

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Banking and Insurance Committee

BILL: SB 1318

SPONSOR: Environmental Preservation Committee

SUBJECT: Underground Petroleum Storage Tanks

DATE: March 18, 2005

REVISED: 03/08/05 03/22/05

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Branning</u>	<u>Kiger</u>	<u>EP</u>	<u>Fav/3 amendments</u>
2.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Fav/1 amendment</u>
3.	<u></u>	<u></u>	<u>GA</u>	<u></u>
4.	<u></u>	<u></u>	<u>WM</u>	<u></u>
5.	<u></u>	<u></u>	<u></u>	<u></u>
6.	<u></u>	<u></u>	<u></u>	<u></u>

Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

This bill implements the recommendations of the Senate Environmental Preservation Committee's interim report no. 2005-153, relating to the state's underground petroleum storage tank cleanup program. Specifically, the bill:

- Directs the Department of Environmental Protection (DEP) to establish a process to uniformly encumber funds appropriated for the underground storage tank program throughout a state fiscal year.
- Authorizes the DEP to establish a prioritization system within a particular scoring range.
- Provides funding for limited interim soil-source removals for sites which will become inaccessible for future remediation due to road infrastructure and right-of-way restrictions resulting from a pending Department of Transportation road construction project.
- Provides funding for limited interim soil-source removals associated with the required secondary containment upgrading of underground petroleum storage systems that are conducted in advance of the site's priority ranking for cleanup.
- Limits the funding for source removals associated with secondary containment upgrades to 10 sites in each fiscal year for each facility owner.
- Limits the amount of funding per facility.
- Limits the activities that may be funded.

- Limits the funding amount for Department of Transportation projects to \$1 million per fiscal year and \$10 million for secondary containment upgrade projects per fiscal year.
- Repeals the funding provisions on June 30, 2008.
- Provides that the Preapproved Advanced Cleanup Program is available for discharges eligible for restoration funding under the Petroleum Cleanup Participation Program for the state's cost-share of site rehabilitation.
- Extends the life of the Inland Protection Financing Corporation from 2011 to 2025 and authorizes the corporation to issue notes, bonds, etc. to pay for large-scale cleanups such as ports, airports, and terminal facilities, that are eligible for state funding.

This bill substantially amends the following sections of the Florida Statutes: 376.3071, 376.30713, and 376.3075.

II. Present Situation:

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. As an incentive to report and clean up contamination from leaking petroleum storage systems, the SUPER Act established the Early Detection Incentive Program or EDI. The EDI program was an amnesty program that allowed owners or operators of contaminated sites to clean up the sites themselves using private contractors and their own funds and then be reimbursed from the state's Inland Protection Trust Fund (IPTF), or have their sites listed on the state's priority cleanup list and wait for the state to clean up the sites. Because of financial and other risks involved in the cleanup process, many owners or operators chose to have their sites listed on the state cleanup list. As a result, the state was overwhelmed with sites needing cleanup.

The Legislature in 1989 provided a number of incentives to encourage owners or operators to clean the sites up themselves and seek reimbursement from the state IPTF. This was known as the reimbursement program.

The EDI program's eligibility ended on December 31, 1988; however the state recognized that the state had a continuing need to provide financial assistance for cleanup of sites that had petroleum storage systems that were abandoned or were no longer in service. To address this continuing need, the Abandoned Tank Restoration Program was established in 1990 to provide financial assistance for cleanup of these sites. Sites accepted into this program were 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 tank cleanup program to phase out the state's cleanup program and shift most of the sites to the reimbursement program. To pay for the revised reimbursement program, the excise tax on petroleum and petroleum products which is deposited into the IPTF was increased. The excise tax structure for the IPTF consists of three tiers depending on the balance in the trust fund. Currently, the tax is at the upper or third tier which is 80 cents per barrel of pollutant. At this rate, the proceeds of the tax distributed to the IPTF amount to approximately \$215 million per year.¹

¹ 2004 Florida Tax Handbook estimates for FY 2003-2004 and FY 2004-2005, p. 100.

Over 18,000 petroleum sites had been identified as having been contaminated and in need of cleanup. The incentives to participate in the reimbursement program proved to be extremely successful. So much so, that the demand for reimbursement exceeded the administrative capacity of the Department of Environmental Protection² (DEP) and the financial resources of the IPTF. 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, by 1996 the program was in arrears for \$551.5³ million for unpaid claims.

Concerns regarding abuse, inefficiencies, and fraud in the reimbursement program prompted three separate entities to investigate Florida's reimbursement program. Those entities included the Eleventh Statewide Grand Jury, the Department of Banking and Finance (Office of the Comptroller) and the Petroleum Efficiency Task Force. In 1995, the Legislature attempted to address the concerns but no resolution was reached on a comprehensive revision of the program that year. The Legislature did, however, enact ch. 95-2, Laws of Florida, as a stop-gap measure to "stop the bleeding" on the IPTF by providing for a moratorium on cleanups and limitations on cleanup activities.

Comprehensive legislation was passed in 1996 that moved the program from a reimbursement program to a prior-approval program, and that is the program that exists today. The legislation also:

- Required contaminated site cleanups to be conducted in priority order based on threats to human health and the environment and provided that the costs must be approved prior to the work being conducted;
- Created the Inland Protection Financing Corporation to issue bonds to pay off the accumulated backlog of reimbursement claims;
- Created a new cost-sharing amnesty program called the Petroleum Cleanup Participation Program;
- Provided for another cost-share program to allow sites to be cleaned up out of priority order to facilitate real property transactions or public works projects (Preapproved Advanced Cleanup Program); and
- Directed the DEP to incorporate risk-based corrective-action principles in its cleanup criteria rule.

There have been no major revisions to the state's underground petroleum storage tank cleanup program since 1996. Recently, issues have arisen that may need legislative direction. The Senate Environmental Preservation Committee was assigned an interim project to look into the underground petroleum storage tank cleanup program to identify those issues. The committee identified the following issues that needed legislative direction.

Funding for limited source removal associated with secondary containment upgrading and Department of Transportation right-of-way and road infrastructure projects. All underground petroleum storage tank systems must be retrofitted with secondary containment by

² In 1992, it was the Department of Environmental Regulation. Currently, the Department of Environmental Protection administers the underground storage tank program.

³ Petroleum Contamination Cleanup and Discharge Prevention Program, March 2004, DEP, p. 14.

December 31, 2009.⁴ According to the DEP, there are 31,500 underground storage tanks and only 11,200 have been upgraded to secondary containment. It is the owner or operator's responsibility to replace their tanks and meet this requirement at their expense. Often, contaminated soil may be found under the tank that has been removed for replacement which was not previously detected. Owners or operators have been reluctant to replace their tanks ahead of their priority ranking because treating the contaminated soil is expensive and the IPTF will not pay for such treatment out of priority order. As a result, the contaminated soil is put back into the ground and cleanup occurs when the site's priority ranking comes due.

The DEP is concerned that the owners or operators will wait until the deadline to replace the tanks. This could result in many owners or operators missing the deadline because the work cannot be done in a timely fashion.

A special complication arises for sites with a priority ranking score below that which is currently being cleaned up and the Department of Transportation has road or right-of-way construction projects scheduled or underway over those sites. Once the project is complete, it is difficult or impossible to access the site needing remediation when the site's priority ranking comes up. There is a need to provide funding for limited interim soil source removals at these sites.

Availability of Environmental Liability Insurance. Subtitle 1 of the Federal Resource Conservation and Recovery Act (Act) requires that owners or operators of underground and aboveground petroleum storage systems maintain financial responsibility for cleanup costs, third-party property damage, and personal injury claims associated with contamination from these systems. In the 1990s, s. 376.3072, F.S., established the Petroleum Liability and Insurance Restoration Program (PLIRP) which was the primary means for demonstrating financial responsibility because private insurance was either unavailable or unaffordable. The PLIRP program, however, will not cover discharges reported after December 31, 1998. Currently, financial responsibility options in Florida include private insurance or self-insurance. The self-insurance option is generally only viable for the major oil companies and their company-owned storage facilities. Most petroleum storage facilities in Florida are covered by private insurance.

A conscious effort was made in Florida to phase out the PLIRP in favor of developing a market for private environmental insurance. The current policies in effect in Florida contain provisions that have proven to be problematic.

- Policies are covering only discharges that can be shown to have occurred during the policy period. It is difficult to determine when a discharge occurred.
- The policy will cover only discharges from the storage system. If the system passes a tightness test, the insurer will deny coverage.
- The policies require that the discharges occur after a retroactive date. Again, it is difficult to prove when a discharge occurred.
- Some carriers have policy exclusions for contamination "arising from the removal" of a storage system. The exclusion also applies to discharges "arising from maintenance" activities. This further complicates the timely upgrading of tanks to secondary containment.

⁴ Rule 62-761.510, Florida Administrative Code.

Representatives with the Florida Petroleum Marketers and Convenience Store Association (Assn.) state that there are an estimated 4,500 sites which are covered by private pollution liability insurance.⁵ The federal Act requires these sites to have pollution insurance coverage of \$1 million per incident and a typical premium for such coverage for a mid-sized site was approximately \$7,000 last year, according to these representatives. However, the premiums have increased five or six times for such sites for the upcoming year.

The dominant environmental insurance carrier in Florida, AIG, will not write or renew coverage on older single-walled corrosion-resistant systems. The concern appears to be that when these single-walled containment systems are replaced with the required secondary containment systems, contamination will be discovered and claims will be filed.

Great American and Mid-Continent are no longer writing coverage in Florida. Zurich Insurance will not write coverage if the insured plans to replace their underground storage tank systems within the next 3 years. Currently, ACE Insurance is writing pollution coverage but it is limited to pollution that is “newly released” or to pollution that has migrated to a third-party site.

There appears to be an issue regarding the settlement and timely payment of pending claims with insurance carriers. Uncertainty over the payment of claims delays or prevents cleanup activities from taking place.

Statutorily direct the DEP to encumber annual cleanup funds at a uniform rate throughout the year. A few years ago the DEP had encumbered cleanup funds at an accelerated rate at the beginning of the fiscal year, thereby leaving no cleanup funds available toward the end of the fiscal year. Proviso language was added to the General Appropriations bill directing the DEP to encumber cleanup funds at a uniform rate throughout the fiscal year. Currently, it is not anticipated that this problem will occur in the near or foreseeable future; however statutory direction would avoid such a problem in the future.

Prioritize the many sites that may have the same priority number. Contaminated sites are cleaned up in priority order based on the threat to human health and the environment – the higher the number, the greater the threat. The priority ranking system looks something like a pyramid. At some point, it was anticipated that there would be several sites that had the same priority number. The need now exists to “prioritize” within a particular priority score ranking.

Provide financing for large-scale cleanups so that the Inland Protection Trust Fund is not in jeopardy for the rest of the cleanups. Several large petroleum sites are so contaminated that it will take large sums of money to clean them up. To expend such sums on one project would jeopardize cleanup work on numerous other sites in the state. Sites that would involve large-scale cleanups include ports, airports, and terminal facilities.

⁵ Other sites are self-insured.

III. Effect of Proposed Changes:

This bill would implement the recommendations of the Senate Environmental Preservation Committee's interim report no. 2005-153 on the underground petroleum storage tank cleanup program.

Section 1. Section 376.3071, F.S., is amended to direct the DEP to establish a process to uniformly encumber funds appropriated for the underground storage tank program throughout a state fiscal year. Allowances are made for emergencies and imminent threats to human health and the environment. This provision does not apply to appropriations associated with the free product recovery initiative or the Preapproved Advanced Cleanup Program.

The DEP is required to establish a priority-scoring system for state-conducted cleanups. The department may use the effective date of a department final order granting eligibility to establish a prioritization system within a particular priority scoring range.

Funding is provided for limited interim soil-source removals. The funding assistance will be available for sites which will become inaccessible for future remediation due to road infrastructure and right-of-way restrictions resulting from pending Department of Transportation road construction projects, as well as for secondary containment upgrading of tanks as required by rule 62-761.510(2)(d), F.A.C., in advance of the site's priority ranking.

- DEP is required to provide written guidance on the limited source removal information and technical evaluation necessary to justify a request for a limited source removal in advance of the priority order.
- The prioritization for limited source removal projects associated with a secondary containment upgrade in any fiscal year will be determined on a first-come, first-served basis according to the approval date for the limited source removal.
- Funding for source removals associated with secondary containment upgrades is limited to 10 sites in each fiscal year for each facility owner, and any related person.
- Funding for Department of Transportation and secondary containment upgrade source removals may not exceed \$50,000 for a single facility. Under certain circumstances, the DEP can authorize up to \$100,000 for a single facility.
- The limited source removal for secondary containment upgrades must be completed within 6 months after the DEP issues its approval of the project. The approval automatically expires at the end of the 6 months.
- Funding for limited interim soil-source removals associated with Department of Transportation projects and secondary containment upgrades are limited to: supplemental soil assessment; soil screening; soil removal; backfill material; treatment or disposal of the contaminated soil; dewatering related to the contaminated soil removal in an amount of up to 10 percent of the total project costs; treatment and disposal of the contaminated groundwater; and preparation of the source removal report. No other costs associated with the tanks upgrade may be paid with state funds.
- In any fiscal year, no more than \$1 million for Department of Transportation limited source removal projects and no more than \$10 million for secondary containment upgrade limited source removal projects conducted in advance of the priority cleanup schedule may be encumbered from the IPTF.
- The limited source removal funding provisions are repealed effective June 30, 2008.

Notwithstanding the priority ranking system, once free product and limited source removals have been conducted, the DEP may reevaluate the site to determine the degree of active cleanup needed to continue site rehabilitation. Also, the DEP will determine if the reevaluated site qualifies for natural attenuation monitoring or no further action.

Section 2. Section 376.30713, F.S., is amended to provide that the Preapproved Advanced Cleanup Program (PAC) is also available for discharges eligible for restoration funding for the state's cost-share of site rehabilitation under the Petroleum Cleanup Participation Program (PCPP). Applications shall include a cost-sharing commitment for the PAC program in addition to the 25-percent-copayment requirement of the PCPP program. These provisions are not available for any discharge under the PCPP where the PCPP's 25-percent-copayment requirement has been reduced or eliminated.

Section 3. Section 376.3075, F.S., is amended to extend the life of the Inland Protection Financing Corporation from 2011 to 2025. The corporation is authorized to issue notes, bonds, etc. to pay for large-scale cleanups such as ports, airports, and terminal facilities, that are eligible for state cleanup funding assistance.

Section 4. This act takes effect July 1, 2005.

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:

This bill is intended to encourage owners or operators of underground petroleum storage systems to upgrade their tanks to secondary containment in advance of the December 31, 2009 deadline. Owners or operators have been reluctant to upgrade in advance of their site's priority cleanup number because of the threat of finding costly contamination previously not indicated. This bill would allow the owners or operators to be paid

\$50,000 for a single facility to remove and treat limited soil contamination associated with the tanks upgrades. In certain circumstances, the DEP could authorize up to \$100,000 for such treatments. The rest of the cleanup on the site would occur when the site's priority ranking number comes due. By removing some of the contamination at the time the tanks are upgraded, the ultimate cost to clean up the site may be less because of natural attenuation that may occur on the site

The DEP had expressed concerns that if the owners or operators waited until the deadline to upgrade the tanks, contractors would not be available to do the work in a timely fashion. As a result, many owners or operators could miss the deadline to upgrade and therefore could not operate until the tanks were upgraded.

The issues of affordability and availability of private pollution liability insurance coverage continue to cause problems for owners of underground and aboveground petroleum storage systems subject to the provisions of this legislation.

C. Government Sector Impact:

The amount of funds to be spent on a single facility for limited soil-source removals is capped at \$50,000. Under extreme circumstances, the DEP could authorize up to \$100,000 per facility. The bill statutorily limits the amount that can be encumbered from the IPTF each fiscal year for limited soil-source removals at \$10 million. Under this provision, a maximum of 200 sites per year could qualify for this limited soil-source removal funding.⁶

The bill also allows Inland Protection Trust Fund moneys to be spent on Department of Transportation sites ahead of their priority ranking because these sites could become unavailable for cleanup in the future due to road infrastructure and right-of-way projects. It is in the state's interest to remediate or clean up sites in a timely and cost-effective basis. The bill statutorily limits the amount that may be encumbered for DOT projects to \$1 million.

Currently, the excise tax on pollutants that is deposited into the IPTF is 80 cents per barrel of pollutant. At this rate, approximately \$215 million is deposited into the Inland Protection Trust Fund each year.⁷ For FY 2004-2005, the Legislature appropriated \$150 million from the IPTF for underground petroleum storage tank cleanups. For FY 2005-2006, the Governor has recommended in his budget proposal an appropriation of \$160 million for the underground petroleum storage tank cleanup program.

It is anticipated that the additional \$11 million for limited soil-source removals from Department of Transportation projects and underground storage tank replacements would not be an additional appropriation, but rather a special use earmarked from the \$160 million.

⁶ $10,000,000/50,000=200$.

⁷ 2004 Florida Tax Handbook estimates for FY 2003-2004 and FY 2004-2005.

The bill also would allow the Inland Protection Financing Corporation to issue notes or bonds to pay for large-scale cleanups at facilities such as ports, airports, and terminal facilities which are eligible for state cleanup funding. It is not anticipated that bonds would be issued in the foreseeable future, but the mechanism would be in place if needed. These large-scale cleanups are extremely expensive and other cleanups could be jeopardized if all of the cleanup funds from the IPTF were diverted to these cleanups.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

Barcode 895114 by Environmental Preservation:

Technical amendment to correct a misspelled word.

Barcode 703410 by Environmental Preservation:

Technical amendment to correct a reference to the DEP's underground storage tank rule.

Barcode 312614 by Environmental Preservation:

Technical amendment to clarify that the amount of funding allowed for dewatering is limited to 10 percent of the total interim soil-source removal costs.

Barcode 082196 by Banking and Insurance:

Technical substitute amendment for amendment (703410) to delete "Laws of Florida" and insert "Florida Administrative Code."

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