

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Environmental Preservation and Conservation

BILL: SB 1278

INTRODUCER: Senator Grimsley

SUBJECT: Fuel Storage

DATE: April 18, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Mitchell	Rogers	EP	Pre-meeting
2.	_____	_____	AEN	_____
3.	_____	_____	AP	_____

I. Summary:

SB 1278 expands the use of the Inland Protection Trust Fund (IPTF) to authorize the Department of Environmental Protection (DEP) to pay \$10 million annually for the repair and replacement of storage tanks, piping, or system components that may have been damaged by the storage of fuels blended with ethanol or biodiesel or to take preventive measures to reduce the potential for such damage. The bill establishes application procedures, DEP review requirements, limitations on use of the funds, authorization for DEP to seek third party assistance to implement the program, and requirements for DEP to ensure that future petroleum storage systems meet new compatibility requirements.

The bill has a \$10 million recurring impact to the IPTF.

II. Present Situation:

Inland Protection Trust Fund

Petroleum is stored in thousands of underground and aboveground storage tank systems throughout Florida. Releases of petroleum into the environment may occur as a result of accidental spills, storage tank system leaks, or poor maintenance practices. These discharges pose a significant threat to groundwater quality, the source of 90 percent of Florida's drinking water. The identification and cleanup of petroleum contamination is particularly challenging due to the geology in Florida, diverse water systems, and the complex dynamics between contaminants and the environment.

In 1983, Florida began enacting legislation to regulate underground and aboveground storage tank systems in an effort to protect Florida's groundwater from past and future petroleum releases.¹ The Department of Environmental Protection (DEP) regulates these storage tank

¹ Chapter 83-310, Laws of Fla.

systems.² Further, DEP may establish criteria for the prioritization, assessment and cleanup, and reimbursement for the cleanup of areas contaminated by leaking underground petroleum storage tanks.³ The Petroleum Restoration Program (PRP) establishes the requirements and procedures for cleaning up contaminated land, as well as the circumstances under which the state will pay for the cleanup.⁴

An owner of contaminated land or the person who caused the discharge is responsible for rehabilitating the land, unless the site owner can show that the contamination resulted from the activities of a previous owner or other third party (responsible party), who is then responsible.⁵ Over the years, DEP has implemented different programs to provide state financial assistance to certain eligible site owners and responsible parties for site rehabilitation. To receive rehabilitation funding assistance, a site must qualify for one of the following Petroleum Cleanup Eligibility Programs:

- Early Detection Incentive Program (EDI), s. 376.3071(10), F.S.;
- Petroleum Liability and Restoration Insurance Program (PLRIP), s. 376.3072, F.S.;
- Abandoned Tank Restoration Program (ATRP), s. 376.305(6), F.S.;
- Innocent Victim Petroleum Storage System Restoration Program (Innocent Victim Program), s. 376.30715, F.S.;
- Petroleum Cleanup Participation Program (PCPP), s. 376.3071(13), F.S.; and
- Consent Order (aka “Hardship” or “Indigent”), s. 376.3071(8)(e), F.S.

To fund the cleanup of contaminated petroleum sites, the Legislature created the Inland Protection Trust Fund (IPTF).⁶ The state levies an excise tax on each barrel of petroleum and petroleum products in or imported into the state to fund the IPTF.⁷ The state determines the amount of the excise tax for each barrel based on a formula that is dependent upon the unobligated balance of the IPTF.⁸ Each year, the Legislature deposits approximately \$200 million from the excise tax into the IPTF.⁹

When DEP determines that incidents of inland contamination related to the storage of petroleum or petroleum products may pose a threat to the public health, safety, or welfare; water resources; or the environment, it must obligate the funds in the IPTF for:

- Prompt investigation and assessment of contamination sites;
- Expedient restoration or replacement of potable water supplies;
- Rehabilitation of contamination sites based on DEP’s cleanup criteria. DEP may not obligate funds for payment of costs which may be associated with, but are not integral to, site rehabilitation, such as the cost for retrofitting or replacing petroleum storage systems;

² Sections 376.30(3) and 376.303, F.S.

³ Section 376.3071(5), F.S.

⁴ DEP, *Petroleum Restoration Program*, <http://www.dep.state.fl.us/waste/categories/pcp/default.htm> (last visited April 14, 2017).

⁵ Section 376.308, F.S.

⁶ Section 376.3071(3) and (4), F.S.

⁷ Sections 206.9935(3) and 376.3071(7), F.S.

⁸ The amount of the excise tax per barrel is based on the following formula: 30 cents if the unobligated balance is between \$100 million and \$150 million; 60 cents if the unobligated balance is above \$50 million, but below \$100 million; and 80 cents if the unobligated balance is \$50 million or less, s. 206.9935(3), F.S.

⁹ DEP, *Agency Analysis of 2017 HB 753*, 2 (March 3, 2017).

- Maintenance and monitoring of contamination sites;
- Inspection and supervision of activities conducted with IPTF funds;
- Payment of expenses incurred by DEP in its efforts to obtain from responsible parties the payment or recovery of reasonable costs resulting from cleanup activities;
- Payment of any other reasonable costs of administration, including those administrative costs incurred by the Department of Health in providing field and laboratory services, toxicological risk assessment, and other assistance to DEP in the investigation of drinking water contamination complaints and costs associated with public information and education activities;
- Establishment and implementation of a compliance verification program including contracting with local governments or state agencies to provide for the administration of such program through locally administered programs, to minimize the potential for further contamination sites;
- Funding ATRP and PLRIP;
- Activities related to removal and replacement of petroleum storage systems, exclusive of costs of any tank, piping, dispensing unit, or related hardware, if soil removal is approved as a component of site rehabilitation and requires removal of the tank where remediation is conducted or if such activities were justified in an approved remedial action plan;
- Reasonable costs of restoring property as nearly as practicable to the conditions that existed before activities associated with contamination assessment or remedial action;
- Repayment of loans to the IPTF;
- Expenditure of sums to cover ineligible sites or costs for PRPP;
- Payment of amounts payable under any service contract entered into by DEP with the Inland Protection Financing Corporation;
- Petroleum remediation throughout a state fiscal year;
- Enforcement of the storage tank regulations by the Fish and Wildlife Conservation Commission; and
- Payments for program deductibles, copayments, and limited contamination assessment reports that otherwise would be paid by another state agency for state-funded petroleum contamination site rehabilitation.¹⁰

As of January 2017, there were approximately 19,927 petroleum contaminated sites eligible for clean up under the IPTF existed throughout the state. DEP completed cleanup of 9,240 sites. DEP is currently working on eligible sites in the following categories: assessment 4,531; active remediation 1,044; and passive remediation 1,368.¹¹

Secondary Containment Upgrades

In 1990, DEP adopted rules to require facilities that store petroleum to install secondary containment devices to prevent the release of petroleum from their storage systems. “Secondary containment” is a release detection and discharge prevention system that meets DEP’s performance requirements adopted in rule and includes dispenser sumps, piping sumps, spill containment systems, the outer wall of double-walled tanks and integral piping, or the liner or an

¹⁰ Section 376.3071(4), F.S.

¹¹ DEP, *Agency Analysis of 2017 HB 753*, 2 (March 3, 2017).

impervious containment area surrounding single-walled tanks, or integral piping.¹² The secondary containment rules require that petroleum storage systems must be constructed of materials impervious to the regulated substance being stored; use non-corrosive or corrosion protected materials; be designed and installed to direct any release to a monitoring point; meet certain requirements if they are single walled; be double walled if they do not meet single walled requirements; provide monitoring; use protective coating for certain materials; use spill containment systems; and use overfill devices and automatic shut offs.¹³ Owners of petroleum storage systems spent significant sums of money to upgrade their storage systems to meet the new requirements. These upgrades and requirements lowered the number of reported spills in Florida from 400 releases per month to 120 releases per year.¹⁴

New Fuel Standards

The United States Congress created the Renewable Fuel Standard program to reduce greenhouse gas emissions and expand the nation's renewable fuel sector while reducing reliance on imported oil. This program was authorized under the Energy Policy Act of 2005 and expanded under the Energy Independence and Security Act of 2007.¹⁵ These acts amended the Clean Air Act to require a certain volume of renewable fuel to replace or reduce the quantity of petroleum-based transportation fuel, heating oil, or jet fuel.¹⁶ This led to an increased use of ethanol and biodiesel as an additive to gasoline and diesel, respectively.

After the expanded use of these alternative fuels, the retail fuel industry observed unusual corrosion within their petroleum storage tank systems.¹⁷ The chemical characteristic of the alternative fuels may affect how they interact with petroleum storage tank systems. Some materials in some petroleum storage tank systems may not perform as intended if storing certain fuels or blends and may be incompatible with those fuels. If petroleum storage tank system materials are not compatible with substances stored in petroleum storage tanks, releases to the environment may occur as a result of corrosion caused by alternative fuels. In 2015, the United States Environmental Protection Agency (EPA) updated the regulations for underground storage tank systems to require owners and operators to use a storage tank system made of or lined with materials that are compatible with the substance stored in the storage tank system.¹⁸ These changes occurred after owners and operators in Florida upgraded their petroleum storage tank system systems to meet the secondary containment requirements.

¹² Fla. Admin. Code R. 62-761.200(53) and Fla. Admin. Code R. 62-762.201(67).

¹³ Fla. Admin. Code R. 62-761.500, Fla. Admin. Code R. 62-762.501, and Fla. Admin. Code R. 62-762.502.

¹⁴ Marshall Mott-Smith and Edward W. English, *Alternative Fuels – How Ethanol Fuels and Biodiesel Are Damaging Our Petroleum Storage System Infrastructure*, 6 (on file with the Senate Committee on Environmental Preservation and Conservation).

¹⁵ EPA, *Renewable Fuel Standard Program*, <https://www.epa.gov/renewable-fuel-standard-program> (last visited April 15, 2017).

¹⁶ EPA, *Program Overview for Renewable Fuel Standards Program*, <https://www.epa.gov/renewable-fuel-standard-program/program-overview-renewable-fuel-standard-program> (last visited April 14, 2017).

¹⁷ Marshall Mott-Smith and Edward W. English, *Alternative Fuels – How Ethanol Fuels and Biodiesel Are Damaging Our Petroleum Storage System Infrastructure*, 6, (on file with the Senate Committee on Environmental Preservation and Conservation).

¹⁸ EPA, *Alternative Fuels and Underground Storage Tanks (USTs)*, <https://www.epa.gov/ust/alternative-fuels-and-underground-storage-tanks-usts> (last visited April 16, 2017).

III. Effect of Proposed Changes:

SB 1278 adds the following findings regarding the Inland Protection Trust Fund (IPTF):

- Congress enacted the Energy Policy Act of 2005, amending the Clean Water Act, to establish a Renewable Fuel Standard requiring the use of ethanol as an oxygenate additive for gasoline and biodiesel as an additive for ultra-low sulfur diesel fuel;
- An unintended consequence of the inclusion of ethanol in gasoline and biodiesel in diesel fuel has been to cause, and potentially cause, significant corrosion and other damage to storage tanks, piping, and storage tank system components regulated under ch. 403, F.S.;
- Florida enacted secondary containment requirements before the mandated introduction of ethanol into gasoline and biodiesel into ultra-low sulfur diesel fuel;
- Storage tanks, piping, and storage tank system components have been found to meet compatibility standards by the Department of Environmental Protection (DEP) in its equipment approval process;
- These compatibility standards, however, may have changed subsequent to DEP approvals as a result of the introduction of ethanol and biodiesel; and
- Therefore, owners and operators of petroleum storage facilities in Florida who complied with the state's secondary containment requirements and installed approved equipment are at particular risk of being forced to repair or replace equipment or take other preventive measures in advance of the end of the expected useful life of the equipment in order to prevent releases or discharges of pollutants because the equipment may not have been evaluated for:
 - Compatibility with ethanol and biodiesel;
 - Cross-contamination due to the storage of gasoline and diesel fuel; and
 - The effects of condensation and minimal amounts of water in storage tanks;

The bill adds as an additional purpose of the IPTF that its funds are available for DEP to use in responding immediately to damage or potential damage to storage tank systems caused by ethanol or biodiesel which could result in incidents of inland contamination. The bill also adds as an additional use of the IPTF that moneys available in the fund may be obligated to provide for the payment of equipment, excavation, electrical work, and site restoration costs related to petroleum storage systems damaged by ethanol or biodiesel.

The bill requires DEP to pay up to \$10 million each fiscal year from the IPTF for labor and equipment costs to repair or replace petroleum storage systems that may have been damaged from the storage of fuels blended with ethanol or biodiesel, or for preventive measures to reduce the potential for such damage.

The bill provides that a petroleum storage system owner or operator may request payment from DEP for:

- The repair or replacement of petroleum storage tanks, integral piping, or ancillary equipment that may have been damaged, or is subject to damage, by the storage of fuels blended with ethanol or biodiesel; or
- Other preventive measures to ensure compatibility with ethanol or biodiesel.

An application for payment submitted to DEP by the owner or operator of a petroleum storage system must include the following:

- An affidavit from a petroleum storage system specialty contractor that:
 - Attests to an opinion that the petroleum storage system may have been damaged as a result of the storage of fuel blended with ethanol or biodiesel or may not be compatible with fuels containing ethanol or biodiesel, or a combination of both;
 - Includes a proposal from the specialty contractor for repair or replacement of the equipment, or for the implementation of other preventive measures to reduce the probability of damage; and
 - States the reasons that repair or other preventive measures are not technically or economically feasible or practical for any equipment that the specialty contractor proposes to replace;
- Copies of any inspection reports, including photographs, prepared by the specialty contractor or DEP or local program inspectors documenting the damage or potential for damage to the petroleum storage system;
- A full proposal from the specialty contractor showing the proposed scope of the repair, replacement, or other preventive measures, including a detailed list of labor and equipment, and other associated costs. If the proposal is for the repair or replacement of equipment, it must also include provisions for any measures needed to prevent a recurrence of the damage, such as the:
 - Use of corrosion inhibitors;
 - Application of coatings compatible with ethanol or biodiesel, as appropriate; and
 - Adoption of a maintenance plan; and
- For proposals to replace storage tanks or piping, the application must also include:
 - A statement from a certified public accountant indicating the depreciated value of the tanks or piping proposed for replacement which must be the maximum allowable replacement cost for the storage tank and piping, exclusive of labor costs, except that tanks that are 20 years old or older are deemed to be fully depreciated and have no replacement value; and
 - Documentation of the age of the storage tank or piping, which may be determined by using historical tank registration records.

The bill requires DEP, upon receipt of an application, to:

- Review it for completeness, accuracy, and the reasonableness of costs and scope of work; and
- Within 30 days after receipt, approve it, deny it, propose modifications to it, or request additional information.

Upon approval of an application, DEP must issue a purchase order to the petroleum storage system owner or operator which:

- Reflects a payment due to the owner for the cost of the scope of work approved by DEP, less a deductible of 25 percent;
- States that no moneys are due to the owner pursuant to the purchase order until the scope of work authorized by DEP has been completed in substantial conformity with the purchase order;
- Except for preventive maintenance contracts under an approved application, the purchase order must specify that the work authorized in the purchase order must be substantially

- completed and paid for by the petroleum storage system owner or operator within 180 days after the date of the purchase order, after which time the purchase order is void; and
- With regard to preventive maintenance contracts under an approved application, the purchase order must include a maintenance completion and payment deadline schedule developed by DEP under which, if the owner or operator fails to meet the scheduled deadlines, the purchase order is invalidated for all future payments due pursuant to the order.

The bill requires DEP, for maintenance contracts, to make periodic payments in accordance with the schedule specified in the purchase order upon a satisfactory showing that maintenance work has been completed and costs have been paid by the owner or operator as specified in the purchase order.

For repair or replacement costs, the applicant may request that DEP make payment following completion of the work authorized by DEP, in accordance with the terms of the purchase order. The request must include a sufficient demonstration that the work has been completed in substantial conformance with the purchase order and that the costs have been fully paid, in which event DEP must issue payment in accordance with the terms of the purchase order.

The bill provides that DEP may develop forms to be used for application and payment procedures, but that, until such forms are developed, an applicant may submit the required information in any format, as long as documentation is complete. DEP may also request the assistance of the Department of Management Services or a third-party administrator to assist in the administration of the application and payment process, the costs of which must be paid from the IPTF.

The bill provides that use of the IPTF to pay costs of petroleum storage systems damaged by ethanol or biodiesel pursuant to the provisions of the bill does not affect the obligations of facility owners or operators or petroleum storage system owners or operators to timely comply with DEP rules regarding the maintenance, replacement, and repair of petroleum storage systems in order to prevent a release or discharge of pollutants.

The bill provides that payments from the IPTF for petroleum storage systems damaged by ethanol or biodiesel may not be made for the following:

- Proposal costs or costs related to preparation of the application and required documentation;
- Costs of certified public accountants;
- Any costs in excess of the amount approved by DEP in the purchase order or which are not in substantial compliance with the purchase order;
- Costs associated with storage tanks, piping, or ancillary equipment previously repaired or replaced with funding from the IPTF;
- Facilities not in compliance with DEP storage tank rules, until such time that noncompliance issues have been resolved; and
- Costs associated with damage to petroleum storage systems caused in whole or in part by causes other than the storage of fuels blended with ethanol or biodiesel.

The bill prohibits DEP from issuing purchase orders for the payment of costs for petroleum storage systems damaged by ethanol or biodiesel unless funds remain for the current fiscal year.

A petroleum storage system owner or operator is prohibited from receiving more than \$200,000 per year for equipment replacement, repair, or preventive measures at any single facility, or \$500,000 per year in aggregate for all facilities it owns or operates.

The bill authorizes owners or operators who have incurred costs for repair, replacement, or other preventive measures for petroleum storage systems damaged by ethanol or biodiesel during the period from July 1, 2015 through June 30, 2017 to apply with DEP to request payment for such costs from the IPTF. DEP is prohibited from disbursing payment for costs pursuant to any such applications that are approved until such time as all purchase orders for previously approved applications have been paid and unless funds remain available in the fiscal year for the payment of such costs. Any such payments are subject to a deductible of 25 percent of the cost of the scope of work approved by DEP in its review and approval of each application.

The bill requires DEP to ensure that petroleum storage systems approved after July 1, 2017 meet applicable standards for compatibility with ethanol blends, biodiesel blends, and other alternative fuels that are likely to be stored in such systems.

The bill takes effect July 1, 2017

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will likely have a positive economic impact on owners and operators of petroleum storage tank systems that may have been damaged, or that could be damaged, by the storage of fuels blended with ethanol or biodiesel.

C. Government Sector Impact:

The bill has a \$10 million recurring impact to the IPTF.

The bill authorizes DEP to develop forms for application and payment procedures. Forms that impose any requirement or solicit any information not specifically required by statute or existing rule are “rules” for the purposes of the administrative procedures act.¹⁹ If DEP develops forms that meet the definition of “rules,” it must follow the rulemaking procedures. DEP possesses sufficient rulemaking authority to amend its IPTF rules to conform to changes made in the statutes, if necessary.

VI. Technical Deficiencies:

SB 1278 amends s. 376.3071, F.S., upon the expiration and reversion of the amendments to that section made pursuant to sections 95 and 126 of chapter 2016-62, Laws of Florida. This language in the directory clause of section 1 of the bill may be unnecessary as there are no amendments due to expire or revert to those subsections or paragraphs of s. 376.3071, F.S., amended by SB 1278.

VII. Related Issues:

The bill creates s. 376.3071(1)(h), F.S., to state Congress enacted the Energy Policy Act of 2005, amending the Clean Water Act, to establish a Renewable Fuel Standard. While the Energy Policy Act of 2005 amended the Clean Water Act for other reasons, it amended the Clean Air Act as it relates to fuel standards.²⁰ The bill may need to be amended to reflect that the Energy Policy Act of 2005 amended the Clean Air Act to establish the Renewable Fuel Standards.

Currently, s. 376.3071(4)(c), F.S., prohibits DEP from using IPTF funds to pay for the cost of retrofitting or replacing petroleum storage systems. The bill may need to amend this paragraph to avoid conflict with the bill’s amendment to s. 376.3071(4)(j), F.S., and the creation of s. 376.3071(4)(r), F.S., that authorize such activities.

The bill creates s. 376.3071(15)(a), F.S., to authorize owners and operators to request payment for the repair or replacement of ancillary equipment. “Ancillary equipment” is a broad term open to an expansive interpretation. It is unclear whether “ancillary equipment” is synonymous with “related hardware” used in s. 376.3071, F.S.

The bill creates s. 376.3071(15)(g)3., F.S., to prohibit DEP from paying costs in excess of those approved by the purchase order, except as provided in paragraph (k). The bill does not include a paragraph (k) in s. 376.3071(15), F.S.

The bill creates s. 376.3071(15)(h), F.S., to authorize applications to be submitted on a first-come, first-served basis, which appears to convey no meaning in that the submission of an application is voluntary. The bill does not indicate the order that DEP should review or approve the applications, which may need clarification.

VIII. Statutes Affected:

The bill substantially amends section 376.3071 of the Florida Statutes.

¹⁹ Section 120.52(16), F.S.

²⁰ EPA, *Program Overview for Renewable Fuel Standard Program*, <https://www.epa.gov/renewable-fuel-standard-program/program-overview-renewable-fuel-standard-program> (last visited April 15, 2017).

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
