

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2536

SPONSOR: Natural Resources Committee and Senator Diaz-Balart

SUBJECT: Underground Storage Tank Systems and the Petroleum Contamination Cleanup Program

DATE: April 5, 1999 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Branning</u>	<u>Voigt</u>	<u>NR</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

This bill addresses certain glitches and other problems that have arisen since the passage of ch. 96-277, L.O.F. Provides for funding of source removal in advance of the site's priority position. Provides a mechanism for the DEP to distinguish between discharges that are eligible for state funding from those discharges reported after December 31, 1998, which are ineligible for state funding on the same site. Provides for cost-sharing for new discharges at a site where contamination already exists and authorizes the department and the responsible party to negotiate for such cost-sharing in a site rehabilitation agreement. Provides that the provisions relating to new discharges applies retroactively back to January 1, 1999. Repeals the repealer in s. 376.30713, F.S., relating to the Preapproved Advanced Cleanup Program.

This bill substantially amends ss. 376.3071, 376.30711, 376.30713, F.S.; creates s. 376.30714, F.S.; and repeals subsection (7) of s. 376.30713, F.S.

## II. Present Situation:

In 1986, the Legislature enacted the State Underground Petroleum Environmental Response Act of 1986 (SUPER Act), to address the problems of pollution from leaking underground petroleum storage systems. The 1986 act established the Early Detection Incentive Program, or EDI, as an incentive to encourage early detection, reporting, and cleanup of contamination from leaking petroleum storage system. Under the EDI program, owners or operators could clean up the sites themselves using private contractors and their funds and then be reimbursed from the Inland Protection Trust Fund; or have their site listed on the state's priority cleanup list and wait for the state to clean up the site. The reporting period under EDI ended on December 31, 1988. Because of the financial and other risks involved in the cleanup process, many owners and operators chose to have their sites listed on the state cleanup list. The number of reported sites far exceeded the initial estimates and the state was overwhelmed with sites needing cleanup.

To encourage participation in the reimbursement program, the Legislature in 1989 provided a number of incentives such as expanding the uses of the Inland Protection Trust Fund to include payment for removal and replacement of storage tanks and reimbursement for the required CPA examinations. In 1990, the incentives were expanded to include partial restoration payments as the work progressed and the payment of interest to responsible parties on amounts that were due.

In 1990, the Legislature established the Abandoned Tank Restoration Program. This program was to facilitate the restoration of sites contaminated by abandoned storage systems under the restoration program of the Petroleum Liability Insurance and Restoration Program (PLIRP). Sites accepted into the program are eligible for reimbursement of cleanup costs after satisfying certain criteria.

In 1992, the Legislature substantially revised the statutory provisions relating to the underground petroleum storage cleanup program. Pursuant to this legislation, the state would phase out its cleanup program and the sites would be shifted to the reimbursement program, thereby requiring the owner or operator of the contaminated sites to bear a portion of the financial liability. Small businesses or not-for-profit corporations could be exempted from this requirement. The legislation also provided that interest be paid on the reimbursements. To pay for the revised reimbursement program, the excise tax on petroleum and petroleum products which is deposited in the Inland Protection Trust Fund was increased. The excise tax structure for the Inland Protection Trust Fund consists of three tiers depending on the balance in the trust fund. Currently, the tax is at the third tier which is 80 cents per barrel of pollutant. At this rate, the proceeds of the tax amount to approximately \$160 million per year.

The incentives to participate in the reimbursement program proved to be successful to the point where the demand for reimbursement exceeded the administrative capacity of the department and the financial resources of the Inland Protection Trust Fund. Because of the limitations on staffing and the financial resources of the fund, a tremendous backlog of unpaid claims for reimbursement was created. As a result, the program was in arrears for almost \$350 million.

Over 18,000 sites had been identified as having been contaminated and in need of cleanup. The vast majority of the annual revenues in the Inland Protection Trust Fund were spent on the petroleum cleanup reimbursement program and the state cleanup program.

Prior to the 1995 legislative session, three separate entities investigated Florida's reimbursement program in light of allegations of abuse, inefficiencies, and fraud. Those entities included the Eleventh Statewide Grand Jury, the Department of Banking and Finance (Office of the Comptroller), and the Petroleum Efficiency Task Force. During the 1995 Legislative session, the Legislature sought to address the many problems facing the underground storage tank program. That legislation attempted to address those allegations by prioritizing the cleanup of sites which posed the greatest threat to human health and safety; reducing the costs for contamination cleanup; providing a source of funding to eliminate the backlog; and managing the cleanup activity to a level which is commensurate with the level of reimbursement capability. While no resolution or agreement was reached on the comprehensive petroleum cleanup bill that year, the Legislature enacted ch. 95-2, L.O.F., which provided a stopgap measure to "stop the bleeding" on the fund by providing for limitations on cleanup activities. Certain cleanup activities could continue only with prior DEP approval which included prior approval of costs.

Chapter 95-2, L.O.F., was only intended to be a temporary measure while work progressed on a totally restructured contamination cleanup program. In 1996, the Legislature enacted ch. 96-277, L.O.F., which was a comprehensive bill that revised the underground petroleum storage cleanup program in Florida. That legislation contained the following provisions:

- Established the Inland Protection Financing Corporation which would issue bonds to pay off the backlog.
- Created a new amnesty program called the Petroleum Cleanup Participation Program which is a cost-sharing program to provide funding assistance for all property contaminated by petroleum discharges.
- Provided for a preapproved advanced cleanup program to allow sites to be cleaned up out of priority order on a limited basis to facilitate property transactions or public works projects. This program requires a minimum cost share of 25 percent by the applicant.
- Directed the DEP to incorporate risk-based corrective action (RBCA) principles in establishing its cleanup criteria rule.
- Required contaminated site cleanups to be conducted in priority order on a prior approval cost basis.

The Inland Protection Trust Fund (IPTF) is the repository for funds for the various petroleum contamination cleanup programs. As of July 1, 1998, over 16,000 discharges have been identified as potentially eligible for state assisted restoration funding through the various amnesty and insurance programs. On December 31, 1998, eligibility for the Petroleum Participation Cleanup Program (PCPP) or the Petroleum Liability Restoration Insurance Program ended. This means that discharges occurring on or after January 1, 1999, are not eligible for funding from the IPTF, and that has presented a problem for the DEP because old discharges are eligible for funding and new discharges are not.

Since the passage of ch. 96-277, L.O.F., a few glitches have also been discovered regarding the petroleum contamination cleanup provisions.

### **III. Effect of Proposed Changes:**

This bill addresses certain glitches and other problems that have arisen since the passage of ch. 96-277, L.O.F.

**Section 1:** Section 376.3071, F.S., is amended to allow the DEP to provide funding for source removal activities. Funding for free product recovery may be provided in advance of the order established by the priority ranking system for site cleanup activities; however, a separate prioritization for free product recovery must be established consistent with the priority ranking system. No more than \$5 million may be encumbered from the Inland Protection Trust Fund in any fiscal year for source removal activities conducted in advance of the priority order.

Under the Petroleum Cleanup Participation Program, sites for which a discharge occurred before January 1, 1995, are eligible for rehabilitation funding assistance on a 25-percent cost-sharing basis. This bill provides that if the DEP and the owner, operator, or person otherwise responsible for site rehabilitation are unable to complete negotiations of the cost-sharing agreement within 120 days after commencing negotiations, the DEP shall terminate the negotiation; the site becomes ineligible for state funding under this program; and all liability protections provided under this program are revoked.

Under the Petroleum Cleanup Participation Program, certain sites are excluded from participation in the program. This bill deletes the language that excludes any person who knowingly acquires title to contaminated property from participating in this program.

**Section 2:** Section 376.30711, F.S., is amended to require the DEP to select five sites eligible for state restoration funding assistance under this section, each having a low priority ranking score, for an innovative technology pilot program. The sites must be representative of varying geographic, geophysical and petroleum contaminated conditions. Using the DEP's list of mechanical, chemical, and biological products and processes which have already been deemed acceptable from an environmental, regulatory, and safety standpoint, the department shall select innovative products and processes, based upon competitive bid procedures to be used on pilot project sites.

**Section 3:** Section 376.30713, F.S., relating to the Preapproved Advanced Cleanup Program, is amended to provide that this section is subject to legislative review prior to March 1, 2001.

**Section 4:** Section 376.30714, F.S., is created to provide a mechanism for the DEP to distinguish between discharges that are eligible for state funding from those discharges reported after December 31, 1998, which are ineligible for state funding on the same site.

The bill states that it is appropriate for persons assuming responsibility for cleanup of discharges occurring after December 31, 1998, at sites with existing contamination to share the costs associated with managing and conducting cleanup of those discharges, upon application to the department and in accordance with a priority established for such cleanup in a negotiated site-rehabilitation agreement.

The bill defines "applicant," "existing contamination," "new discharge," and "qualified site."

Free product attributable to a new discharge must be removed to the extent practicable and in accordance with DEP rules at the expense of the owner, operator, or other responsible party.

Beginning January 1, 1999, the DEP may negotiate and enter into site-rehabilitation agreements with applicants at sites at which there is existing contamination and at which a new discharge occurs. The site-rehabilitation agreement must include, but need not be limited to, allocation of the funding responsibilities of the department and the applicant for cleanup of the qualified site, establishment of a mechanism to guarantee the applicant's commitment to pay its agreed-upon amount of site rehabilitation as set forth in the agreement, and establishing the priority in which cleanup of the qualified site will occur. Under any negotiated site-rehabilitation agreement, the applicant will be responsible for no more than the cleanup costs at the qualified site which are

attributable to the new discharge. However, the payment of any applicable deductibles, copayments, or other program eligibility requirements under ss. 376.305, 376.3071, and 376.3072, F.S., continue to apply to the existing contamination and must be accounted for in the negotiated site-rehabilitation agreement. The DEP may preapprove or conduct additional assessment activities at the site.

Applications for site-rehabilitation agreements may be submitted to the DEP not later than 120 days after discovery of the new discharge. The application must include at least the following:

- A limited contamination-assessment report sufficient to demonstrate the extent of the new discharge; and
- Certification by the applicant that the applicant has the prerequisite authority to enter into the site-rehabilitation agreement.

Any costs incurred by the applicant associated with the application are not refundable from the Inland Protection Trust Fund.

Only one application may be submitted for any new discharge under this section.

If the DEP and the applicant are unable to agree on the apportionment of the funding responsibilities for a site otherwise qualified under this section, the provisions of ch. 120, F.S., apply. The administrative law judge shall, in making any determinations or recommendations regarding the apportionment of the funding responsibilities of the department and the applicant for the new discharge and the existing contamination, consider any admissible evidence relating to apportionment of the discharge.

Certain specified new discharges are not covered by these provisions.

If the department is unable to complete negotiations of the agreement within 90 days after commencing negotiations, the department shall terminate negotiations with the applicant and the site shall receive no further consideration under this section. However, if the parties are negotiating under this section in good faith and need additional time, the parties may agree to continue negotiations.

Site rehabilitation conducted at qualified sites must be conducted under ss. 376.3071(5)(b) and 376.30711, F.S. If the terms of the agreement are not fulfilled by the applicant, the applicant forfeits any right to continued funding for any site rehabilitation work under the agreement and is subject to enforcement action by the DEP or local government to compel cleanup of the new discharge.

New discharges otherwise meeting the criteria of this section or any site-rehabilitation agreement made under this section or any site-rehabilitation agreement do not create an independent entitlement to continued restoration funding or to cleanup of the existing contamination in advance of its previous priority order.

Upon execution of the site-rehabilitation agreement, retroactive to the date of discovery of the new discharge, the provisions of s. 376.308(5) shall extend to contamination covered by a site-rehabilitation agreement as long as the applicant remains in compliance with the terms and conditions of the agreement. However, if state funding of any agreement entered into under this section is discontinued, the provisions of this subsection no longer apply to the new discharge.

This section does not preclude the DEP from pursuing penalties in accordance with ss. 376.303(1)(k) and 376.311, F.S., for violations of any law or any rule, order, permit, registration, or certification adopted or issued by the DEP.

The provisions of this section would apply retroactively to January 1, 1999.

**Section 5:** This act takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Economic Impact and Fiscal Note:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

Persons with a contaminated site which is eligible for state funding assistance who experience a new discharge could benefit from the provisions which provide for a negotiated cost-sharing site rehabilitation agreement in that the extent of their cleanup liability could be established and would provide certainty as to their financial responsibility regarding the site.

By deleting the provision which prohibits persons who knowingly acquire contaminated property from participating in the Petroleum Contamination Participation Program, owners of petroleum contaminated property could sell or transfer their property without losing program eligibility. This is a benefit to the private sector in that the marketability of petroleum contaminated sites is enhanced.

It is anticipated that the provisions relating to the negotiated site-rehabilitation agreements would encourage pollution liability insurance carriers to do business in Florida. These provisions would allow insurance carriers to identify future liability requirements for new discharges. If more insurance carriers do business in Florida, competition could lower the premiums offered for this insurance.

**C. Government Sector Impact:**

The Department of Environmental Protection will have to establish a separate mechanism to prioritize and address source removal activities at low priority sites. The DEP estimates that one FTE will be required to implement this provision.

This bill would give the DEP the express authority to negotiate with a site owner for the cost-sharing responsibilities where a new discharge occurs on a site that is eligible for state cleanup funding assistance. It is anticipated that such negotiations may reduce the possibility of litigation and could reduce the DEP's costs and manpower that would otherwise be devoted to such legal proceedings.

Currently, the private contributions for cleanups pursuant to the Preapproved Advanced Cleanup Program exceed 50 percent of the cleanup costs. Continuation of this program increases the state's ability to cleanup more sites without having to increase the existing legislative appropriation for petroleum site cleanup activities.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.