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# Environmental and Land Use Law

## A SUPER Act for Florida: Funding Cleanup of Leaking Underground Petroleum Storage Tank Sites

by J. Michael Huey, Ralph A. DeMeo, and Robert D. Fingar

The 1986 Florida Legislature, addressing one of Florida's most pressing environmental concerns, leaking underground petroleum storage tanks, enacted the State Underground Petroleum Environmental Response Act of 1986 ("SUPER Act"),<sup>1</sup> an innovative statutory mechanism for addressing groundwater contamination caused by leaking underground tanks. This article summarizes key provisions of the SUPER Act, including a discussion of the background and scope of the leaking petroleum storage tank problem in Florida.



### Background and Scope

Nine out of 10 Floridians are dependent upon groundwater as their primary source of drinking water.<sup>2</sup> Because of the state's permeable soils and high water tables, Florida's groundwater is particularly vulnerable to contamination from leaking underground storage tanks. As Florida's population continued to grow throughout the 1970's and eighties, the number of gasoline stations increased, with a concomitant increased risk of gasoline spillage or leakage. Furthermore, the original steel tanks which were the standard in the industry for storing gasoline became increasingly subject to leakage from corrosion and wear and tear. The result, according to the Florida Department of Environmental Regulation, was that as of December 1985, there were 406 known or suspected incidences of gasoline groundwater contamination in Florida. Not surprisingly, the department estimates that 6,000 gasoline storage tanks in Florida are either leaking or at leak-developing stages.<sup>3</sup>

The state's awareness of the scope of the groundwater contamination problem is relatively recent. The 1983 Florida Legislature, responding in part to reports of gasoline contamination in the city wellfield of Belleview, Florida, enacted

the "Water Quality Assurance Act of 1983 ("act").<sup>4</sup> Pursuant to the act, the department promulgated the "Stationary Tank Rule," Ch. 17-61, Florida Administrative Code. Ch. 17-61 requires owners and operators of aboveground and underground gasoline storage tanks having a capacity of greater than 550 gallons to register their tanks with the department and meet other notification (including notification of a discharge of gasoline), retrofitting, inventory and monitoring requirements.<sup>5</sup>

Prior to the adoption of Ch. 17-61, storage tank owners and operators were not obligated to register their tanks or report petroleum leaks to the department. Instead, owners and operators were subject to the general prohibition against discharge of pollutants into or upon any waters or lands of the state.<sup>6</sup>

Persons responsible for environmental contamination resulting from leaking petroleum storage tanks faced liability to the state<sup>7</sup> for damages arising therefrom. F.S. Ch. 376 prohibits discharge of refined petroleum products upon any lands or waters of the state. The department typically required the violator to clean up and restore the environment, including restoring the quality of the

groundwater, treatment and disposal of all pumped water, treatment and/or disposal of contaminated soils, replacement and repair of leaking pipelines, and further actions concerning the site's specific contamination.<sup>8</sup>

Furthermore, although liability under Ch. 376 is for damages and losses to property or resources of the state,<sup>9</sup> Ch. 376 preserves individual causes of action for groundwater contamination caused by discharge from petroleum storage tanks.<sup>10</sup> Thus, the petroleum storage tank owner or operator faced extensive liability to the state and to private persons.

Ch. 17-61 represented the state's first examination of the leaking storage tank problem. Although the reporting requirements of Ch. 17-61 drew the public's attention to the problem, they revealed merely the tip of the iceberg. Compounding the problem, a number of disincentives for reporting petroleum storage tank leaks threatened the effectiveness of the leak notification requirement.

According to the Service Station Dealers of Florida, a dealer trade organization, many known leaks were unreported for fear of potentially devastating economic consequences of a leak.<sup>11</sup> For example, the department's estimates of retrofitting costs to meet design and construction standards range from \$10,000 to \$20,000 per tank and monitoring costs as high as \$6,000 per site. With an average of 3.5 tanks per site, an operator could be required to spend from \$40,000 to \$75,000 per station to comply with Ch. 17-61. In addition to these fixed costs, operators faced potential cleanup costs of up to \$250,000 for a typical gasoline tank leak. An extensive leak involving third party damages for which an operator may be strictly liable or incur civil penalties might cost millions.<sup>12</sup> Many gasoline retailers, especially the smaller retailers, might not

have the financial resources to meet these costs.

A further complication, according to the department, service station dealers, and members of the Florida Petroleum Marketers Association, a trade association of gasoline wholesalers, was that pollution liability insurance was difficult and expensive to obtain, largely due to the potential for unlimited liability for discharges.<sup>13</sup> Owners and operators were among the victims of the insurance and tort reform crisis which emerged full-blown in the 1980's. Although some operators carried liability insurance, those with high risk facilities because of the age and/or geographic location of their tanks faced the greatest problem obtaining insurance coverage. This created a situation in which those sites which were most dangerous were least likely to have insurance available to cover the costs of cleanup of soil and groundwater. Furthermore, cleanup contractors also were faced with the unavailability of liability insurance. The combined effect of the lack of financial resources and insurance coverage for operators and contractors left the burden of pollution problems, in reality, on the State and the public.

In addition to the lack of financial resources and insurance, difficulties existed in pinpointing liability for gasoline discharges, especially in the instance of slow leaks which could have existed for years prior to discovery. Valuable time was lost trying to determine responsibility while the soil and groundwater remained contaminated. Also, leaks may have occurred from abandoned tanks for which the owner could not be found. Finally, because cleanup was a particularly high risk, cleanup contractors and, therefore, gasoline operators, faced sub-

stantial liability risks if cleanup was not accomplished properly. Therefore, inadequate financial resources or insurance protection often meant deficient site cleanup or no cleanup, at a resultant high cost to the public health, safety and welfare.

#### The SUPER Act

The SUPER Act was intended to address the above and related concerns, in part by easing the regulatory and financial burden on owners, operators, and cleanup contractors, and by ensuring that contaminated sites and public drinking water needs would be given immediate and appropriate attention through a series of funding measures, incentives for early reporting, and provisions for reimbursement of cleanup costs expended by owners and operators.

• *Liability* — Although the SUPER Act preserves private causes of action in strict liability, it provides further that in civil actions brought after July 1, 1986, against an owner or operator of a petroleum storage system for damages arising out of a discharge, the plaintiff must prove negligence if the system was installed, replaced, or retrofitted and maintained consistent with the standards of Ch. 17-61.<sup>14</sup> Furthermore, the SUPER Act provides that response action contractors working for the state or local governments may be indemnified by the department under certain circumstances for damages to third parties caused by their acts or omissions in carrying out a response action or caused by a discharge or release of pollutants.<sup>15</sup> As part of the effort to accomplish competent cleanup of contaminated sites, the SUPER Act also provides for certification of pollution storage system spe-

cially contractors.<sup>16</sup> These provisions clearly go far toward ensuring compliance with Ch. 17-61 standards and effective cleanup of contaminated sites.

• *Funding* — Because funding of contaminated site cleanup was of critical importance to the industry and the public, the SUPER Act amends F.S. Ch. 206 which generally provides for motor fuel taxes. Under the SUPER Act, a new Inland Protection Trust Fund<sup>17</sup> is created to fund cleanup and to supplement the existing Coastal Protection Trust Fund,<sup>18</sup> and the Water Quality Assurance Trust Fund Tax.<sup>19</sup>

The fund imposes a tax of 10 cents on each barrel of "pollutant"<sup>20</sup> when first produced in or imported into Florida. The tax on petroleum products<sup>21</sup> first imported into Florida by a licensed refiner is imposed when the product is first removed or transferred from a storage facility.

The fund tax is increased to 20 cents per barrel if the unobligated fund balance falls below \$5 million, until the fund reaches \$15 million, at which time the tax returns to 10 cents per barrel. If the unobligated balance of the fund exceeds \$50 million, the tax is discontinued until the fund falls below \$35 million, at which time the tax returns to 10 cents per barrel.<sup>22</sup> The fund is initially funded by a loan of \$5 million from the Coastal Protection Trust Fund.<sup>23</sup> Persons who produce or import taxable pollutants for sale, use or otherwise into the state must register with the Florida Department of Revenue if they have not already registered under Ch. 206.<sup>24</sup> The taxes due under this section must be separately stated on sales documents, and any person selling tax-paid pollutants must, other than retail

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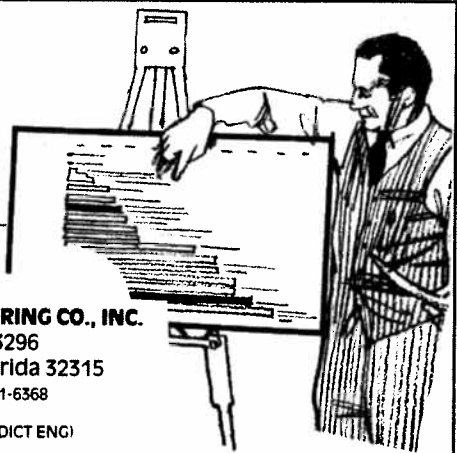
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dealers, certify that these taxes have been paid.<sup>25</sup>

The SUPER Act's funding provisions should provide the needed dollars to ensure proper cleanup of groundwater contaminated by leaking underground petroleum tanks.

• *EDI and Reimbursement Programs*

— Perhaps the most important provisions of the SUPER Act are the Early Detection Incentive ("EDI") and reimbursement programs, which provide mechanisms for reporting and cleanup of groundwater contamination. The SUPER Act authorizes the department to enact rules to establish a priority listing for state cleanup of "petroleum storage system" discharges. A petroleum storage system is a tank and its associated piping and dispensing equipment, registered with the department under Ch. 17-61, which contains any liquid fuel commodity made from petroleum, including diesel fuel and gasoline.<sup>26</sup> Following cleanup of a discharge, the department may seek recovery of "cleanup costs" from responsible parties. Cleanup costs include costs of investigation and assessment, restoration or replacement of potable water supplies, cleanup of affected soil, groundwater and surface water, and maintenance and monitoring.<sup>27</sup>

The EDI program, however, creates a "grace period" extending from July 1, 1986, through September 30, 1987, for reporting of petroleum discharges, without recourse against the discharger by the state, for imposition of liability under Ch. 376.<sup>28</sup> Petroleum storage system discharges which are *initially reported* to the department during the grace period will be deemed "qualified sites."<sup>29</sup> A site may be "qualified" if it is not a federal facility, if the department has not been denied site access and if the owner/operator has not willfully failed to comply with the registration, inventory, monitoring and retrofitting requirements of Ch. 17-61.<sup>30</sup> At present, a report to the department may be in any manner, but a complete written report must be submitted on department forms which were effective in October 1986. The department will incur cleanup costs of qualified sites, in accordance with its priority schedule, without recourse against the discharger. The department is scheduled to adopt its site priority rule in March 1987. The priority considerations will include fire/explosion hazard, threat to uncontaminated drinking water supply wells,

and migration potential of the petroleum product.<sup>31</sup>

Under the SUPER Act's reimbursement program, persons who initially report a petroleum storage system discharge at a nonfederal facility and conduct voluntary cleanup of the site on or before September 30, 1987, will be entitled to reimbursement from the department for cleanup costs incurred on or after January 1, 1985.<sup>32</sup> However, persons who have willfully failed to comply with the registration, inventory, monitoring and retrofitting requirements of Ch. 17-61, have reported discharges before July 1, 1986 where the department has initiated an enforcement action and cleanup has not begun, or have denied the department site access are not entitled to reimbursement.<sup>33</sup>

Furthermore, under the SUPER Act, persons who initiated cleanup on or before June 30, 1986, must have submitted written notice of intent to seek reimbursement to the department by July 31, 1986. Persons who initiate cleanup between July 1, 1986, and September 30, 1987, must submit notice of intent

to the department within 30 days of initiating cleanup. Documentation of site conditions prior to cleanup must accompany the notice of intent.<sup>34</sup> The department will notify the person of eligibility if the department determines that a site is eligible for reimbursement. Furthermore, the person (or his agent) responsible for cleanup must keep records of hydrological and other site investigations and assessments, plans, contracts and contract negotiation documents, accounts, invoices, sales tickets and other payment records related to costs of site rehabilitation.<sup>35</sup>

After cleanup is complete, the person responsible for cleanup must submit to the department a form application for reimbursement, together with evidence that site rehabilitation was conducted in accordance with the department's criteria.<sup>36</sup>

Although the department has not yet established its cleanup criteria, the following factors will likely be considered in all cleanup activities under the department's aegis: the degree to which human health is affected by the discharge; the

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size of the population affected; the present and future uses of the affected aquifer or surface waters, including the likelihood that the discharge will migrate to a source of public drinking water; the natural rehabilitation processes; and state water quality standards.<sup>37</sup> This rule will be one of the first attempts by a state or federal agency to answer by rule the question "how clean is clean?" Reimbursement will be made for sites reported during the grace period within 90 days of the date that the department would have initiated its own cleanup of the site based on its priority schedule.<sup>38</sup> No reimbursement will be made for sites reported on or before June 30, 1986 until funding obligations for sites reported during the grace period have been met.<sup>39</sup>

An emerging issue under the SUPER Act is the effect of the reimbursement provisions on owners and operators who carry pollution liability insurance policies. Under the SUPER Act, the party who is eligible to apply for reimbursement is the "person initiating site rehabilitation" and the "person responsible for conducting site rehabilitation."<sup>40</sup> It is possible in a typical insurance coverage context that the insurance company could initiate and conduct site rehabilitation. Thus, the insurance company theoretically would be eligible to apply for reimbursement under the SUPER Act.

However, because in most cases the insured initiates and conducts site

rehabilitation and the company pays the claim to the insured, the department has taken the position that where the facility owner or operator seeks reimbursement for cleanup and the project was paid for through insurance funds, only the "person initiating and conducting site rehabilitation" may apply for reimbursement which reimbursement should be paid only to such person and not directly to insurance companies.<sup>41</sup>

### Conclusion

The SUPER Act represents a giant step in the direction of accomplishing reasonable regulation of leaking petroleum storage systems. The Florida Legislature, in recognizing the economic and environmental realities of environmental contamination by petroleum products, and in effectively balancing the same, has created unique programs to the mutual benefit of industry and the public interest. □

<sup>1</sup> Ch. 86-159, Laws of Florida (1986).

<sup>2</sup> H.R. Committee on Community Affairs "Staff Analysis," CS/HB 269 (March 12, 1986).

<sup>3</sup> *Id.*

<sup>4</sup> Ch. 83-310, Laws of Florida (1983), codified in FLA. STAT. Ch. 376 (1983).

<sup>5</sup> For a discussion of the requirements of Ch. 17-61, Fla. Admin. Code, see Preston & Maurer, *LUST in the Heart of Florida: Regulation of Pollutant Storage Tanks*, 1 F.S.U. J. LAND USE & ENVTL. LAW 321 (Spring 1985).

<sup>6</sup> FLA. STAT. §376.302 (1983).

<sup>7</sup> FLA. STAT. §376.308 (Supp. 1986).

<sup>8</sup> FLA. STAT. §376.305 (Supp. 1986). Liability was also imposed under FLA. STAT. Ch. 403 (Supp. 1986).

<sup>9</sup> See *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663 (Fla. 1978), cert den., 444 U.S. 965 (1979).

<sup>10</sup> FLA. STAT. §376.313 (Supp. 1986).

<sup>11</sup> *Supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* See also, Wall Street Journal, Aug. 26, 1986, at 6, col. 1.

<sup>14</sup> FLA. STAT. §376.313(4) (Supp. 1986).

<sup>15</sup> FLA. STAT. §376.319 (Supp. 1986).

<sup>16</sup> FLA. STAT. §§489.105(14), 489.113 (Supp. 1986).

<sup>17</sup> FLA. STAT. §206.9935(3) (Supp. 1986).

<sup>18</sup> FLA. STAT. §206.9935(1) (Supp. 1986).

<sup>19</sup> FLA. STAT. §206.9935(2) (Supp. 1986).

<sup>20</sup> FLA. STAT. §206.9925(5) (Supp. 1986).

<sup>21</sup> FLA. STAT. §206.9925(4) (Supp. 1986).

<sup>22</sup> FLA. STAT. §206.9935(3)(b) (Supp. 1986).

<sup>23</sup> FLA. STAT. §376.3071(6)(c) (Supp. 1986).

<sup>24</sup> FLA. STAT. §206.9930(1) (Supp. 1986).

<sup>25</sup> FLA. STAT. §206.9930(3) (Supp. 1986).

<sup>26</sup> FLA. STAT. §376.301(11) (Supp. 1986).

<sup>27</sup> FLA. STAT. §376.3071(4)(a)-(e) (Supp. 1986).

<sup>28</sup> FLA. STAT. §376.3071(9) (Supp. 1986).

<sup>29</sup> FLA. STAT. §376.3071(9)(b) (Supp. 1986).

<sup>30</sup> *Id.*

<sup>31</sup> Memorandum from John Ruddell to Thomas Maurer (July 8, 1986).

<sup>32</sup> FLA. STAT. §376.3071(12) (Supp. 1986).

<sup>33</sup> FLA. STAT. §376.3071(12)(b) (Supp. 1986).

<sup>34</sup> FLA. STAT. §376.3071(10)(c) (Supp. 1986).

<sup>35</sup> FLA. STAT. §376.3071(12)(d) (Supp. 1986).

<sup>36</sup> FLA. STAT. §376.3071(12)(e) (Supp. 1986).

<sup>37</sup> FLA. STAT. §376.3071(5) (Supp. 1986).

<sup>38</sup> FLA. STAT. §376.3071(12)(g) (Supp. 1986).

<sup>39</sup> *Id.*

<sup>40</sup> FLA. STAT. §376.3071 (Supp. 1986).

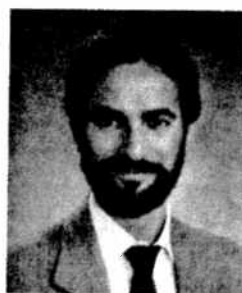
<sup>41</sup> Memorandum from Thomas Maurer to Bill Buzick (August 13, 1986).

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