

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government, Safeguard Individual, and Promote Personal Responsibility:
The bill amends statutory language to further enhance the funding options and administration of the petroleum tank cleanup program which may reduce the cost and time of cleanup at contaminated petroleum storage sites for both the public (DOT) and the private sector.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

History of Petroleum Storage Tank Legislation/Programs:

(1983)

Water Quality Assurance Act of 1983:

The regulation of underground petroleum storage tanks began in the early 1980s with the recognition that below and above ground tanks were leaking and may present possible threats to the drinking water of the state. The legislative response to the problem began with the passage of the Water Quality Assurance Act of 1983, which provided for the following:

- Prohibition against petroleum discharges
- Cleanup of petroleum discharges
- State mandated cleanup if not done expeditiously
- Strict liability for petroleum contamination
- Inspection and monitoring of tanks

(1986)

State Underground Petroleum Environmental Response Act of 1986 (SUPER Act):

In 1985, the Legislature determined that an incentive program was needed to accelerate the assessment and cleanup process and created the State Underground Petroleum Environmental Response Act of 1986 (SUPER Act) to address problems associated with leaking petroleum tanks. The Legislature also created the Inland Protection Trust Fund (IPTF), section 376.3071, F.S.

The IPTF is a non-lapsing revolving trust fund with revenues generated from an excise tax per barrel of petroleum products currently produced or imported into the state to pay for the expedited cleanup of petroleum contaminated sites. The amount of the excise tax collected per barrel is dependent upon the unobligated balance of the IPTF according to the following formula:

- 30 cents per barrel if the unobligated IPTF balance is between \$100 - \$150 million
- 60 cents per barrel if the unobligated IPTF is between \$50 - \$100 million
- 80 cents per barrel if the unobligated IPTF is less than \$50 million¹

Currently, the tax is in the upper tier (80 cents per barrel). At this rate, the tax proceeds deposited into the IPTF amount to approximately \$215 million per year.²

In order to provide an incentive to report and expedite the clean up of contamination from leaking petroleum storage tanks, the SUPER Act established the Early Detection Incentive Program (EDI).

¹ Section 206.9935(3)(b), F.S.

² 2004 Florida Tax Handbook estimates for FY 2003-2004 and FY 2004-2005, p. 100.

This program was an “amnesty program” that allowed owners or operators of contaminated sites to:

- Clean up the contaminated sites themselves using private contractors along with their own monies and allow them to seek reimbursement from the Inland Protection Trust Fund (IPTF), or
- Have the contaminated site listed on the state’s priority cleanup list and wait for the state to clean up the site at a future date.

Due to the financial costs and other risks associated with the cleanup process, many owners or operators chose to have their sites placed on the state’s cleanup list. As a result, the state was inundated with sites which required cleanup. The EDI program’s eligibility ended in 1989.

(1988)

Petroleum Liability and Insurance Restoration Program:

The Petroleum Liability and Insurance Restoration Program (PLIRP) was created in its original form in 1988 in response to anticipated federal financial responsibility requirements. In the 1988 time period there were few, if any, private insurers writing coverage for petroleum-contaminated sites. PLIRP provided petroleum facilities that were in state regulatory compliance eligibility to purchase \$1 million in pollution liability protection from a state contracted insurer. PLIRP also provided \$1 million worth of site restoration coverage either through reimbursement or state cleanup. In 1992, with commercial liability insurance available in the marketplace, legislation was passed to return the responsibility for site cleanup to the responsible party and to phase out the DEP’s participation in the restoration insurance program by the end of 1998.

(1990)

Abandoned Tank Restoration Program:

In 1990, the Legislature established the Abandoned Tank Restoration Program to address the problem of out-of-service or abandoned tanks that have contamination associated with previous operations. Sites accepted in this program were eligible for reimbursement of cleanup costs upon satisfying certain criteria.

(1992)

In 1992, the Legislature substantially revised statutory provisions relating to the underground storage tank cleanup program to phase out the state’s cleanup program and most of the sites were shifted to the “reimbursement program.” As a result, the demand for reimbursement exceeded the administrative capacity of DEP and the funds available in the IPTF. By 1994, the program was in arrears of approximately \$550 million for unpaid claims.⁴

(1995)

Prior to the 1995 legislative session, three separate entities investigated the reimbursement program as a result of allegations of abuse, inefficiencies, and fraud. The investigations were conducted by the:

- Eleventh Statewide Grand Jury,
- Department of Banking and Finance (Office of the Comptroller), and
- Petroleum Efficiency Task Force.

In 1995, the Legislature sought to address the many issues facing the underground storage tank program. The Legislature enacted chapter 95-2, Laws of Florida, as a stop-gap measure to curtail the deficit of the IPTF by providing for a moratorium on cleanups and limitations on cleanup activities.

³ <http://www.dep.state.fl.us/waste/categories/pcp/pages/plirp.htm>

⁴ 2005 - DEP “Florida’s Petroleum Cleanup & Discharge Prevention Program Briefing”

(1996 to current date)

In 1996, comprehensive legislation was passed that transformed the program from a “reimbursement program” to a “prior-approval program” which is the basis for the current program to date. Highlights of the legislation include:

- Cleanup Criteria - The contaminated site cleanups are to be conducted in a “priority order” based on threats to human health and the environment and the “cost to cleanup” must be approved prior to the work being conducted.
- Inland Protection Financing Corporation (IPFC) - The IPFC was created to issue bonds to pay off the accumulated backlog of reimbursement claims. In February, 1998, the IPFC obtained \$262 million in bond proceeds. By 1999, the deficit balance created by the reimbursement program had been eliminated using a combination of bond proceeds and IPTF funds. DEP, however, reports that one large settlement is pending in court. Section 376.3075, F.S., authorizes IPFC through July 1, 2011.
- Petroleum Cleanup Participation Program (PCPP) - This program was created as a cost-share amnesty program. Sites qualifying for the program are eligible for up to \$300,000 of site rehabilitation funding with a co-payment of 25 percent of the costs by the owner, operator, or person responsible. The co-payment can be reduced if the owner demonstrates an inability to pay.
- Preapproved Advanced Cleanup Program (PACP) - The PACP is a cost share amnesty program which allows sites to be cleaned up out of priority order to facilitate real property transactions or public works projects.
- Risk-Based Corrective Action (RBCA) – DEP incorporates RBCA principles in its cleanup criteria rule. RBCA considers the actual risk to human health, public safety, and the environment in determining whether alternative cleanup strategies can be utilized to provide for cost-effective cleanups. RBCA allows for using alternative cleanup target levels, institutional and engineering controls, and remediation on a case-by-case basis.

Table A below lists the number of sites that have undergone cleanup or await cleanup, from 1986 to 2005.⁵

Table A: DEP Current Petroleum Program Statistics	
Total number of contaminated eligible sites identified from 1986 to 2005	18,058
Eligible sites undergoing cleanup in January 2005	4,211
Eligible sites awaiting cleanup in January 2005	9,340
Total number of eligible site closures (Cleanups Completed)	4,507
Total number of ineligible site closures (Cleanups Completed)	3,350

DEP’s goal is to have all state funded cleanups completed in approximately 25 years. The average cost to cleanup is approximately \$380,000 per site with the average time to complete a site cleanup to be three to five years per site.

⁵ DEP, 2005 Petroleum Contamination Cleanup and Discharge Prevention Programs Report
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Currently, there is not an Innocent Victim Petroleum Storage System Restoration program for property owners with contaminated sites that were acquired prior to July 1, 1990.

**Summary of The Florida Senate Interim Project Report 2005-153
Underground Petroleum Storage Tank Cleanup Program:**

In 2004, the Senate Environmental Preservation Committee completed an interim project which reviewed the underground petroleum storage tank cleanup program. The committee report identified the following issues for legislative consideration:

- ❖ 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 December 31, 2009.⁶ 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 where the DOT has a road project either scheduled or is underway and the site has a priority ranking score below that which is currently being cleaned. 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 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, section 376.3072, F.S., established the Petroleum Liability and Insurance Restoration Program (PLIRP) which was the primary means for demonstrating financial responsibility because insurance was either unavailable or unaffordable. The PLIRP program, however, does 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.

⁶ Rule 62-761.510, Florida Administrative Code.

- 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.

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 Insurance companies 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 three years.

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 schematic of the priority ranking system resembles a pyramid. At some point, the Legislature knew that there would be several sites that had the same priority number. The DEP needs authorization to “prioritize” sites within a particular priority score ranking.

- ❖ Provide financing for large-scale cleanups so that the Inland Protection Trust Fund is not in jeopardy for depletion of funds for the balance of remaining 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.

Effect of Proposed Change

This bill implements many of the recommendations of the Senate Environmental Preservation Committee’s Interim Report No. 2005-153, regarding the underground petroleum storage tank cleanup program.

- A. The bill amends section 376.3071, F.S., to:

- Direct 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. Encumbrances for the Free Product Recovery Initiative of section 376.3071(5)(c), F.S., and the PACP of section 376.30713, F.S., are specifically exempted from this provision. This amendment will aid DEP in improving the overall efficiency of the storage tank program because it will hinder the approval of large numerous projects early in the fiscal year which could encumber a disproportionate amount of total budget and result in the suspension or reduction of preapproved cleanup work later in the year pending the next year's appropriation.
- Require DEP to adopt rules to establish priorities based upon a scoring system for state-conducted cleanups. DEP may use the effective date of a DEP final order granting eligibility to establish a prioritization system within a particular priority scoring range. This amendment will allow DEP to introduce new cleanup sites into the preapproved system at a more controlled and continuous pace throughout the year as budget projections allow, which may result in more uniform encumbrances and contractor billings for DEP.

Limited Soil Source Removal Provisions Category:

For limited source removals associated with both "DOT road projects" and "secondary containment" upgrades:

- a) 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.
- b) 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 DOT road construction projects, as well as for secondary containment upgrading of tanks as required by chapter 62-761, Florida Administrative Code, in advance of the site's priority ranking for site cleanup activities.
- c) Funding for DOT and secondary containment upgrade source removals may not exceed \$50,000 for a single facility unless DEP determines that it is cost-effective and environmentally beneficial to exceed this amount, but in no event will DEP authorize costs in excess of \$100,000 for a single facility.
- d) DEP funding for limited interim soil-source removals associated with DOT 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.
- e) No more than \$1 million for DOT 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 in any fiscal year.

For limited source removals associated with "secondary containment" upgrades only:

- a) 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.
- b) Funding for limited source removals associated with secondary containment upgrades is limited to 10 sites in each fiscal year for each facility owner and any related person. 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.

- Clarify that once free product and limited source removals have been completed, and notwithstanding the order established by the priority ranking system, DEP may reevaluate the site to determine the degree of active cleanup needed to continue site rehabilitation. In addition, DEP will determine if the reevaluated site qualifies for natural attenuation monitoring or no further action.
 - Effective June 30, 2008, the limited source removal funding provisions are repealed. The limited soil source removal provisions may result in decreased overall cleanup costs because the eligible source removal costs are capped and limited in scope.
 - Provide that the Legislature, by law, must specifically approve a cleanup project to be financed before the DEP can enter into a service contract with the IPFC to pay for indebtedness for such project.
- B. The bill amends section 376.30713, F.S., to provide that the PACP is also available for discharges eligible for restoration funding under the PCPP for the state's cost share of site rehabilitation. Applications will include a cost-sharing commitment for the PACP program in addition to the 25 percent co-payment requirement of the PCPP program. This section of statute is not available for any discharge under the PCPP where the PCPP's 25 percent co-payment requirement has been reduced or eliminated. This amendment may result in decreased overall cleanup costs because of the larger percentage of cost share above 25 percent.
- C. The bill creates section 376.30715, F.S., to establish the innocent victim petroleum storage system restoration program for property owners with contaminated sites that were acquired prior to July 1, 1990. In order to be eligible for financial cleanup assistance, sites must have ceased operating as a petroleum storage or retail business prior to January 1, 1985.
- D. The bill amends section 376.3075, F.S., to extend the life of the IPFC 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. The IPFC is limited to indebtedness to less than \$10 million in any state fiscal year and is limited in its total outstanding debt to no more than \$100 million. This amendment may result in significant overall cost savings for the program because the cleanup activities, including source removal, can be coordinated with the long term development and redevelopment plans for maximum efficiency.

C. SECTION DIRECTORY:

- Section 1. Amends s. 376.3071, F.S., relating to petroleum remediation activities within the IPTF.
- Section 2. Amends s. 376.30713(1), F.S., to provide that the PACP is also available for discharges eligible for restoration funding under the PCPP for the state's cost share of site rehabilitation.
- Section 3. Creates s. 376.30715, F.S., to provide for innocent victim petroleum storage system restoration.
- Section 4. Amends s. 376.3075, F.S., to extend the life of the IPFC from 2011 to 2025 and authorizes the IPFC to issue notes, bonds, etc. within limits, to pay for large-scale cleanups that are eligible for state cleanup funding.
- Section 5. Provides the bill take effect July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.
2. Expenditures:
 - a. The bill provides for limited soil source recovery funds to be capped at \$50,000 for a single facility to spend on soil source removals. Under extreme circumstances, DEP may authorize up to \$100,000 per facility.
 - b. Currently, the excise tax that is deposited into the IPTF is 80 cents per barrel of pollutant which amounts to approximately \$215 million to be deposited into the IPTF each year.⁷ For FY 2004-2005, the Legislature appropriated \$150 million from the IPTF for underground petroleum storage tank cleanups. The Governor has recommended in his FY 2005-2006 budget proposal an appropriation of \$160 million for the underground storage tank cleanup program. House Bill 1885 contains an appropriation of \$170 million for the cleanup of leaking underground storage tanks.
 - c. The bill provides that no more than \$1 million for DOT 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 in any fiscal year. It is anticipated that the additional \$11 million (\$1 million for DOT limited source removal projects and no more than \$10 million for secondary containment upgrade limited source removal projects) would not be an additional appropriation, but rather a special use earmark from the proposed \$160 million requested by the Governor.
 - d. The bill authorizes the IPFC 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. 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 large scale cleanups. The amount of money associated with large scale cleanups is unknown due to the remediation being site specific and each site cleanup being unique; however, it is estimated that a cleanup of this magnitude would likely be a multi-million dollar expenditure. The IPFC is limited to indebtedness to less than \$10 million in any state fiscal year and is limited in its total outstanding debt to no more than \$100 million.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.
2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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. The bill provides for limited soil source recovery funds to be capped at \$50,000 for a single facility to spend on soil source removals. Under extreme circumstances, DEP may authorize up to \$100,000 per facility. The remaining 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.

⁷ 2004 Florida Tax Handbook estimates for FY 2003-2004 and FY 2004-2005, p. 100.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other: None.

B. RULE-MAKING AUTHORITY:

The bill requires DEP to adopt rules to establish priorities based upon a scoring system for state-conducted cleanups.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 11, 2005, the Agriculture and Environment Appropriations Committee met and adopted a strike-all amendment which is described in this analysis.