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 2126

INTRODUCER: Senator Baker

SUBJECT: Petroleum Contamination

DATE: April 20, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Branning	Kiger	EP	**Favorable**
2.	Emrich	Deffenbaugh	BI	**Favorable**
3.			GA	
4.				
5.				
6.				

I. Summary:

This bill creates a statutory presumption regarding the discovery of contamination at those underground petroleum storage tank sites that are being upgraded to secondary containment as required by the Department of Environmental Protection's rules. The contamination is presumed to be part of the original discharge that qualified the site for state cleanup funding. Provides the conditions under which the presumption does not apply.

This bill creates the following section of the Florida Statutes: s. 376.30716.

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 there was 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 are estimated to be approximately $240.3 million for FY 2005-2006, and $245 million for FY 2006-2007.[1]

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 Protection[2] (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 $551.5[3] million for unpaid claims.

Comprehensive legislation was passed in 1996 that moved the program from a reimbursement program to a prior-approval program and provided a mechanism to pay off the backlog of unpaid claims for reimbursement. The prior-approval program has been successful in managing the demand for cleanup of these contaminated sites.

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, s. 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, 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.

An issue that continues to be problematic is one concerning when the discharge that causes the contamination occurred. "Old discharges" at a site eligible for state-funded cleanup (those

[1] 2006 Florida Tax Handbook (draft) estimates for FY 2005-2006 and FY 2006-2007.
[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.

reported before December 31, 1998) are eligible to be cleaned up using state funds. “New discharges” (those reported after December 31, 1998) are not. The cleanup of these discharges would be covered by the owner or operator of the facility through his environmental insurance. In 1999, the Legislature created s. 376.30714, F.S., 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 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.

A conscious effort was made in Florida to phase out the PLIRP in favor of developing a market for private environmental insurance. The current private insurance policies in effect in Florida contain provisions that have proven to be problematic. Many of these provisions concern the issue of “old discharges” and “new discharges.” Those provisions include the following:

- 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.

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.

Legislation passed in 2005 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 upgrading of underground petroleum storage tanks in advance of the December 31, 2009, deadline because owners or operators have been reluctant to replace their tanks ahead of their priority ranking. They are reluctant 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 often is put back into the ground and cleanup occurs when the site’s priority ranking comes due. Further, the DEP was concerned that the owners or operators would 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. 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 "old discharge" that is eligible for state funding and the "new discharge" that the insurer must cover.

III. Effect of Proposed Changes:

Section 1. Creates s. 376.30716, F.S., pertaining to the cleanup of certain sites. The bill defines the terms "exclusion zone" to mean 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 and "subsequently discovered discharge" to mean a discharge or suspected discharge that is discovered on or after July 1, 2005, at a site eligible for state funding under sections 376.305, 376.3071, or 376.3072, F.S.

The bill reiterates current language in s. 376.30714, F.S., which states that it may be difficult to distinguish between petroleum discharges from a system eligible for state funding and a system not eligible for such funding reported after December 31, 1998. The legislation creates a statutory presumption by providing that until the secondary containment upgrade of underground storage tanks, as required by Rule 62-761, F.A.C., 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, this presumption does *not* apply:

- If the DEP 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 DEP 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.

This bill further provides that s. 376.30714, F.S., relating to DEP's negotiated agreements regarding "old discharges" and "new discharges," does not apply to a subsequently discovered discharge. The DEP shall not, as part of a closure report or assessment for a site that is eligible for state funding require soil or groundwater sampling.

Regardless of the discharge presumption provided for in this bill, a facility owner or operator is required to report all incidents or discharges in accordance with DEP rules and shall provide the DEP with a copy of all test results of storage tank and piping tightness, regardless of the results.

Section 2. The 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:

This bill provides a presumption as to when a petroleum discharge occurred. For purposes of upgrading the underground storage tank systems to the required secondary containment, this presumption is intended to clarify that contamination found during the upgrade is presumed to be related to the "old discharge" and would be covered by the state cleanup funding program, and not by the facility owner or operator's insurance.

The effect of the presumption will provide an economic benefit to petroleum storage insurers as they will not have to fund the cleanup of contaminated petroleum storage tank sites that are being upgraded to secondary containment as required by the DEP, unless the presumption is overcome. Limitation of an insurer's exposure may encourage insurers to provide additional pollution liability coverage.

It is anticipated that this bill would remove an impediment to the facility owner or operator to begin upgrading early and allow the facility owner or operator to take advantage of the financial incentives provided by the 2005 Legislature to upgrade early.

C. Government Sector Impact:

The DEP had expressed concern that all of the required upgrades to underground storage systems would try to be done right before the December 31, 2009, deadline and that contractors would not be available to do the work. The Legislature in 2005 allowed limited funds from the Inland Protection Trust Fund to be used to facilitate the upgrading of underground storage systems in advance of the deadline. It is anticipated that this bill will further encourage some of these facilities to upgrade in advance of the deadline, thereby affording more environmental protection.

Representatives with the DEP state that the bill has a fiscal impact of approximately $3,150,000 for fiscal year 2006-07.[4] However, this legislation will not require additional

[4] This figure assumes an average of 168 discharges per year occurring on sites that have an eligible discharge that is either not within the funding range to be cleaned up or it is in the process of being cleaned up. If this trend of 168 discharges per year continues for the next four years (until completion of secondary containment upgrades by December 31, 2009) and 75 percent of the 168 discharges are considered part of the original eligible discharge, then 126 discharges per year will require

funding because such funding is already provided for in the DEP budget request for fiscal year 2006-2007 from the Inland Protection Trust Fund, according to department officials.[5]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

cleanup. Further, if each of the 126 discharges increases the total cost of a state funded cleanup by an amount of $25,000, the annual increased costs would be approximately $3,150,000, or $12,600,000 over a four year period.

[5] DEP staff states that the Governor's recommended budget request is for $171,000,000, while the Senate has proposed $191,000,000, and the amount proposed by the House is $183,000,000.

VIII. Summary of Amendments:

None.