



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government:** The scope of petroleum related discharges that will require cleanup by state funded programs will likely increase as a result of this legislation. However, DEP reports the fiscal impact of this bill can be handled through the existing resources of the Inland Protection Trust Fund (IPTF) and will not require any additional appropriations.

**Safeguard Individual Liberty :** The scope of petroleum related discharges that will require cleanup by state funded programs will likely increase as a result of this legislation. However, DEP reports the fiscal impact of this bill can be handled through the existing resources of the IPTF and will not require any additional appropriations. The discovery of additional contamination that is folded into the existing state funded discharge cleanup may also provide an economic benefit to the insurance industry, as they will not have to fund the expanded cleanups.

**Promote Personal Responsibility:** The scope of petroleum related discharges that will require cleanup by state funded programs will likely increase as a result of this legislation. However, DEP reports the fiscal impact of this bill can be handled through the existing resources of the IPTF and will not require any additional appropriations. The discovery of additional contamination that is folded into the existing state funded discharge cleanup may also provide an economic benefit to the insurance industry, as they will not have to fund the expanded cleanups.

#### B. EFFECT OF PROPOSED CHANGES:

The Storage Tank Regulation Section is part of the Bureau of Petroleum Storage Systems in the DEP Division of Waste Management. In 1983, Florida was one of the first states in the country to pass legislation (State Underground Petroleum Environmental Response Act) and adopt rules for regulation of underground and aboveground storage tank systems. Since then, over 28,000 facilities have reported discharges of petroleum products from storage tank systems.

Florida relies on groundwater for about 92 percent of its drinking water needs, and has some of the most stringent water pollution rules in the country. To further the safeguards for the water system, all new and replacement petroleum storage tank systems must have secondary containment, and all remaining single-wall systems must replace their systems with secondary containment by the beginning of 2010. DEP contracts with counties to perform annual compliance inspections.<sup>1</sup>

Thousands of petroleum facilities that are eligible for state funded cleanups occasionally have additional discharges that are not covered by a state funded program. Distinguishing between the original discharge and the new discharge can be very difficult and determining the costs of cleanup associated with each discharge can be equally difficult. "Old discharges" at a site eligible for state-funded cleanup (reported prior to December 31, 1998) are eligible to be cleaned up using state funds. "New discharges" (reported after December 31, 1998) are not eligible for state funding. For those new discharges, the owner of the petroleum facility would be responsible for funding the cleanup through their environmental liability insurance for a new discharge.

The current environmental liability insurance policies in effect in Florida contain provisions that have proven to be problematic:

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<sup>1</sup> <http://www.dep.state.fl.us/waste/categories/pss/default.htm>

- 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.<sup>2</sup>

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.<sup>3</sup>

In 1999, the Legislature created section 376.30714, F.S., to provide a mechanism for DEP to distinguish between old and new discharges which allows DEP to negotiate and enter into site-rehabilitation agreements with applicants at sites in which there is existing contamination and in which a new discharge occurs.

In 2005, the Legislature provided funding for limited interim soil source removals for sites eligible for state funding that upgrade their underground petroleum storage tanks to secondary containment in advance of the site’s priority ranking for cleanup. This was done in an effort to expedite the required secondary containment upgrading of underground petroleum storage tanks in advance of the December 31, 2009 deadline due to owners or operators being reluctant to replace their tanks ahead of their priority ranking. Owners and operators are reluctant to replace tanks because treating the contaminated soil is expensive and the IPTF will not pay for such treatment out of priority order.<sup>4</sup> As a result, the contaminated soil is often put back into the ground and cleanup occurs when the site’s priority ranking comes due. However, even with the funding provisions enacted in 2005, many facility owners are still reluctant to upgrade their tanks early because their insurance carrier may cancel or refuse to renew their policies if they discover contamination and free product at the time of the upgrade, since it is difficult or impossible to distinguish between and “old discharge” that is eligible for state funding and the “new discharge” that the insurer must cover.

**Effect of Proposed Change**

The bill creates section 376.30716, F.S., relating to petroleum contamination. The bill provides the following two definitions relating to petroleum:

- “Exclusion zone” means the subsurface area within 10 feet of an underground storage tank, integral piping, and dispenser, and the area between the underground storage tank and dispenser.
- “Subsequently discovered discharge” means a discharge or suspected discharge on or after July 1, 2005, at a site eligible for state funding under ss. 376.305, 376.3071, or 376.3072, F.S.

Language in the bill acknowledges that it is difficult to distinguish between a discharge of petroleum products from a petroleum storage system which is eligible for state cleanup funding and which is not eligible for state cleanup funding. The bill stipulates that until a secondary containment upgrade of

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<sup>2</sup> HB 1735 CS, 2005

<sup>3</sup> Id.

<sup>4</sup> 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.

underground storage tanks is complete at a site, a subsequently discovered discharge at the site is presumed to be part of the original discharge that qualifies for state funding. However, the presumption does not apply:

- If the department presents competent and substantial evidence demonstrating that the subsequently discovered discharge occurred from a source that is independent and separate from the discharge that qualifies for state funding.
- To a site where petroleum storage systems have been upgraded, prior to July 1, 2005, to secondary containment in accordance with rule 62-761, F.A.C.
- To a site having newly discovered free product outside the exclusion zone.
- To a site having an increase in the concentration of existing petroleum contamination outside the exclusion zone of 1,000 percent or greater.
- To a site for which the department has, by a current valid order, determined that the discharge that is eligible for state funding has been cleaned up or no further action is necessary.

The bill exempts owners and operators of petroleum storage systems from section 376.30714, F.S., relating to DEP's negotiated agreements regarding "old discharges" and "new discharges" if the discharge is considered a subsequent discharge. The bill provides that DEP shall not, as part of a closure report or assessment for a site eligible for state funding, require soil or ground water sampling.

The bill provides that regardless of the discharge presumption provided in the bill:

- Owners or operators are required to report all incidents or discharges to DEP
- Owners or operators are to provide copies of all storage tank and piping tightness tests regardless of the results to DEP.

#### C. SECTION DIRECTORY:

Section 1 Creates section 376.30716, F.S., relating to subsequent petroleum discharges and eligibility for state funding.

Section 2 Provides the act will take effect upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None.
2. Expenditures: None. DEP reports the fiscal impact of this bill can be handled through the existing resources of the IPTF and will not require any additional appropriations.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is anticipated that the bill would further encourage petroleum facilities to perform the secondary containment upgrading of underground petroleum storage tanks in advance of the December 31, 2009

deadline. The discovery of additional contamination that is folded into the existing state funded discharge cleanup may also provide an economic benefit to the insurance industry, as they will not have to fund the expanded cleanups.

D. FISCAL COMMENTS:           None.

### **III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

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.

1. Applicability of Municipality/County Mandates Provision:

2. Other:           None.

B. RULE-MAKING AUTHORITY:

No additional rule making authority is required to implement the provisions of this bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:   None.

### **IV.     AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

None