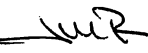



Florida Department of
Environmental Protection

Memorandum

TO: Directors of District Management
Waste Program Administrators

THROUGH: John M. Ruddell, Director 
Division of Waste Management

FROM:  Lisa M. Duchene, Government Analyst II
Bureau of Waste Cleanup

DATE: November 20, 2001

SUBJECT: Soils Authority

This memorandum was written in response to requests from District staff asking for guidance and direction on cases involving “soils-only contamination” (i.e., no groundwater impacts). The Division of Waste Management has consistently taken the position that the Department does have the authority to require that such soils-only contaminated sites be cleaned up by the responsible party. Although we have acknowledged that the soils authority debate continues and that some statutory provisions make the debate arguable, we believe that our argument will prevail if challenged. In other words, we maintain the position that we have statutory authority to require cleanup of soils regardless of impacts to groundwater. This memo is not intended to direct District staff to necessarily pursue every responsible party with soils-only contamination. District enforcement discretion will still play an important role in these decisions, and as was noted in recent Waste Program Administrator Meeting minutes, cases with soil contamination that is leaching to groundwater or surface waters should likely take higher priority. As always, enforcement decisions must be made on a case-by-case basis.

This memo is intended to aid district staff in understanding where authority can be found to require cleanup of soils-only contamination and to allow them to cite such authority when they are faced with drafting warning letters or notices of violation. Keep in mind, the concerns with soils-only contamination are the threat to human health based on direct exposure and the impact on the environment (ecological impacts). Therefore, the statutory authorities to which we cite need to lend support to those arguments.

For ease in locating statutory authority, the following provisions and accompanying analysis are presented in numerical order by statutory section beginning with Chapter 376. I have added emphasis (bold or italics) in some places to show the connection to our concerns regarding human health and the environment.

Legislative intent is clearly stated in s. 376.30, Florida Statutes (F.S.), and although the title of the section and subsection (1) refer to “pollution of surface and ground waters,” the actual intent

MEMORANDUM

Directors of District Management

Waste Program Administrators

Page Two

November 20, 2001

language stated in subsections (2) and (3) is stated much more broadly and includes references to environmental and health hazards.¹

Next, we can look to the following definitions from s. 376.301, F.S., which lend strength to our argument that the Department does have soils authority.

(9) "Contaminant" means any physical, chemical, biological, or radiological substance *present in any medium* which may result in adverse effects to *human health or the environment* or which creates an adverse nuisance, organoleptic, or aesthetic condition in groundwater.

(10) "Contaminated site" means *any contiguous land, sediment, surface water, or groundwater areas* that contain contaminants that may be harmful to *human health or the environment*.

(12) "Discharge" includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing, or dumping of any pollutant or hazardous substance which occurs and which affects *lands* and the surface and ground waters of the state not regulated by ss. 376.011-376.21.

(35) "Pollution" means the presence *on the land or in the waters* of the state of pollutants in quantities which are or may be potentially harmful or injurious to *human health or welfare, animal or plant life, or property or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation*.

¹ Section 376.30(2) and (3), F.S., state in part (emphasis added):

(2) The Legislature *further finds* and declares that:

(a) The storage, transportation, and disposal of pollutants, drycleaning solvents, and hazardous substances within the jurisdiction of the state and state waters is a hazardous undertaking;

(b) Spills, discharges, and escapes of pollutants, drycleaning solvents, and hazardous substances that occur as a result of procedures taken by private and governmental entities involving the storage, transportation, and disposal of such products pose threats of great danger and damage *to the environment of the state, to citizens of the state, and to other interests deriving livelihood from the state;*

(c) Such hazards have occurred in the past, are occurring now, and present future threats of potentially catastrophic proportions, all of which are expressly declared to be inimical to the paramount interests of the state as set forth in this section; and

(d) Such state interests outweigh any economic burdens imposed by the Legislature upon those engaged in storing, transporting, or disposing of pollutants, drycleaning solvents, and hazardous substances and related activities.

(3) The Legislature intends by the enactment of ss. 376.30-376.319 to exercise the police power of the state by conferring upon the Department of Environmental Protection the power to:

(a) Deal with the *environmental and health hazards* and threats of danger and damage posed by such storage, transportation, disposal, and related activities;

(b) Require the prompt containment and removal of products occasioned thereby;

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MEMORANDUM
Directors of District Management
Waste Program Administrators
Page Three
November 20, 2001

Section 376.301, F.S. (emphasis added).

When working within Chapter 376, we look to section 376.302, F.S., specifically subsection (1), for a description of prohibited acts.² This subsection does refer to “discharg[ing] pollutants or hazardous substances into or upon...the lands” as a prohibited act, but it must be a discharge which violates any departmental “standard” as defined in s. 403.803(13), F.S.³ At this point, our soils authority argument shifts to Chapter 403 temporarily.

Based on the definition of “standard,” we can meet the s. 376.302(1)(a), F.S., criteria by establishing that the departmental standard being violated relates to solid waste management. Essentially if the soils-only contamination is not leaching to groundwater or volatilizing to cause air quality concerns, but still presents a threat to human health or the environment, then we can assert that it is causing a solid waste violation. The terms “solid waste” and “disposal” are defined very broadly in Chapter 403.⁴ Based on these definitions, contaminants found in soils constitute disposal of solid waste. Pursuant to s. 403.708(1), F.S., such disposal is prohibited except when done in a manner approved by the department.⁵

² Section 376.302(1), F.S., provides (emphasis added):

(1) It shall be a violation of this chapter and it shall be prohibited for any reason:

(a) To discharge pollutants or hazardous substances into or upon the surface or ground waters of the state *or lands*, which discharge violates any departmental "standard" as defined in s. 403.803(13).

(b) To fail to obtain any permit or registration required by this chapter or by rule, *or to violate or fail to comply with any statute*, rule, order, permit, registration, or certification adopted or issued by the department pursuant to its lawful authority.

(c) To knowingly make any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter, or to falsify, tamper with, or knowingly render inaccurate any monitoring device or method required to be maintained under this chapter or by any permit, registration, rule, or order issued under this chapter.

³ Section 403.803(13), F.S., provides the following definition (emphasis added):

(13) "Standard" means any rule of the Department of Environmental Protection relating to air and water quality, noise, *solid-waste management*, and electric and magnetic fields associated with electrical transmission and distribution lines and substation facilities. The term "standard" does not include rules of the department which relate exclusively to the internal management of the department, the procedural processing of applications, the administration of rulemaking or adjudicatory proceedings, the publication of notices, the conduct of hearings, or other procedural matters.

⁴ Sections 403.703(13) and (19), F.S. provide the following definitions (emphasis added):

(13) "Solid waste" means sludge unregulated under the federal Clean Water Act or Clean Air Act, sludge from a waste treatment works, water supply treatment plant, or air pollution control facility, or garbage, rubbish, refuse, special waste, *or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations*. Recovered materials as defined in subsection (7) are not solid waste.

(19) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste *into or upon any land* or water so that such solid waste or hazardous waste or any constituent thereof may enter other lands or be emitted into the air or discharged into any waters, including groundwaters, *or otherwise enter the environment*.

⁵ Section 403.708(1) states as follows (emphasis added):

(1) No person shall:

MEMORANDUM

Directors of District Management

Waste Program Administrators

Page Four

November 20, 2001

Additionally, we can cite to any violation of Chapter 403 as a violation of section 376.302(1)(b) because of its reference to violations of *any statute* (see footnote two above).

Further support for our authority to require cleanup of soils-only contamination is found in section 376.305(1), F.S. This provision gives the Department broad authority to require cleanup by stating: "Any person discharging a pollutant as prohibited by ss. 376.30-376.319 shall immediately undertake to contain, remove, and abate the discharge to the satisfaction of the department." This provision does not state that the responsible party must only remove the pollutants from the air and water. It clearly states that the person must remove the discharge *to the satisfaction of the department*. Given that our agency's mission includes protection of human health and the environment, in order to satisfy us, the responsible party may be required to remove the discharge from the soil as well, when it presents a threat to human health or the environment.⁶

Additional legislative intent regarding to what extent cleanup is required can be found in section 376.307, F.S., which creates and authorizes the Department to use the Water Quality Assurance Trust Fund to conduct cleanups and later seek cost recovery in certain instances. Specifically, subsection (1) states: "The Water Quality Assurance Trust Fund is intended to serve as a broad-based fund for use in responding to *incidents of contamination* that pose a serious danger to the quality of groundwater and surface water resources *or otherwise pose a serious danger to the public health, safety, or welfare*. . . ." If the Florida Legislature is giving the Department authority to clean up contamination that poses a serious danger to the public health, safety, or welfare (which will include soils-only contamination in some cases), and then to seek cost recovery from the responsible party, then clearly the Department has the authority to require a

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- (a) Place or deposit any solid waste *in or on the land* or waters located within the state except in a manner approved by the department and consistent with applicable approved programs of counties or municipalities. However, nothing in this act shall be construed to prohibit the disposal of solid waste without a permit as provided in s. 403.707(2).
 - (b) Burn solid waste except in a manner prescribed by the department and consistent with applicable approved programs of counties or municipalities.
 - (c) Construct, alter, modify, or operate a solid waste management facility or site without first having obtained from the department any permit required by s. 403.707.

Section 403.707(2) provides exemptions under certain conditions for "disposal by persons of solid waste resulting from their own activities on their own property." However, the introductory language in subsection (2) states (emphasis added): "Except as provided in s. 403.722(6), no permit under this section is required for the following, *provided that the activity shall not create a public nuisance or any condition adversely affecting the environment or public health* and shall not violate other state or local laws, ordinances, rules, regulations, or orders:...." If we pursue an enforcement action, then presumably we believe that the soils-only contamination creates a condition adversely affecting the environment or public health; therefore, the exception to the permit requirement provided in s. 403.707(2), F.S., is not applicable.

⁶ Note that we recognize a common question asked by District staff when dealing with non-program sites is "What level of cleanup will satisfy the Department?" This memo is not intended to address that question because the answer given in the past remains the same; i.e., we cannot enforce Chapter 62-777, F.A.C., Soil Cleanup Target Levels (SCTL's) at non-program sites. District staff may offer the SCTL's as a guidance document to interested parties, but the cleanup target levels applied to a particular site still must be derived on a site-by-site basis.

MEMORANDUM
Directors of District Management
Waste Program Administrators
Page Five
November 20, 2001

responsible party who is conducting the cleanup to act in a manner that achieves the same result. To apply a different standard would be illogical. Furthermore, although the term "contamination" is not defined in Chapter 376, we certainly should look to the related definitions of "contaminant" and "contaminated site" (see above) which lend further support to the above interpretation that cleanup of soils-only contamination is not only authorized, but contemplated as evidenced by these statements of legislative intent.

When determining who is liable for contamination cleanup, we refer to section 376.308, F.S., which provides in part:

In any suit instituted by the department under ss. 376.30-376.319, it is not necessary to plead or prove negligence in any form or matter. The department need only plead and prove that the prohibited *discharge or other polluting condition* has occurred. The following persons shall be liable to the department for any *discharges or polluting condition*:

Section 376.308(1), F.S. (emphasis added). As noted above, the term "discharge" is defined in Chapter 376 and includes reference to discharges which affect *lands* as well as water; however, the phrase "polluting condition" is not defined. Again, we have to look to a related definition that can logically be utilized to help discern legislative intent. In this case, the definition of "pollution" is most closely related and lends support to our argument that persons who discharge or create a condition in the environment caused by pollution will be liable for cleanup of that condition. Since the definition of "pollution" refers to "the presence *on the land or* in the waters of the state of pollutants in quantities which are or may be potentially harmful or injurious to *human health or welfare, animal or plant life, or property or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation,*" clearly we can require the responsible party to remove the pollutants⁷ or hazardous substances⁸ to the satisfaction of the department, even if they are present as soils-only contamination.

⁷ Section 376.301(34), F.S., defines "pollutants" as follows: "Pollutants" includes any "product" as defined in s. 377.19(11), pesticides, ammonia, chlorine, and derivatives thereof, excluding liquefied petroleum gas.

Section 377.19(11) defines "product" as "any commodity made from oil or gas and includes refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, condensate, gasoline, waste oil, kerosene, benzene, wash oil, blended gasoline, lubricating oil, blends or mixtures of oil with one or more liquid products or byproducts derived from oil or gas, and blends or mixtures of two or more liquid products or byproducts derived from oil or gas, whether hereinabove enumerated or not."

⁸ The definition of "discharge" refers to both pollutants and hazardous substances; therefore, the s. 376.308(1), F.S., provision covers both types of contamination. Section 376.301(20), F.S., defines "hazardous substances" to mean "those substances defined as hazardous substances in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986." Given the breadth of the definitions of "pollutants" and "hazardous substances," most substances will fall into one or both categories.

MEMORANDUM

Directors of District Management

Waste Program Administrators

Page Six

November 20, 2001

Finally, section 376.315, F.S., lends further strength to our argument by providing the following: “Sections 376.30-376.319, being necessary for the *general welfare and the public health and safety* of the state and its inhabitants, shall be liberally construed to effect the purposes set forth under ss. 376.30-376.319 and the Federal Water Pollution Control Act, as amended.” (Emphasis added.)

We can also look to Chapter 403 statutory provisions, in addition to those already cited, that lend support to our argument that we have authority to require cleanup of soils-only contamination. Section 403.021, provides a legislative declaration of public policy including the following:

(6) The Legislature finds and declares that control, regulation, and abatement of the activities which are causing or may cause pollution of the air or water resources in the state and *which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable enjoyment of life or property* be increased to ensure conservation of natural resources; *to ensure a continued safe environment*; to ensure purity of air and water; to ensure domestic water supplies; *to ensure protection and preservation of the public health, safety, welfare, and economic well-being*; to ensure and provide for recreational and wildlife needs as the population increases and the economy expands; and to ensure a continuing growth of the economy and industrial development.

Section 403.021(6), F.S. (Emphasis added.)

Additional authority is found in section 403.121(1) and (2), F.S., wherein the Department is authorized to institute either a civil action or an administrative proceeding to establish liability and to recover damages for any injury to the air, waters, *or property, including animal, plant, and aquatic life*, of the state caused by any violation of law, rule, regulation, permit, certification, or order of the Department.⁹ Furthermore, s. 403.121(2)(b), F.S., provides that “[i]f the department has reason to believe a violation has occurred, it may institute an administrative proceeding to order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action.” This section can be cited in combination with s. 376.302, F.S., as both refer to violations of any law or statute, and therefore, can be cross-referenced as violations of both Chapters 376 and 403.

⁹ See s. 403.121(1)(a) and 403.121(2)(a) and (c), F.S.

MEMORANDUM
Directors of District Management
Waste Program Administrators
Page Seven
November 20, 2001

Similar language is found in s. 403.131, F.S.,¹⁰ giving the Department injunctive relief, where appropriate, and in s. 403.141, F.S.,¹¹ which describes who may be held liable. Both of these sections require a violation of s. 403.161(1), F.S.,¹² in order to be triggered. We cannot rely on s. 403.161(1)(a), F.S., because it prohibits any person from causing "pollution," and that term is defined more narrowly in Chapter 403 to only apply to air and water.¹³ Instead, we can rely on a violation of s. 403.161(1)(b), F.S., by utilizing the solid waste argument discussed above and asserting that they have failed to obtain a required solid waste permit.

Also, we can continue to rely on section 403.726, F.S., to abate an "imminent hazard" and then seek cost recovery from the responsible party, including an imminent hazard created by soils-only contamination.¹⁴

¹⁰ Section 403.131(1), F.S., provides (emphasis added): "The department may institute a civil action in a court of competent jurisdiction to seek injunctive relief to enforce compliance with this chapter or any rule, regulation, permit certification, or order; to enjoin any violation specified in s. 403.161(1); and to seek injunctive relief to prevent irreparable injury to the air, waters, and property, including animal, plant, and aquatic life, of the state and to protect human health, safety, and welfare caused or threatened by any violation."

¹¹ Section 403.141(1), F.S., provides in part (emphasis added): "Whoever commits a violation specified in s. 403.161(1) is liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic life, of the state and for reasonable costs and expenses of the state in tracing the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the state to their former condition,...."

¹² Section 403.161(1), F.S., provides in pertinent part:
(1) It shall be a violation of this chapter, and it shall be prohibited for any person:
(a) To cause pollution, except as otherwise provided in this chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.
(b) To fail to obtain any permit required by this chapter or by rule or regulation, or to violate or fail to comply with any rule, regulation, order, permit, or certification adopted or issued by the department pursuant to its lawful authority.
* * *

¹³ Section 403.031(7), F.S., provides the following definition:
(7) "Pollution" is the presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity of air or water in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property, including outdoor recreation unless authorized by applicable law.

¹⁴ Section 403.726, F.S., provides in pertinent part (emphasis added):
(1) The Legislature finds that hazardous waste which has been improperly generated, transported, disposed of, stored, or treated may pose an imminent hazard to the *public health, safety, and welfare and the environment*.
(2) The department shall take any action necessary pursuant to s. 403.121 or s. 403.131 to abate or substantially reduce any imminent hazard caused by a hazardous substance, including a spill *into the environment* of a hazardous substance. The department is authorized to use moneys from the Water Quality Assurance Trust Fund to finance such actions, and such expenditures from the fund shall be recoverable pursuant to s. 376.307.
(3) An imminent hazard exists if any hazardous substance creates *an immediate and substantial danger to human health, safety, or welfare or to the environment*. The department may institute action in its own name, using the procedures and remedies of s. 403.121 or s. 403.131, to abate an imminent hazard. However, the department is authorized to recover a civil penalty of not more than \$25,000 for each day of continued violation. Whenever serious harm to *human health, safety, and welfare; the environment; or private or public property* may occur prior to completion of an administrative

MEMORANDUM
Directors of District Management
Waste Program Administrators
Page Eight
November 20, 2001

Finally, section 403.727, F.S., lists additional violations that we have traditionally cited to by relying on the broad definitions of "hazardous waste" and "hazardous substance" found in section 403.703, F.S.¹⁵

After completing my review and analysis of existing statutory authorities within Chapters 376 and 403, I am confident that the Department is authorized to require cleanup of soils-only contamination. We can pursue enforcement of soils-only contamination cases, exercising enforcement discretion as appropriate, in order to protect the public health, safety, and welfare and the environment.

LMD/ldr

cc: Douglas A. Jones, BWC
Jack Chisolm, OGC
Larry Morgan, OGC
Tony Ettore, OGC
Mike Kennedy, NW District
Brian Cheary, NE District
Mike Gonsalves, SW District
Brett LeRoux, Central District
Jeff Gould, South District
Paul Wierzbicki, SE District

hearing or other formal proceeding which might be initiated to abate the risk of serious harm, the department may obtain, ex parte, an injunction without paying filing and service fees prior to the filing and service of process.

¹⁵ Section 403.703, F.S., provides the following definitions:

(21) "Hazardous waste" means solid waste, or a combination of solid wastes, which, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or may pose a substantial present or potential hazard to human health or the environment when improperly transported, disposed of, stored, treated, or otherwise managed. The term does not include human remains that are disposed of by persons licensed under chapter 470.

(29) "Hazardous substance" means any substance which is defined as a hazardous substance in the United States Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 94 Stat. 2767.