persons who did not apply in time or who were not financially

unable to afford the cleanup costs, and who were otherwise uninsured, the Legislature created [§ 376.3072, Fla. Stat.](#), which authorized the Florida Petroleum Liability and Restoration Insurance Program. This program provided insurance for owners facing liability for incidents occurring after January 1, 1989, provided that they had registered with the state prior to January 1, 1995. This program provides for state funded cleanup dollars between \$300,000 and \$1.2 million, depending on when the applicant registered their site in this program. The legislature also enacted the Petroleum Contamination participation program (PCPP), which provides for \$400,000 in state funded cleanup. Lastly the legislature authorized the Innocent Victim program which provides applicants an opportunity to reapply to the ATRP program. In all, these five programs represent a multi-billion-dollar bailout of polluters, and the Legislature assumed the financial burden of these cleanups so that they would be paid for by Florida's citizens.

*B. Creation of the Inland Protection Trust Fund*

To pay for the costs associated with the above activities, the Legislature created the Inland Protection Trust Fund (IPTF). The IPTF, which was created under [§ 376.3071, Fla. Stat.](#), is to be used to investigate, assess and rehabilitate contamination sites, restore contaminated potable water supplies, rehabilitate contaminated sites, maintain and monitor contaminated sites and to reimburse all other expenses associated with such sites. See, § 376.3071(4)(a)-(k), Fla. Stat. The IPTF is funded primarily through a tax on every barrel of petroleum products that enters the state. The tax is presently set at 80 cents per barrel and this tax is then passed along to Florida's citizens every time they purchase gas or diesel. The Legislature has directed the Department to "implement rules and policies to eliminate and reduce duplication of site rehabilitation efforts, paperwork, and documentation, and micromanagement of site

rehabilitation tasks.” § 376.3071(2)(b), Fla. Stat. This includes the adoption of standardized forms associated with the site rehabilitation process. See, § 376.3071(2)(d)-(e), Fla. Stat. The IPTF is also subsidized by deposits of “. . . all penalties, judgments, recoveries, reimbursements, loans, and other fees and charges related to the implementation of this section and s. 376.3073 and the excise tax revenues levied, collected, and credited pursuant to ss. 206.9935(3) and 206.9945(1)(c).” See, § 376.3071(3), Fla. Stat. Monies received by the Department from these sources are required to be deposited into the IPTF. § 376.3071(3), Fla. Stat.

### *C. Site Rehabilitation and Contract Procurement*

Of the 19,000 state-funded sites, 9,971 are still being cleaned up, or are awaiting cleanup. Of the 12,630 private party cleanups, 2,657 are being cleaned up, or are awaiting cleanup. The sheer volume of contaminated sites in Florida, coupled with the involvement of a state agency in the cleanup process, required the creation of an administrative process that would provide the framework in which site cleanups would proceed. In 2003, the Legislature furthered the process with the adoption of [§ 376.30701, Fla. Stat.](#) This statute required the Department to adopt necessary rules associated with the cleanup/remediation process. § 376.30701(2), Fla. Stat. The Legislature required that the Department work to “[e]nsure that the site-specific cleanup goal is that all contaminated sites being cleaned up pursuant to this section ultimately achieve the applicable cleanup target levels provided in this subsection.” § 376.30701(2)(c), Fla. Stat.

The administrative rules governing site rehabilitation begin with an evaluation of each contaminated site. This evaluation, which must be conducted in compliance with [62-771.300, F.A.C.](#), results in assigning an overall score to each site. A priority list featuring all sites is then created (62-771.300(6), F.A.C.). Sites are placed on this list and ranked according to their

priority scores. **Cleanup is required to be undertaken beginning with those sites with the highest priority scores and then working down the list. 62-771.300(7), F.A.C. The idea, therefore, is that the sites with the highest health threats to human receptors such as drinking water wells are cleaned up first.**

Once a site is chosen for cleanup operations, the issue becomes who will undertake the remediation process. The selection process is undertaken pursuant to [§ 376.3071\(6\), Fla. Stat.](#), and must follow the requirements of Chapter 287, Florida Statutes and, more specifically, [§ 287.0595, Fla. Stat.](#) The process requires that contractors certify to the Department that they hold all required licenses needed to perform the work. [§ 376.3071\(6\)\(c\), Fla. Stat.](#) The Department may consider “only qualified vendors” when it solicits bids to rehabilitate a site, and the Legislature has directed the agency to reject solicitations from unqualified vendors. [§ 376.3071\(6\)\(d\), Fla. Stat.](#) Notably absent from the statutory requirements is the ability of site owners to choose the contractor who will perform work on their property. Further, “A site owner or operator, or his or her designee, may not receive any remuneration, in cash or in kind, directly or indirectly, from a rehabilitation contractor performing site cleanup activities pursuant to this section.” [See, § 376.3071\(6\)\(m\), Fla. Stat.](#)

To administer the requirements of [§ 376.3071\(6\), Fla. Stat.](#), the Department adopted [§ 62-772, F.A.C.](#) [§ 62-772.400\(1\), F.A.C.](#), provides that the agency will use the competitive bidding process established in [§ 287.057, Fla. Stat.](#) And unlike the enabling statute, [§ 62-772.400\(5\), F.A.C.](#), establishes rights for the site owners/responsible parties to have input over the remediation process. Included in these rights is the ability for the site owner/responsible party (on a one-time basis) to reject vendors whom the agency has selected to conduct the site

rehabilitation, but that right only applies to challenges “for cause,” i.e. a material reason must be given for rejecting the agency-selected vendor. See, § 62-772.400(5)(b)3., F.A.C.

## II. FDEP Employees and Vendor Contracting

### A. *Pre-2014 Cleanup Rules*

The rules for initiating the process of awarding contracts to vendors so that contaminated petroleum sites could be remediated were not always straightforward. When Governor Scott first took office in January 2011, § 376.3071, Fla. Stat. did not contain detailed provisions concerning how contracts were to be awarded to vendors. Subsection 6, which currently contains those provisions, did not exist. Instead, § 376.3071(12)(f), Fla. Stat., stated that: “[any eligible person who performs a site rehabilitation program or performs site rehabilitation program tasks such as preparation of site rehabilitation plans or assessments; product recovery; cleanup of groundwater or inland surface water; soil treatment or removal; or any other tasks identified by department rule developed pursuant to subsection (5), may apply for reimbursement.” In 1996, reimbursement was changed to the preapproval program. At that time, the Department did not have an administrative rule governing the procedure of awarding these contracts. Instead owners of contaminated property which was registered in a state-funded cleanup program were allowed to pick a contractor from a list of state approved companies.

### B. *Targeting Employees and Contractors in Order to Change the Rules*

The Scott administration apparently concluded that the then-existing contractor procurement process needed to be changed so that more oversight existed. The problem was that putting greater controls on the program would meet considerable resistance from politically powerful allies in the petroleum industry, and this made the adoption of new rules extremely difficult. The answer arrived at by senior management, it seems, was to embark upon a misguided approach that called for blaming perceived problems, not only upon bad actors within the petroleum industry, but also on agency employees. This, it was hoped, would provide the needed impetus that would convince the Legislature to adopt the changes that were allegedly needed.

The approach had the support of Secretary Herschel Vinyard. Within the FDEP, he and senior management in FDEP began an employee intimidation campaign aimed at the Division of Waste Management's Petroleum Restoration Program. The campaign, which began early in the Scott administration, amounted to telling employees that there were serious problems in the program, particularly in the owner selection process. Contractors, it was alleged, were offering kickbacks to site owners if the site owners would select them to undertake remediation operations on their property. In addition, contractors who owned contaminated sites were being paid to remediate their own property. The contractors would be paid out of the IPTF by the Department under § 376.3071, Fla. Stat.

Vinyard gave impetus to the idea of malfeasance when he held a teleconference with the Florida Petroleum Manufacturers' Association (FPMA). The meeting teleconference took place on February 21, 2013. During the meeting, Vinyard advised the attendees that there were serious problems with the preapproval program (concerning contracts) and that he had received additional disturbing information just the day before. He advised the FPMA he would not

continue to support the program unless changes were approved by the Legislature during the 2013 session. Jorge Caspary, who was the Division Director, Division of Waste Management at that time, echoed Vinyard's concerns, stating that there were multiple contemporaneous investigations taking place. (This is the same manager who, at a management meeting in July 2011, was quoted as saying that "[n]othing motivates people like losing a job."<sup>1</sup> In addition, senior management asserted that multiple entities, from environmental contractors to site owners, were complaining to the FDEP about these improprieties.<sup>2</sup>

In 2011 and 2012, pressure was being applied to FDEP employees in multiple programs. It was a time in which jobs were cut, particularly those held by people with seniority and practical environmental experience. But it was not just the cutting of positions, it was also the draconian manner in which the changes were made.<sup>3</sup> Those that remained were afraid that with one wrong move they could, or would, be next.<sup>4</sup> And it was during this time that pressure mounted on FDEP's employees within the Petroleum Restoration Program. Management implied that improprieties in the contracting apparatus were taking place with the approval, tacit or otherwise, of Department employees. Consequently, the employees were told, the matter had been referred to the FDLE to open a criminal investigation of all persons involved.

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<sup>1</sup> See, Peer Report, *Florida Eco-Agency Cuts Muscle and Bone – Fat Long Gone*, December 5, 2012. <https://www.peer.org/news/news-releases/florida-eco-agency-cuts-muscle-and-bone-%E2%80%93-fat-long-gone.html>.

<sup>2</sup> We know this to be the case, inasmuch as an op-ed entitled "Remuneration and Gas Station/Convenience Store Owners" was published in the May 2012 edition of *KhaasBaat*. It alleged that this activity was taking place and that the FDEP was actively investigating it. The article was written by Marc Eichenholtz, president of MAS Environmental LLC. In the article, Eichenholtz stated that "The FDEP is working vigorously to put an end to remuneration and several investigations are under way (sic). They may also offer amnesty to site owners who were not aware of the illegality of remuneration providing they come forward immediately and offer details to the FDEP about the consultant who made the offers." <http://khaasbaat.com/may2012/guest.htm>.

<sup>3</sup> See, Peer Report, *Rolling Purge Ripples Through Florida Environment Agency*, November 13, 2012, <https://www.peer.org/news/news-releases/rolling-purge-ripples-through-florida-environment-agency.html>

<sup>4</sup> See, Peer Report, *Florida Eco-Agency Cuts Muscle and Bone – Fat Long Gone*, December 5, 2012. <https://www.peer.org/news/news-releases/florida-eco-agency-cuts-muscle-and-bone-%E2%80%93-fat-long-gone.html>

*C. The Outcome of the Investigations*

What transpired next was bizarre. Apparently, former Deputy District Director, Jeff Littlejohn, eventually held a meeting in late 2013 (or early 2014) with program employees to apprise them of the results of the FDLE investigation. He asserted that he had received a report from the FDLE and that they had found no criminal activity involved. Littlejohn was reportedly enraged at the FDLE's conclusions and asserted that the investigation was nevertheless continuing.

When *Florida* PEER learned of the assertions being made by FDEP management we began our own investigation into the matter. In April 2016, we submitted a public records request to the FDLE asking for a copy of their investigative file, including a copy of their final report detailing their findings. To our surprise, FDLE responded that no such investigation had been conducted by their agency. After we implored them to continue their search, they did find one investigation that they conducted into a company, Earth Systems, that was accused of submitting false test results to the FDEP (by a former employee) as part of that company's remediation efforts. The FDLE, however, found no evidence of criminal activity and on September 5, 2013, wrote to Candie Fuller, the FDEP's Inspector General, and advised her that they had closed their file. At the end of the day, the FDLE was unable to provide our office with any evidence that it had conducted a criminal investigation into contractor (or employee) malfeasance of the sort complained about by Deputy Secretary Littlejohn.

This does not mean, however, that the FDEP did not conduct its own investigation into the activities of contractors hired by the agency. Since the FDLE records indicated that communications were taking place with the FDEP's Office of Inspector General (OIG), we

decided to ask that office for their records on the subject. We submitted no less than 15 public records requests to the OIG and were provided with a myriad of documents detailing investigations into complaints received from the office by persons employed by contractors who alleged improprieties on the part of those contractors, e.g. receiving improper remuneration. While the OIG looked into the cases, in only 1 case (discussed below) was there a finding of verifiable malfeasance, and that was against FDEP senior management in 2014. All the other cases occurred in 2012 and 2013 and all were closed with no findings.<sup>5</sup>

The OIG also provided us with an audit report issued by the OIG on January 28, 2013.<sup>6</sup> This report reviewed petroleum cleanup facilities, specifically looking for situations involving facilities that were owned by remediation contractors. (This, it will be recalled, was one of the main reasons that the FDEP concluded that program procurement rules needed to be changed.) The period examined was 1999-2011. The OIG reviewed 922 facilities (page 3) and found that of the 992, only 24 of them “were found to have an owner that shared a common member with a contractor.” (page 3) The report stated that there is no law preventing a contractor from purchasing contaminated property that is registered in a state funded program and then cleaning up that property with those state funds. The report concluded, that the OIG found no program non-compliance in the cases that they reviewed. (page 5) The OIG did conclude, however, that tighter controls needed to be put in place in order to “safeguard program funds.”

What was the ultimate result of the outcry promoted by the FDEP's senior management?

In the 2014 legislative session, the Legislature amended § 376.3071 so that stricter contractor

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<sup>5</sup> Interestingly, one of the cases was filed by the same Marc Eichenholtz, president of MAS Environmental LLC., who had written the May 2012 op-ed in *KhaasBaat*. Eichenholtz filed his complaint with the OIG on May 20, 2013, in which he alleged improprieties on the part of the FGS Group.

<sup>6</sup> See, attached exhibit A.

assignment procedures were required.<sup>7</sup> The new bill became law on July 1, 2014, and resulted in the addition of paragraph (6), to § 376.3071, *supra*. § 62-772.400, F.A.C. was similarly adopted by the Department, setting forth administrative rules to comply with the new statute.

Ironically, the only sustained complaint<sup>8</sup> that we found relating to the contractor procurement process involved two senior FDEP managers, Jorge Caspary (former Division Director, Division of Waste Management) and Valerie Huegel (former Bureau Chief, Division of Waste Management). Former Deputy Secretary Littlejohn was implicated as well. According to the report produced by the OIG, former Deputy Secretary, Jeff Littlejohn, instructed Caspary and Huegel, to direct assign 144 Low Score Assessment<sup>9</sup> (LSA) sites equally to the 72 Agency Term Contractors. (pages 1 -4). A whistleblower alleged that these assignments violated § 287.057, Fla. Stat. Caspary and Huegel claimed that the assignments were appropriate under § 287.057, Fla. Stat., even though the program's rules had changed to prohibit assignments being made outside of the competitive bidding process. (page 3) The OIG concluded that the allegations against the two were nevertheless proven, because the actions taken by Caspary and Huegel violated the Agency Term Contract provisions. No disciplinary action against them was taken, however. Likewise, no action was taken against Littlejohn, since he had resigned by that time.

At the end of the day, what we are left with is a document trail that is silent on the claims of FDEP management that the FDLE was conducting a criminal investigation into activities of agency employees and third-party contractors for alleged misconduct in the petroleum contract procurement aspect of site remediation. The OIG likewise found no evidence of misconduct on

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<sup>7</sup> <http://laws.flrules.org/2014/151>

<sup>8</sup> OIG Case Number: II-01-12-2014-092

<sup>9</sup> LSA sites are sites who have received a low priority score, indicating that the health threat to drinking water wells is significantly lower than high-scored sites.

the part of the contractors, or on the part of rank and file employees. Rather, the only misconduct occurred, ironically, by the very person(s) who was pointing the finger at others.

The reasons for former Deputy Secretary Littlejohn's machinations are unclear. The only logical explanation is that the Department saw the need to tighten controls on this program; however, it also sensed that actions taken in that direction would anger important constituents in the contractor community. The allegations raised, even though unconfirmed by multiple investigations, gave the Department (and the Legislature and Governor) the cover that they needed to pass the statutory and rule revisions that they deemed necessary at the time. It remains to be seen whether the changes will initiate a significantly positive direction for the program.

### III. The Weakening of the Inland Protection Trust Fund

As described in Part I., supra, the IPTF was created by the Legislature to provide necessary capital needed to restore contaminated sites. The FDEP created the Petroleum Cleanup Participation Program as the mechanism through which properties contaminated by petroleum products are restored. It uses the IPTF, for these purposes.<sup>10</sup> This is an enormous undertaking requiring massive expenditures of taxpayers' dollars. In fact, before the statute was changed in 2014, the problem was clearly stated by the Legislature. It had acknowledged that there was not sufficient revenue to remediate all the contaminated sites in Florida when it stated that:

(1)(a) The Legislature finds and declares that the petroleum contamination site rehabilitation program, as previously structured, has resulted in site rehabilitation proceeding at a higher rate than revenues can support and at sites that are not of the highest priority as established in s. 376.3071(5). This has resulted in a large backlog of reimbursement applications and excessive costs to the

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<sup>10</sup> <http://www.dep.state.fl.us/waste/categories/pcp/pages/pcpp.htm>

Inland Protection Trust Fund. It is the intent of the Legislature that contamination site cleanups be conducted on a preapproved basis with emphasis on addressing first the sites which pose the greatest threat to human health and the environment, within the availability of funds in the Inland Protection Trust Fund, recognizing that source removal, wherever it is technologically feasible and cost-effective and will significantly reduce the contamination or eliminate the spread of contamination, shall be considered to protect public health and safety, water resources, and the environment.<sup>11</sup>

In an effort to determine the health of the IPTF, we obtained copies<sup>12</sup> of IPTF quarterly reports dating back to 2011, to determine how the IPTF has been managed since the present administration took office. What we found was that the Legislature, at FDEP's request, has consistently diverted significant monies from the IPTF, and that this has occurred on a regular basis. The specific amounts are set forth below:

<b>Report Date</b>	<b>Total Revenue \$</b>	<b>Amount Appropriated by the Legislature for Cleanup</b>	<b>Amount Diverted</b>	<b>% Diverted</b>
<b>November 30, 2011</b>	189.6	\$128 Million	\$5.5 Million	3%
<b>December 31, 2012</b>	\$189 Million	\$125 Million	\$24.6 Million	13%
<b>December 31, 2013</b>	\$188 Million	\$125 Million	\$37.6 Million	20%
<b>December 31, 2014</b>	\$192 Million	\$110 Million	\$55.9 Million	29%
<b>November 30, 2015</b>	\$198 Million	\$125 Million	\$39.7 Million	20%
<b>December 31, 2016</b>	\$206 Million	\$118 Million	\$62.9 Million	30.53%

<sup>11</sup> § 376.30711(1)(a), Fla. Stat.

<sup>12</sup> Pursuant to Chapter 119, Florida Statutes

## FLORIDA'S CONTAMINATED PETROLEUM SITES

<b>December 31, 2017 (FDEP Projection)</b>	\$200 Million	\$118 Million	\$63.5 Million	31.75%
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The records show that despite the substantial sums needed to remediate sites that pose health risks to Floridians, over the past 6 years, together with the projections for 2017, the Legislature has diverted \$289.7 million out of the IPTF for purposes other than its intended purpose.<sup>13</sup> In addition, The Legislature, as will be described below, has actually encouraged the Department to remediate those sites that pose less of a risk to the public's health, safety and welfare.

Another issue to consider is the extent to which the enforcement in the Tanks program has floundered during the recent years.<sup>14</sup> As PEER has reported each year, overall enforcement in the Department has fallen under the current administration. Our latest report, which covers calendar year 2016, was published in August 2017.<sup>15</sup> This report showed the drastic decline in assessments that the Tanks program has experienced since 2011. The decline is shown on page 77 of the report:<sup>16</sup>

Year	Total Tanks Assessments
<b>2009</b>	\$1,505,376.25
<b>2010</b>	\$1,207,823.56
<b>2011</b>	\$1,537,209.03
<b>2012</b>	\$728,232.83
<b>2013</b>	\$187,273.84
<b>2014</b>	\$124,285.82

<sup>13</sup> It must be remembered that, § 376.3071, Fla. Stat. dictates that the IPTF be used specifically for cleaning up petroleum contaminated sites.

<sup>14</sup> It should be noted that civil penalties from Tanks program enforcement are being deposited into the Water Quality Assurance Trust Fund, pursuant to §376.307(4)(c), Fla. Stat., and are therefore not reflected in the above quarterly reports concerning the IPTF.

<sup>15</sup> <https://www.peer.org/news/news-releases/florida-eco-enforcement-still-scraping-bottom.html>

<sup>16</sup> [https://www.peer.org/assets/docs/fl/8\\_31\\_17\\_PEER\\_Report\\_DEP\\_2016\\_Enforcement.pdf](https://www.peer.org/assets/docs/fl/8_31_17_PEER_Report_DEP_2016_Enforcement.pdf)

## FLORIDA'S CONTAMINATED PETROLEUM SITES

<b>2015</b>	\$137,862.28
<b>2016</b>	\$51,500.00

Of the assessments levied by the Department over that same period, it has collected the following amounts:

Year	Total Tanks Collections
<b>2009</b>	\$547,232.56
<b>2010</b>	\$686,353.91
<b>2011</b>	\$508,421.05
<b>2012</b>	\$206,211.98
<b>2013</b>	\$111,891.78
<b>2014</b>	\$37,269.83
<b>2015</b>	\$94,849.27
<b>2016</b>	\$27,765.25

From the above, it is evident that overall assessments and collections in the Tanks program have dropped precipitously over the past 6 years. Moreover, the Department has collected only 36% of the \$2,766,363.80 in assessments levied since 2011.

#### IV. Scoring of Contaminated Sites and the Move to Close Springshed Sites

##### A. *Scoring of Sites in General*

In establishing the IPTF, the Legislature required the Department to rank contaminated sites so that the IPTF's assets would be used to first clean up those sites, such as drinking water wells, that posed the highest threat to public health receptors. When Governor Scott took office this was accomplished through § [376.3071, Fla. Stat.](#) More specifically, § 376.3071(5)(a), Fla.

Stat., required the Department to “adopt rules to establish priorities based upon a scoring system for state-conducted cleanup at petroleum contamination sites. . .”<sup>17</sup>

The Legislature also recognized, however, that the Department was approving cleanup at some sites that were not the highest ranked sites. The Legislature’s response was not to stop the practice. Instead, prior to 2014, the Legislature, through § 376.3071(11)(b), Fla. Stat., allowed the Department to approve cleanup of sites with priority scores of 10 or less, provided the site owner or contractor could show that there was little to no chance that the contaminated site would pose future problems. At the same time, however, the Legislature also provided that no more than \$30,000 could be spent on each site and that a total \$10 million of IPTF assets could be cumulatively encumbered for these sites in any given fiscal year. See, §§ 376.3071(11)(b)3.a. & c., Fla. Stat. In addition, the Legislature required that rehabilitation work be preapproved by the Department before it was commenced. See, § 376.3071(1)(a), Fla. Stat. Thus, when Governor Scott took over, the system was one in which the Legislature required the Department to direct its resources to cleaning up the sites that posed the greatest threat to the public’s health and to the environment, while simultaneously acquiescing in the Department’s practice of directing the cleanup of some lower priority sites.

The above system continued until 2014, when the Legislature amended § 376.3071, Fla. Stat. As noted in Section II, supra, the amended § 376.3071(6), Fla. Stat., created new restrictions upon contractor retention.<sup>18</sup> And while § 376.3071(5), Fla. Stat., still required that sites be prioritized for cleanup, the Legislature also created a new section to deal with low-priority sites. § 376.3071(12)(b), Fla. Stat., rather than emphasizing the cleanup of the most

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<sup>17</sup> Recall that § 376.3071(1), Fla. Stat., also acknowledged that there was not enough money in the IPTF to restore all sites.

<sup>18</sup> These new restrictions also resulted in the deletion of § 376.3071(11), Fla. Stat.

highly contaminated sites, now allowed the Department to approve the cleanup of **low-priority sites with priority scores of 29 or less**. This is now the case for all such sites in which the owner/contractor provides the Department with a “No Further Action” proposal which, if approved, obligates the Department to issue a “site rehabilitation completion order”<sup>19</sup> that effectively closes the site cleanup process. See, §§ 376.3071(12)(b)1. & 2., Fla. Stat. In addition, the Legislature now allowed up to \$15 million of IPTF assets to be used for these purposes each year, and within that overall limit there is now no ceiling to the amount of money that can be spent on any one site. § 376.3071(12)(b)3.d., Fla. Stat.

*B. Other Statutory Changes in 2014*

There were other changes approved by the Legislature in 2014, and they are set forth below:

2010 Cleanup Provision	2010 Statutory Provision	Corresponding 2014 Cleanup Provision	2014 Statutory Provision
<b>A. Site Reassessment Maintains Priority Score of 10 or less</b>	§ 376.3071(11)(b)1.a.	No reassessment required, even though the priority score was raised from 10 to 29	None
<b>B. “No excessively contaminated soil, as defined by department rule, exists onsite as a result of a release of petroleum products.”</b>	§ 376.3071(11)(b)1.b.	“Soil saturated with petroleum or petroleum products, or soil that causes a total corrected hydrocarbon measurement of 500 parts per million or higher for the Gasoline Analytical Group or 50 parts per million or higher for the Kerosene Analytical Group, as defined by department rule, does not exist onsite as a result of a	§ 376.3071(12)(b)4.a.

<sup>19</sup> See, Section III.C., infra.

FLORIDA'S CONTAMINATED PETROLEUM SITES

		release of petroleum products.”	
<b>C. “A minimum of 6 months of groundwater monitoring indicates that the plume is shrinking or stable.”</b>	§ 376.3071(11)(b)1.c.	“A minimum of 12 months of groundwater monitoring indicates that the plume is shrinking or stable.”	§ 376.3071(12)(b)4.b.
<b>D. “The release of petroleum products at the site does not adversely affect adjacent surface waters, including their effects on human health and the environment.”</b>	§ 376.3071(11)(b)1.d.	“The release of petroleum products at the site does not adversely affect adjacent surface waters, including their effects on human health and the environment.”	§ 376.3071(12)(b)4.c.
<b>E. “The area of groundwater containing the petroleum products’ chemicals of concern is less than one-quarter acre and is confined to the source property boundaries of the real property on which the discharge originated.”</b>	§ 376.3071(11)(b)1.e.	“The groundwater contamination containing the petroleum products’ chemicals of concern is not a threat to any permitted potable water supply well.”	§ 376.3071(12)(b)4.e.
<b>F. “Soils onsite that are subject to human exposure found between land surface and 2 feet below land surface meet the soil cleanup target levels established by department rule or human exposure is limited by appropriate institutional or engineering controls.”</b>	§ 376.3071(11)(b)1.f.	“Soils onsite found between land surface and 2 feet below land surface which are subject to human exposure meet the soil cleanup target levels established in subparagraph (5)(b)9., or human exposure is limited by appropriate institutional or engineering controls.”	§ 376.3071(12)(b)4.f.
N/A	N/A	“The area containing the petroleum products’ chemicals of concern:  (I) Is confined to the source property	§ 376.3071(12)(b)4.d.

		<p>boundaries of the real property on which the discharge originated, unless the property owner has requested or authorized a more limited area in the "No Further Action" proposal submitted under this subsection; or</p> <p>(II) Has migrated from the source property onto or beneath a transportation facility as defined in s. 334.03(30) for which the department has approved, and the governmental entity owning the transportation facility has agreed to institutional controls as defined in s. 376.301(22). This sub-sub-subparagraph does not, however, impose any legal liability on the transportation facility owner, obligate such owner to engage in remediation, or waive such owner's right to recover costs for damages."</p>	
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From the above, it is evident that some provisions were effectively unchanged. However,

- The new statutory provisions do not require a reassessment of the site to show that the priority score has not changed;
- 12, rather than 6, months of groundwater monitoring must show that the plume is shrinking or stable;
- Whereas, the old rule required the contaminated sites to be less than ¼ acre and confined to the source property, the new rule simply requires the plume to be confined to the source property, but there is an exception that plumes that have migrated onto transportation sites are allowed.

What is interesting is that, despite the statutory changes, the Department has adopted an administrative rule, 62-771.300, F.A.C. that still limits cleanup assignments to those sites with

the highest priority scores. There is no mention of low-priority sites. § 62-771.300(7), F.A.C., states that:

“Site Selection and Task Assignments. Sites will be selected for response actions beginning with the highest ranked sites on the most recent priority ranking list and proceed through lower ranked sites. Contractors will be assigned to specific program tasks at sites in accordance with the provisions of Chapter 62-772, F.A.C.”

The only mechanism for avoiding this process is in the event of emergencies. See, 62-771.300(9), F.A.C. Consequently, based upon the administrative rules, we would expect to see a Departmental emphasis upon the cleanup of sites that pose the highest public health risk. As will be discussed below, that is not what the data shows.

### *C. The Administrative Process of Site Cleanup and Closure*

Both the statutes and the Florida Administrative Code authorize the Department to finalize the rehabilitation process of contaminated sites. The Florida statutes authorize the Department to issue different orders, depending upon the nature of the cleanup. 100 percent cleanup is not required. For cleanups conducted under § 376.3071(5)(b)8., Fla. Stat., the FDEP can issue a “No Further Action” order for those sites in which the Department determines that it is necessary or appropriate to deviate from state water quality standards in order to close the site, i.e. leave more contaminants in the ground. The Department can issue a “No Further Action” order with conditions in other situations as well. According to § 376.3071(5)(c)2., Fla. Stat., “Site Rehabilitation Completion Orders” are used with low-scored sites. Orders issued under § 376.3071(12)(b)2., Fla Stat., acknowledge that the site is being closed, even though minimal contamination still exists, provided that the Department concludes that the contamination will not harm the public health, safety, welfare, or the environment. § 376.3071(12)(b)4.f., Fla. Stat.

The Department has adopted administrative rules designed, in principal, to implement the requirements of the above statutes. § [62-780.680, F.A.C.](#), is the rule that governs the requirements to be used by the Department in closing contaminated sites. This rule, separates site closures into different risk management options.

- Risk Management Option Level I—62-780.680(1), F.A.C.—is a No Further Action (without any controls) designation that is assigned if testing has concluded that there is no free product, i.e. petroleum, present, there is no contaminated soil present in the “unsaturated zone,” and there is no contaminated groundwater or surface water present.
- Risk Management Option Level II—62-780.680(2), F.A.C.—is assigned when the site is to be closed, but institutional controls are to be maintained. These are sites in which contaminants remain but it is not “technologically feasible or cost-effective” to remove them. These are sites in which the contamination is not migrating to other properties and does not “pose a risk to human health, public safety or the environment.” Additionally, sites can be closed with this option if the Department decides to assign alternative cleanup target levels (CTL), which means that the decision has been made to allow higher levels of contamination to remain at the site.
- Risk Management Option Level III—62-780.680(3), F.A.C.—is another designation that is assigned when the site is to be closed, but institutional controls are to be maintained. This designation applies in much the same way as Level II, however, in these cases the property owner notifies the Department that the land usage is limited such that alternative CTLs are appropriate.

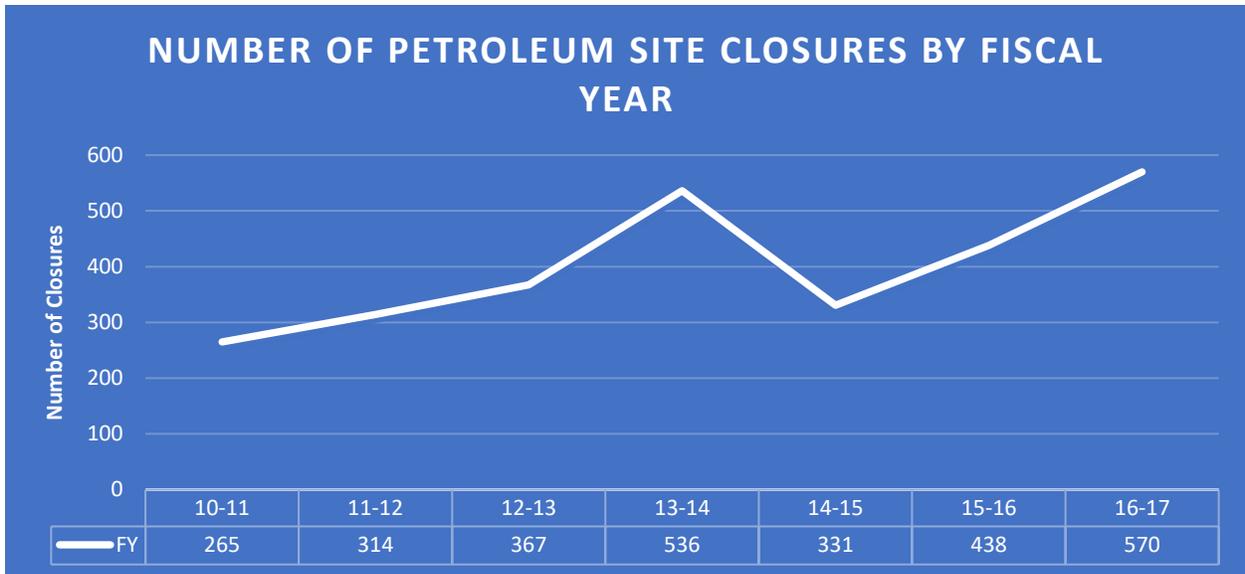
After the property owner has provided the Department with the necessary information to show that further rehabilitation activities are no longer needed, or the Department has made this determination on state funded sites, the Department is required to issue a Site Rehabilitation Completion Order.<sup>20</sup> See, 62-780.680(5), F.A.C. This is a final administrative order and constitutes final agency action. See, 62-780.680(9), F.A.C.

*D. What Sites are Being Remediated?*

With the above in mind, we submitted multiple public records requests to the FDEP for the agency's records of those petroleum sites that have been closed by the Department since fiscal year 2010-2011. Based upon the records provided to us by the Department we were able to determine both the number of sites that have been closed by the Department since that period, as well as the priority scores associated with those sites. What we found was that over the course of the last seven years, the number of sites that have been closed by the Department has (with one exception) steadily risen. The following chart presents the results for each year:

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<sup>20</sup> These orders, by rule, apply to all site closures, not just those involving low priority sites, notwithstanding the enabling statute.



The above data demonstrates the Department's approach to close an ever-increasing number of petroleum sites each year. Indeed, the number of closures has more than doubled over the period. However, at the same time as the Department is closing greater numbers of cases, the data also shows that the sites that are receiving the most attention, and thus being closed, are the sites with the lower priority scores. Indeed, over the course of the same period, the median priority score of those sites that have been closed each year has steadily declined. The numbers are presented below:



The data paints a very clear picture. First, when the Scott administration took office, the Department was using the IPTF to close petroleum sites that posed a higher risk to the public's health, safety and welfare. That approach was generally in keeping with the both the statutory and rule mandates that sites be remediated in the order of their priority score, with the highest rated sites receiving the most attention. Since then, the median priority scores of those sites that have been closed has been cut in half (while the number of sites closed has more than doubled).

The second takeaway is that it was the 2014 legislative changes that formally allowed the Department to shift this emphasis. Those changes, it will be recalled, now allowed the Department to approve the cleanup of sites with priority scores of 29 or less. See, § 376.3071(12)(b), Fla. Stat. That is exactly what has occurred, according to the data. Furthermore, this is occurring during a time in which the IPTF has seen its financial resources depleted by the Legislature. It therefore stands to reason that, with less money available, the Department would shift its focus to closing sites with lower priority scores.

The Department's website includes a list of all facilities that are [eligible for cleanup](#) under the IPTF. Of the 19,058 sites currently eligible, we found that 6,730 are currently being

actively remediated and the median score of those sites is 29. The Department has currently closed 9,366 sites and their median priority score is 41. There are 2,962 sites still waiting for assessments and those sites have a median score of 10 (135 of the 2,962 sites have a priority score of 30 or higher).

*E. What Tallevast Teaches Us*

While it is important that all petroleum sites be remediated to the extent possible, the issue presented by both the new statutes/rules and the Department's performance is more than one of just numbers. As 62-780.680, Fla. Stat., shows, each of the contaminated sites places the state's drinking water supply which is its groundwater, surface waters, soil, and most importantly the thousands of private residential drinking water wells spread all across the state at risk. The sites cause environmental damage, but they also pose a direct threat to the health and safety of members of the public who are exposed to them.

This is something that should be obvious to the FDEP, particularly after the agency (and, more importantly the public) has had to endure the after-effects of allowing site contamination to go unchecked. Leakage from above-ground fuel oil storage tanks in Manatee County was deemed restored by the Department in 1996 on property that has since come to be known as the Tallevast site. As a result of findings from studies concerning the situation at the property, the Department learned that highly carcinogenic volatile organic compounds (VOC) such as trichloroethene (TCE) and others [were present in the groundwater](#). These VOCs had apparently been discharged into the environment by American Beryllium, "[an ultra-precision machine parts manufacturing plant](#)." Four years later, in 2000, Lockheed (the new owner) informed the FDEP that it had found this contamination on the site. The FDEP, however, [waited almost four \(4\) years](#) before it notified neighboring residents about the pollution. It was later determined that the

contaminates had, in fact, contaminated the groundwater and the drinking water wells of those people. It appears from the data that we've reviewed for this report that the Department learned little from the Tallevast nightmare. Rather, the data strongly suggests that the Department, in choosing to remediate predominately those sites with lower scores, is needlessly exposing both the public and the environment to risks coming from the other sites with significantly higher levels of contaminants. This has occurred, in part, because the Scott/Vinyard FDEP administration fired, forced to resign, or intimidated experienced FDEP employees. Those employees took with them the institutional knowledge needed to prevent another Tallevast nightmare.

*F. Public Notice*

The cleanup of contaminated petroleum sites in Florida is a process that, simply stated, can occur without any notice to the public, even property owners whose property is directly affected by the contamination. § [376.30702, Fla. Stat.](#), requires any person who discovers such contamination (during the process of site rehabilitation activities) to notify the Department of the existence of the contamination. See, § 376.30702(1) & (2), Fla. Stat. Then, if a school is located on the contaminated site the Department is obligated to notify the appropriate school board, so that teachers, parents and guardians of students can be notified of the contamination. See, § 376.30702(3), Fla. Stat. The only other instances in which property owners are required to be directly notified that their site is contaminated is in those situations in which the Department decides that remediation efforts are to extend to other property because the plume has migrated. This is required by § 376.3071(5), Fla. Stat.

The Florida Legislature has therefore adopted a statutory scheme that allows contamination to exist on property without the property owner even knowing about it. How can this happen? It could happen if the property owner who originally owned the contaminated property (and told the Department, or a site rehabilitation company) later sells the property to an unsuspecting buyer without telling the buyer about the contamination. Under the existing statute, that new owner could own the property for any number of months or years and not know of the pollution, at least until the Department decided to begin cleanup operations. Adjacent property owners are no better off. Because of a lack of statutory notice requirements, it is entirely possible that that property owners in Florida who own property directly adjacent to contaminated property do not know about the contamination located next door to them.

It is not only property owners who are at risk by these sites. Current laws require no notice to be given to individuals who rent property that is known to be contaminated with



petroleum products. It makes no difference whether the tenants are residential tenants, or tenants who are operating a business. The lack of knowledge is the same and it is up to property owners and/or landlords to decide whether to

provide this notice to them.

The location of these sites is not always obvious to the unsuspecting passerby. Since many of the sites were contaminated decades ago and have since been abandoned, it is entirely possible that one would not know of (or suspect) the contamination just by casually looking at



the property. We found an example of this in the FDEP's Oculus database. A site on Mahan Drive in Tallahassee is one that is currently home to a number of persons living

in mobile homes. The site was formerly home to a grocery store that also sold gasoline. While it has long since been torn down, the petroleum byproducts remain and the site is now scored as having significant contamination (it has a priority score of 55). Yet, in looking at the property from the road, one would never expect this property to be contaminated.<sup>21</sup> A closeup shot of the source of the contamination shows this to be the case. And while the property owner was notified by the Department that the site would be remediated, there are no records in Oculus to suggest that other persons living on the property received any notice of the contamination.

These are not sporadic situations that are unlikely to occur elsewhere. As noted above, there are over [19,000](#) sites that are known to be contaminated in Florida and for which the state has assumed all financial liability. Over 9,000 of those sites are still open sites, meaning that they are still likely to be sources of ongoing contamination.

### *G. Identifying Those Mostly at Risk—Metropolitan vs. Rural*

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<sup>21</sup> This photograph, taken from the FDEP Oculus file (Facility ID 9501509) shows the site, as seen from Mahan Drive. Mobile homes are seen in the background, while the source of the contamination is immediately beside the truck in the foreground. The individuals are workers conducting site analysis work. The second photograph shows the closeup view of the source of the contamination.

How does one know whether he or she may be at risk of being exposed to these contaminants? In conducting our review of these issues, we found that the listing of facilities provided by the Department on its website also shows the counties in which each facility is located. We evaluated that data and found that more metropolitan, high population density counties typically have an average facility risk score that is lower than more rural counties.<sup>22</sup> For example, Miami-Dade County has an overall average score of 19, whereas, Bradford County has an average score of 56. (Scores over 50 would be considered to present a substantial risk to the public's health.) The reason for the difference is that the scoring system used by the Department takes the extent to which the population is served by municipal wells vs. private wells into consideration. The idea is that persons who are served by municipal wells are at a lower risk of exposure to contaminants than those who consume potable water from private wells. Therefore, counties with high population densities served by municipal wells have lower scores. Yet, persons whose water supply comes from a private well could still be at risk, even though they live in a county with a low average score. **Consequently, based upon our investigation and analysis, we recommend that residents who have a drinking water well or irrigation well and who live within a quarter to half mile (1,320 ft. to 2,640 ft.) of a contaminated site should have their water tested. Residents who want to find out where the contaminated sites are in relation to where they live should call the FDEP at (850) 245-8839 to obtain that information.**

## V. Springsheds

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<sup>22</sup> Exhibit B, attached, is a table that breaks down this summary information by county. The table provides the percentage of contaminated sites in each county that remain to be cleaned up, as well as the average priority scores of all sites for each county.

During the time when the Legislature had embarked upon changing the rules concerning the cleanup of petroleum sites, Governor Scott was pursuing his own high-profile efforts directed towards showing others that he was intent upon cleaning up Florida's springs. [The FDEP's website notes that:](#)

“The state of Florida has made it a priority to protect Florida's springs. In 2013 Governor Rick Scott announced a \$10 million investment in springs restoration. Additional funds from the Florida Department of Environmental Protection and local partners brought the total for springs restoration projects to \$37 million. In 2014, Governor Scott allocated \$55 million more for springs protection.”

These announcements have continued. As recently as August 2017, the [Governor's website was continuing to announce](#) the Governor's commitment to cleaning up Florida's springs – this time with a \$50 million investment. The cause of the decline in health of Florida's springs is widely considered to be [excessive nitrates](#) (from agricultural interests) that have fueled the growth of harmful algae. In 2014, the *Tampa Bay Times* [reported](#) that excessive pumping of fresh water is also seen as a contributing factor. Meanwhile, the [FDEP's website states](#) that lawn care, human consumption of water and recreational activities are the biggest contributors to the contamination of Florida's springs.

Florida's springs are located throughout much of the state, though the majority are concentrated in the north-central sectors. The Department has identified these springs and [they are listed on its website](#).<sup>23</sup> [Beginning in 2001](#), the Department catalogued the springs and included descriptions of them on its website. In addition, the Florida Springs Institute provides an [interactive map](#) showing identified springs in the state.

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<sup>23</sup> Other maps are available at <http://www.floridasprings.org/visit/map/>

Notwithstanding the fact that the overwhelming contributor to the pollution of Florida's springs are nutrients, the FDEP has used the Governor's springs initiative to create a list of mostly low-priority petroleum sites that it intends to remediate as part of the Governor's initiative. According to this list, there are 739 contaminated petroleum sites that are considered contributors. A review of this list revealed that the median priority score was 10. One of the sites, in Baker County, has a priority score of 45. Otherwise, the next highest priority score was 29, and 54 sites had that score. In total, only 73 of the 739 sites scored over 13. This means that approximately 90% of the 739 sites being cleaned up pose almost no health threat to Florida's citizens or the environment.

The location of some of the sites identified by the Department is also questionable. For example, 17 sites were in Brevard County, even though no springs are listed by the Department in that County. 35 sites were listed in Gadsden County, which is home to Chattahoochee Spring in the very Northwest corner of the county. However, some of the sites were located over 20 miles from the spring itself. Underground contamination from petroleum sites can indeed migrate to areas geographically removed from the source of the contamination, but given the distances involved in these cases, coupled with the low priority of the individual sites, it seems doubtful that they are significant contributors to the springs in question. In addition, not all contaminated sites in proximity to a spring were identified as a springshed site and are being cleaned up, further calling into question the true basis for the initiative.

## VI. Cases Brought Against Big Oil

The 2010 Macondo oil spill in the Gulf of Mexico created massive environmental damage that obligated BP to reimburse residents who live in the Gulf states, But, it turns out that

while BP owed Florida's taxpayers money for that spill, other companies were engaging in conduct of a different sort that obligated them to taxpayers. *Florida* PEER has learned that the Department recently identified situations in which major oil companies submitted claims to the IPTF seeking reimbursement of costs allegedly incurred in the remediation of underground storage tanks in Florida. The companies involved were Chevron USA, Inc.,<sup>24</sup> ConocoPhillips Company,<sup>25</sup> and Sunoco, Inc. The claims were paid by the Department, apparently in the normal course of business as allowed by statute. What is unusual about this is that the companies, unbeknownst to the Department, also proceeded to file claims against their private insurers in an effort to recover the same monies under those policies. In other words, according to the Department, they were allegedly seeking double reimbursement. The companies, of course, denied any wrongdoing. The Department's response to this activity was to seek reimbursement from the companies in civil proceedings, as opposed to seeking criminal prosecution of them for fraud.

In pursuing the case against them, the Department chose not to use its own Office of General Counsel, which has attorneys who were authorized to act on the Department's behalf. Instead, on March 14, 2014, the Department retained the services of private counsel, namely the Tallahassee/Miami law firm of Shutts & Bowen LLP. Under Article 4 of the retainer the firm was to be paid an hourly rate of \$175 per hour for the work that it performed. A cap of \$350,000 was also imposed (not including expenses). In addition, under Article 4 (4) of the retainer, the firm was entitled to recover "success" fees if the firm recovered monies exceeding the Department's expenses. Public records indicate that the firm was paid \$493,249.17 by the

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<sup>24</sup> Including affiliates Texaco Downstream Properties, Inc. and Union Oil Company of California.

<sup>25</sup> Including its affiliates Conoco, Inc., Phillips Petroleum Company, Tosco and Circle K

Department for the services that it rendered. The records do not readily show how much of this amount was attributed to fees and how much was expenses, however, it is difficult to see how the firm could have racked up \$143,249.17 (which is the amount over and above the \$350,000.00 retainer) in expenses (over the course of a year and a half) when the case did not go to court and only required negotiating a settlement with the three companies involved.

What were the results of Shutts & Bowen's handling of the case for Florida's taxpayers? Settlement agreements obtained by *Florida* PEER, show that the Department ultimately agreed to settle the cases with the companies involved. Settlement agreements were reached on November 26, 2014, in the amount of \$7,000,000.00 to be paid by Chevron,<sup>26</sup> on November 24, 2014, in the amount of \$3,200,000.00 to be paid by ConocoPhillips,<sup>27</sup> and on October 26, 2015, in the amount of \$475,000.00 to be paid by Sunoco.<sup>28</sup> In response to a public records request to the FDEP for copies of the payments made by companies to fulfill the obligations of their settlement agreements we found that only one of them, ConocoPhillips, has paid the full settlement (\$3,200,000.00). Chevron has paid \$5,521,085.85 of the \$7,000,000.00 that it agreed to pay in 2014, leaving it with a balance of \$1,478,914.15. Sunoco has paid \$429,884.74, of the \$475,000.00 that it agreed to pay 2 years ago. It still owes \$45,115.26. Finally, we can also find no evidence that the Department conducted any investigation beyond these three companies to determine whether other such situations exist.

## VII. Conclusion

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<sup>26</sup> See, attached Exhibit C.

<sup>27</sup> See, attached Exhibit D.

<sup>28</sup> See, attached Exhibit E.

The records provided to us by the Department paint a picture of a program run by senior managers who, in an effort to obtain legislative changes to the program were not above threatening their own employees (as well as private contractors) with criminal prosecution, even though there was no evidence that any criminal acts had occurred. Once the changes were obtained, the program used them to use IPTF resources to close low-priority sites at the expense of sites with higher threats to human health and the environment. One would have more respect for the program if senior management had, instead, gone to the Legislature and pushed for the changes based upon sound arguments, rather than creating a cloud of suspicion over the thousands of Florida citizens who worked in the program, whether they were state employees or working for a contractor. It is beyond any measure of acceptance that any public official, whether they are elected or appointed, would make such accusations about the very citizens that they are supposed to represent without any proof that such crimes were taking place. But it must be remembered that this was occurring at a time when we reported that the overall approach of the Secretary, and those under him, was one of employee intimidation, which extended to any citizen who was associated with the program. So, this does not come as a surprise.

What is equally troubling is the continual diversion of funds out of the Inland Protection Trust Fund by the Legislature, particularly when the Legislature itself acknowledges in the statute that there are insufficient funds to remediate all the sites that are contaminated with petroleum products. To then give the Department the authority to spend the money to clean up those sites with a lower health receptor threat at the expense of sites with high scores and which are a threat to human health receptors is disingenuous, at best. It is not surprising, therefore, that we see the Department recharacterizing sites as being in springsheds, apparently so that the

Governor can eventually justify this diversion of money and claim that he is doing everything that he can to clean up Florida's springs.

What the legislature has enacted by law, and which the Department has implemented, is a program that puts the citizens of Florida at risk of being exposed to contamination without their knowledge or consent. Continual, aggressive oversight is required if these activities are to be curtailed. If not, we will continue to see situations such as we saw with the Tallevast site in Manatee County, as well as other failures such as those recently observed in Flint, Michigan and at the Marine Corps base at Camp Lejeune, North Carolina that risked the lives of thousands of everyday citizens and almost a million veterans. As Thomas Payne stated in his book "Common Sense", which was written in 1774, "when people make a mystery of government they usually do so for the worst of reasons". The handling of the petroleum restoration program by Florida's Legislature and the FDEP are a textbook example of Payne's words being timely almost 250 years after they were written. From the diversion of taxpayer dollars out of a trust fund set up to restore contaminated sites, to the intentional lying to employees and thousands of citizens about criminal investigations surrounding their performance and the process by which the FDEP chooses to spend money on those sites that pose the lowest health risk to the public, everywhere one turns the malfeasance is observed. And it is capped off by the decision of the agency to allow big oil companies to escape criminal prosecution by paying a civil settlement, to be presided over by a private law firm paid for by the taxpayers. At the end of the day, we see a Department that is all about posturing and less about doing the actual job of protecting Florida's environment and the health, safety and welfare of those who live or visit here.