The Florida Senate

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Committee on Environmental Preservation Senator Paula Dockery, Chair

UNDERGROUND PETROLEUM STORAGE TANK CLEANUP PROGRAM

SUMMARY

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. The act established the Early Detection Incentive Program, or EDI, as an incentive to report and clean up contamination from leaking petroleum storage systems. Sites reported under this program were eligible for cleanup using state funds. The owner or operator could clean up the site himself using a private contractor and then be reimbursed from the Inland Protection Trust Fund (also known as the reimbursement program), or have their site listed on the state's priority cleanup list and wait for the state to clean up the site.

To encourage participation in the reimbursement program, the Legislature provided a number of incentives such as allowing partial restoration payments as the work progressed and the payment of interest to responsible parties on amounts that were due.

The Abandoned Tank Restoration Program was established in 1990 to facilitate the restoration of sites contaminated by abandoned underground petroleum storage systems. Sites in this program are eligible for reimbursement of cleanup costs after satisfying certain criteria.

The state's underground storage tank provisions were revised in 1992 to phase out the state's cleanup program and shift the sites to the reimbursement program. To pay for the expanded reimbursement program, the excise tax on petroleum and petroleum products which is deposited into the Inland Protection Trust Fund was increased. Currently, the tax is at the upper or third tier which is 80 cents per barrel of pollutant. At this rate, approximately $215 million is deposited annually into the Inland Protection Trust Fund, most of which is available for cleanups.

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[1] and the financial resources of the Inland Protection Trust Fund. 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 million for unpaid claims.

Prior to the 1995 legislative session, three separate entities investigated Florida's reimbursement program in response to allegations of abuse, inefficiencies, and fraud. The 1995 Legislature sought to address the many problems facing the program. No resolution or agreement was reached on the comprehensive petroleum cleanup bill that year; however, ch. 95-2, Laws of Florida, was enacted as a stop-gap measure to "stop the bleeding" on the fund by providing for a moratorium and limitations on cleanup activities.

Ultimately, comprehensive revisions to the underground petroleum storage tank cleanup program were enacted in 1996. That legislation:

- Provided for the issuance of 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 (Preapproved Advanced Cleanup Program);
- Directed the Department of Environmental Protection to incorporate risk-based corrective-action principles in its cleanup criteria rule; and

[1] At that time it was the Department of Environmental Regulation. Currently, the Department of Environmental Protection administers the underground storage tank program.

- Required contaminated site cleanups to be conducted in priority order on a prior approval costs basis.

There have been no major revisions or legislative reviews since the state's underground petroleum storage cleanup program was substantially revised in 1996. Recently, issues have arisen that may need legislative direction.

BACKGROUND

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. The Early Detection Incentive Program, or EDI, was established as an incentive to encourage early detection, reporting, and cleanup of contamination from leaking underground petroleum storage systems. Under the EDI program, owners or operators could clean up the sites themselves using private contractors and their funds and then be reimbursed from the Inland Protection Trust Fund; or have their site listed on the state's priority cleanup list and wait for the state to clean up the site. The reporting period for eligibility under the EDI program ended on December 31, 1988. Because of financial and other risks involved in the cleanup process, many owners and operators chose to have their sites listed on the state cleanup list. The number of reported sites far exceeded the initial estimates and the state was overwhelmed with sites needing cleanup.

The Legislature in 1989 provided a number of incentives to encourage participation in the reimbursement program. Those incentives included expanding the uses of the Inland Protection Trust Fund to pay for removal and replacement of storage tanks, and reimbursement for the required certified public accountant examinations. In 1990, the incentives were expanded to include partial restoration payments as the work progressed and the payment of interest to responsible parties on the amounts that were due.

The Abandoned Tank Restoration Program was established in 1990 in response to the need to provide financial assistance for cleanup of sites that have abandoned petroleum storage systems. Sites accepted into this program are 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 cleanup program. Legislation that year provided that the state would phase out its cleanup program and the sites would be shifted to the reimbursement program, thereby requiring the owner or operator of the contaminated sites to bear a portion of the financial liability. Small businesses or not-for-profit corporations could be exempted from this requirement. The legislation also provided that interest was to be paid on the reimbursements. To pay for the revised reimbursement program, the excise tax on petroleum and petroleum products which is deposited in the Inland Protection Trust Fund was increased. The excise tax structure for the Inland Protection Trust Fund 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.[2] At this rate, the proceeds of the tax distributed to the Inland Protection Trust Fund amount to approximately $215 million per year.[3]

The incentives to participate in the reimbursement program proved to be extremely successful. In fact, the demand for reimbursement far exceeded the administrative capacity of the department[4] and the financial resources of the Inland Protection Trust Fund. 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 million.[5]

Over 18,000 petroleum sites had been identified as having been contaminated and in need of cleanup. The vast majority of the annual revenues in the Inland Protection Trust Fund were spent on the petroleum cleanup reimbursement program and the state cleanup program.

Prior to the 1995 legislative session, three separate entities investigated Florida's reimbursement program in response to allegations of abuse, inefficiencies, and fraud. Those entities included the Eleventh Statewide Grand Jury, the Department of Banking and Finance

[2] s. 206.9935(3), F.S.
[3] 2004 Florida Tax Handbook estimates for FY 2003-2004 and FY 2004-2005, p. 100.
[4] At that time it was the Department of Environmental Regulation. Currently, the Department of Environmental Protection administers the underground storage tank program.
[5] Petroleum Contamination Cleanup and Discharge Prevention Programs, March 2004, DEP, p. 14.

(Office of the Comptroller), and the Petroleum Efficiency Task Force. The 1995 Legislature sought to address the many problems facing the underground storage tank program. Legislation that year attempted to address those allegations by prioritizing the cleanup of sites which posed the greatest threat to human health and safety; reducing the costs for contamination cleanup; providing a source of funding to eliminate the backlog; and managing the cleanup activity to a level which is commensurate with the level of reimbursement capability. While no resolution or agreement was reached on the comprehensive petroleum cleanup bill that year, the Legislature did enact ch. 95-2, Laws of Florida, which provided a stopgap measure to "stop the bleeding" on the fund by providing for a moratorium and limitations on cleanup activities. Certain cleanup activities could continue only with prior Department of Environmental Protection (DEP) approval which included prior approval of costs.

Chapter 95-2, L.O.F., was only intended to be a temporary measure while work progressed on a totally restructured contamination cleanup program. A comprehensive bill that revised the underground petroleum storage cleanup program in Florida passed in 1996. That legislation:

- Established the Inland Protection Financing Corporation which would issue bonds to pay off the accumulated backlog of claims for reimbursement.
- Created a new amnesty program called the Petroleum Cleanup Participation Program. This is a cost-sharing cleanup program for properties or sites not otherwise eligible under the EDI program, the Abandon Tanks Restoration Program, or PLRIP.
- Created a Preapproved Advanced Cleanup Program to allow sites to be cleaned up out of priority order on a limited basis to facilitate property transactions or public works projects. This program requires a minimum cost-share of 25 percent by the applicant. The actual amount is bid each year by the applicant.
- Directed the DEP to incorporate risk-based corrective-action (RBCA) principles in establishing its cleanup criteria rule.
- Required contaminated site cleanups to be conducted in priority order on a prior approval cost basis.

The Inland Protection Trust Fund is the repository for funds for the various petroleum contamination cleanup programs. Discharges reported after December 31, 1998, are not eligible for state funding. This means that discharges occurring on or after January 1, 1999, are not eligible for funding from the Inland Protection Trust Fund. This has presented a problem for the DEP because discharges before January 1, 1999 are eligible for funding and discharges after December 31, 1998 are not and there is no scientific way to distinguish between and an old discharge and a new discharge.

In 1999, the Legislature addressed certain glitches and other problems that were identified since the underground storage tank program was revised in 1996. The Legislature allowed the DEP to provide funding for certain source removal activities. Funding for free product recovery may be provided in advance of the order established by the priority ranking system for site cleanup activities; however, a separate prioritization for free product recovery must be established consistent with the priority ranking system. No more than $5 million may be encumbered from the Inland Protection Trust Fund in any fiscal year for source removal activities conducted in advance of the priority order.

Under the Petroleum Cleanup Participation Program, sites for which a discharge occurred before January 1, 1995, are eligible for up to $300,000 of site rehabilitation funding with a copayment of 25 percent of the costs by the owner, operator, or person responsible for cleanup. The copayment percentage can be reduced if the owner demonstrates an inability to pay. If negotiations for the cost-sharing agreement cannot be completed within 120 days after commencing negotiations, the DEP will terminate the negotiation and the site becomes ineligible for state funding under this program. All liability protections provided under the program are then revoked.

Section 376.30714, F.S., was created to provide a mechanism for the DEP to distinguish between old discharges that are eligible for state funding from new discharges reported after December 31, 1998, which are ineligible for state funding on the same site.

In February 1998, the Inland Protection Financing Corporation obtained $262 million in bond proceeds and by late 1999, the backlog created by the reimbursement program had been paid off using a

combination of bond proceeds and Inland Protection Trust Fund moneys.[6]

Since the state's underground petroleum storage cleanup program was substantially revised in 1996, there have been no major revisions or legislative reviews. Recently, issues have arisen that may need legislative direction.

METHODOLOGY

Staff met with representatives of the Department of Environmental Protection, the Florida Petroleum Council, the Florida Petroleum Marketers Association and other affected parties to identify issues and possible solutions. In addition, staff reviewed past legislation, the law, and past reports on the state's underground petroleum storage tank program.

FINDINGS

As a result of the meetings with affected persons, most of the issues relating to the state's underground petroleum storage tank cleanup program were identified and discussed. Those issues included:

- Providing funding for limited soil source removal activities to encourage the upgrading of petroleum storage tanks to the mandatory secondary containment requirement in advance of the December 31, 2009, deadline.
- Creating a low-interest, or no-interest loan program to help owners and operators pay for the required tank upgrades by January 1, 2010.
- Availability of environmental liability insurance.
- Privatization of certain administrative functions.
- Statutorily directing the DEP to encumber annual cleanup funds at a uniform rate throughout the year.
- Providing a way to prioritize the many sites that may have the same priority number.
- Providing a way to finance and pay for catastrophic cleanup sites so that the Inland Protection Trust Fund is not in jeopardy for other petroleum site cleanups.

Issues Discussion.

Funding for limited source removal associated with secondary containment upgrading. All underground petroleum storage tank systems must be retrofitted with secondary containment by December 31, 2009.[7] 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 and operators have been reluctant to replace their tanks ahead of their priority ranking because treating the contaminated soil is expensive and the Inland Protection Trust Fund 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 owners and operators will wait until the deadline to replace the tanks. This could result in many owners and operators missing the deadline because the work cannot be done in a timely fashion.

A solution to this problem would be to provide a financial incentive to storage tank owners and operators to replace their tanks and systems ahead of schedule. The proposal would allow moneys from the Inland Protection Trust Fund to be used to pay for limited interim soil source removal at the time the tanks are replaced. The total costs that are associated with a single site would be statutorily limited. Also, the total amount that could be encumbered from the Inland Protection Trust Fund for limited interim soil source removals would be capped each year. This would not be additional moneys appropriated for cleanups but rather a portion of the annual cleanup appropriations would be earmarked for this purpose.

A special complication arises when the Department of Transportation (DOT) has a road or right-of-way construction project over a site with a priority ranking score below that which is currently being cleaned up. The proposal would allow funding for these sites because they will become inaccessible for future remediation due to road infrastructure and right-of-way restrictions resulting from the DOT road construction project. Further, the amount that may be spent on such DOT projects would also be capped annually and would not be in addition to the annual appropriations.

There appears to be very little controversy over this proposal. The statutory details would still need to be refined.

Availability of Environmental Liability Insurance. Subtitle 1 of the federal Resource Conservation and

[6] Id. at page 14.
[7] Rule 62-761.510, Florida Administrative Code.

Recovery Act requires that owners and operators of underground and aboveground petroleum storage systems maintain financial responsibility for cleanup costs, third-party property damage, and personal injury claims association with contamination from these systems. Section 376.3072, F.S., the Petroleum Liability and Insurance Restoration Program (PLIRP), was the primary means for demonstrating financial responsibility because insurance was 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 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, if not impossible, 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.[8]

The dominant environmental insurance carrier in Florida, AIG, will not write or renew coverage on older single-walled corrosion-resistant systems. The carrier appears to be concerned that when these single-walled systems are replaced with the required secondary containment systems, as required by January 1, 2010, contamination will be discovered and claims will be filed.[9]

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 systems within the next 3 years. If an owner or operator must find a new carrier, the covered discharges will be as of the date of the policy; there will be no retroactive provision.

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. The small owner or operator does not have the financial resources to conduct the cleanup and contractors are reluctant to perform the work if there is no certainty of payment.

There has been little progress toward finding a solution to this issue. The affected stakeholders are continuing to work on this issue.

Privatization of certain administrative functions. It was found that the DEP has privatized certain administrative functions and continues to seek ways to streamline the process. It was generally agreed that this was not an issue that needed to be statutorily addressed at this time.

Statutorily directing 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. The Legislature addressed this by adding proviso language in the General Appropriations Bill to direct 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, it was suggested that the DEP be given statutory direction to avoid such a problem in the future.

Providing a way to prioritize the many sites that may have the same priority number. When Florida revised its cleanup program from a reimbursement system to a prior approval system, the sites were given a priority ranking based on threats to human health and the environment – the higher the number, the more of a threat the site was. The priority ranking system looks something like a pyramid. At some point, the Legislature knew that there would be several sites that had the same priority number. The need now exists to "prioritize" within a particular priority score ranking.

[8] Paper submitted to the tanks workgroup on behalf of the Florida Petroleum Marketers, September 28, 2004.
[9] Id.

Financing for catastrophic cleanup sites so that the Inland Protection Trust Fund is not in jeopardy for the rest of cleanups. There are large petroleum sites that are so contaminated that it will take large sums of money to clean up. To expend such sums on one project would jeopardize cleanup work on numerous other sites. It has been suggested that alternative financing be available for such projects when the need arises.

In 1996, the Legislature established the Inland Protection Financing Corporation to issue bonds to pay off the backlog of reimbursement claims that had accumulated under the old reimbursement system. That backlog was paid off in 1999 and the corporation terminates on July 1, 2011.

To pay for the catastrophic cleanups in the future, the Inland Protection Financing Corporation could be given statutory authority to issue bonds for the express purpose of paying for any catastrophic cleanups; provided that the debt ratio provisions of s. 215.98, F.S., should be considered when authorizing the issuance of such bonds. Also, the life of the corporation would be extended to 2025.

Creating a low-interest, or no-interest loan program to help owners and operators pay for the required tank upgrades by 2010. Underground storage tank owners and operators are financially responsible for the required replacement of their underground storage systems to secondary containment by 2010. This can be very expensive for the small owner or operator. To help with this cost, a proposal has been made to create a low-interest or no-interest loan program using Inland Protection Trust Funds. There is no consensus currently on this approach.

RECOMMENDATIONS

1. Funding for limited soil source removal associated with secondary containment upgrading in advance of the replacement schedule should be statutorily allowed.
2. Statutorily direct the DEP to encumber annual cleanup funds at a uniform rate throughout the year.
3. Statutorily provide a way to prioritize the many sites that may have the same priority number.
4. Statutorily allow the Inland Protection Financing Corporation to issue bonds to pay for catastrophic petroleum contamination site cleanups.
5. Continue to work to find a solution to the availability of environmental liability insurance in Florida.