

BREACHING THE TRUST FUND

The 2009 Florida Legislature faced a massive budget deficit. The State responded by diverting into general revenue from a number of state trust funds, including the Inland Protection Trust Fund (IPTF), Section 376.3071, F.S. The 2009 Legislature bonded some \$90 million for clean-up of petroleum contaminated sites under the IPTF. The IPTF previously generated about \$200 million annually, of which about \$150 million or more should have been available for actual clean-up costs. While the IPTF may not be the most important state trust fund, one would think that the protection of drinking water supplies would make nearly everyone's Top Five. Nonetheless, the Legislature's second major diversion from the IPTF (it diverted \$20 million in 2002) presents some interesting policy considerations.

Some background here is necessary. The IPTF was created in 1986 to respond to "incidents of inland contamination from petroleum storage tanks," and is funded by a tax on "pollutants" imported into, or produced in Florida. Subsection 376.3071 (3), F.S.

The 1986 Legislature also created the Early Detection Incentive (EDI) Program, subsections 376.3071 (9) and (12), F.S., which was essentially an "amnesty" program for petroleum clean-up. The EDI Program ran from 1986 to 1988, and over 7000 sites established eligibility.

The federal government decided to address the then-estimated 2 million underground petroleum storage tank (UST) systems nationwide at the same time. 1987 Congressional testimony by Ronald Brand of the EPA. In 1984, Congress enacted Subchapter IX, amending RCRA and creating federal regulation of USTs. 42 USC 6991. These amendments include technical, clean-up, and financial responsibility requirements for owners or operators of USTs, as well as procedures for EPA approval of state storage tank programs. The Superfund Amendments and Reauthorization Act of 1986 (SARA) set standards for payment out of a \$500 million "Leaking Underground Storage Tank Trust Fund."

The RCRA steps were only a start. One commentator has stated: "[T]he costs of addressing LUST discharges are staggering." Rawson, *Are We Properly Controlling Our LUSTS?*, 40 IDAHO L.REV. 111, 116 (2003). Rawson cited a 2002 study that estimated it would take \$29 billion to clean up just MTBE fuel additive contamination nationwide. A 2007 Government Accounting Office (GAO) Study cited state estimates that a total \$12 billion was needed just in federal and state funds to clean up UST releases known as of September, 2005.

Congress directed EPA to adopt financial responsibility regulations allowing owners or operators to use insurance, guarantees, surety bonds, letters of credit, self insurance or state corrective action and compensation programs and other EPA-approved methods as allowable

mechanisms for demonstrating financial responsibility. 42 USC 6991b (d)(1) and 6991c (c)(1). The regulations were to be effective by November 8, 1988.

EPA entered into UST rulemaking in 1985. The Agency enacted regulations requiring owners or operators of USTs to demonstrate financial responsibility for corrective action costs and for compensating third parties for bodily injury and property damage. 40 CFR Subpart H.

Against this background, the 1988 Florida Legislature ended the EDI Program and replaced it with the Petroleum Liability and Insurance Restoration Program (PLIRP), Section 376.3072, F.S. PLIRP authorized the IPTF to provide financial responsibility for participating “insureds” for corrective action. The DEP also contracted with a private insurer to provide a means by which insureds could purchase insurance coverage for third party liabilities. Briefly stated, PLIRP was the financial responsibility mechanism for more than 4400 claims for discharges reported from January 1, 1989 to December 31, 1998. In addition to the EDI “amnesty” discharges and PLIRP claims, the IPTF also funds sites that are eligible for funding assistance under the Abandoned Tank Restoration Program (ATRP), Section 376.307 (5), F.S., and the Petroleum Clean-up Participation Program (PCPP), Section 376.3071 (13), F.S.

Three questions arise for these technical and financial responsibility requirements. First, what is the legal relationship between the Florida and federal program. More specifically, can Florida divert IPTF revenues for purposes other than petroleum clean-up? In addition, what are the policy ramifications of taking revenues from a tax negotiated between industry and the legislature for a specific purpose and diverting those trust revenues to the general revenue or some other unrelated use?

The starting point for the analysis is 42 USC 6991c, which authorizes each state to apply to EPA for federal approval of the state’s UST program. An approved state program may be more stringent than the federal program, but Florida has not obtained EPA approval of its UST program. 42 USC 6991g preserves a State’s right to adopt standards that are more stringent or impose additional liability with respect to a release. Florida may not, however, authorize standards or defenses that conflict with RCRA. *Boyes v. Shell Oil*, 199 F.3d 1260 (C.A.11 2000). In *Boyes*, the Eleventh Circuit held that subsection 376.308(5)’s bar against suits to compel clean-up in advance of a site’s priority rank in clean-up schedule under subsection 376.3071(5)(a), F. S., was preempted by RCRA provisions allowing suit to imminent hazards caused by release of RCRA regulated substances. 199 F.3d at 1269. In particular, the *Boyes* Court stated:

. . . . Florida has a comprehensive statutory scheme to regulate contamination caused by [USTs] . . . Its program, however, has never been approved by the EPA Administrator. Because Florida’s [UST] program has not been approved pursuant to the RCRA, which would have allowed Florida law to supplant or replace

federal law, the Florida program is preempted to the extent there is a conflict.

199 F.3d at 1269 (f.n.o.). See also, *Ashoff v. City of Ukiah*, 130 F.3d 409, 411(C.A. 9 1997) (“RCRA [also] allows citizens suits in approved states.”); *Feikema v. Texaco*, 16 F.3d 1408 (C.A. 4 1994) (EPA Consent Order preempted state common law action for abatement of UST release); *G. J. Leasing v. Union Electric*, 825 F. Supp. 1363 (S.D. Ill. 1993), *vacated in part on other grounds*, 839 F.Supp. 21 (state UST program that is not approved by federal RCRA program is preempted where less strict than RCRA).

What happens when a state diverts financial responsibility trust fund monies? We note that if Florida had obtained program approval from EPA, it would be subject to 42 USC 6991c (f)(2)(B), which directs EPA to withhold federal Leaking Underground Storage Tank Trust Fund money from “any State that has diverted funds from a State fund or State assurance program for purposes other than those related to the regulation of underground storage tanks covered by this subchapter.” Florida would have also been subject to withdrawal of authorization of program approval and “reestablishment” of the federal program if EPA found that Florida was not administering and enforcing the program in accordance with the provisions of federal law, 42 USC 6991c (e), or EPA could have determined that the IPTF was not proper financial responsibility under 42 USC 6291c (c)(6).

Given that Florida is not an approved state program, what if any, are the consequences of a sweep of the IPTF and bonding of an amount less than the proceeds available for UST program purposes? 42 USC 6991c (e) suggests, through the use of the term “reestablishment,” that the federal program applies in states that do not have EPA UST program approval, with the caveat that under 42 USC 6991g, Florida could have more stringent standards and impose greater liabilities for a discharge than provided for by federal law, but inconsistent elements of Florida’s program may be problematic.

In examining EPA’s regulations, 40 CFR 280.101 contemplates that EPA will review a state fund to determine whether it is an acceptable means by which owners or operator may demonstrate financial responsibility. This regulation does not appear to be tied to the state UST program approval provisions in 42 USC 6991c, as described above, but instead applies “in a state where EPA is administering the requirements of this subpart.” 40 CFR 280.101 (a). Theoretically, this would include Florida, a non-approved state.

In fact, by letter dated November 6, 1989, the DEP applied to EPA Region IV for approval of PLIRP as Florida’s financial responsibility program. As part of the application, then-DER Secretary Dale Twachtmann advised EPA that the IPTF would “serve as a repository for funds which will enable the Department to respond without delay to incidents of inland contamination related to the storage of petroleum and petroleum products in order to protect the public health, safety and welfare and to minimize environmental damage.” Secretary

Twachtmann also advised that the IPTF would provide for investigation and assessment of contaminated sites; expeditious replacement or restoration of potable water supplies; clean-up and monitoring of contaminated sites; inspection and supervision; compliance verification; cost recovery actions; and reasonable costs of administration. Based on these assurances, EPA apparently approved Florida's trust fund as an allowable financial responsibility mechanism. www.epa.gov/oust/states/findstates.htm. (No agency personnel have found the approval letter requested by one of the authors, but the above-noted site shows the Florida fund as approved by EPA.)

Even where EPA approves a state fund as a financial responsibility mechanism (or as one of a combination of mechanisms), what happens when the funding mechanism is changed, such as has occurred here? By Memorandum dated November 22, 1989, entitled "Final Guidance for Reviewing State Funds for Financial Responsibility," the EPA Office of Underground Storage Tanks provided some illumination. According to the Memorandum: "A State must submit its fund to EPA if it wants formal approval of the fund as an alternative financial assurance mechanism for use by its UST owners and operators, to assist them in meeting the Federal financial responsibility requirements." Further, there must be a "definite funding source (e.g. tank fees) to make sure that funds will be available to owners and operators. A State fund that relies only on yearly appropriations out of general revenues from its legislature would not adequately assure that funds would be certain and available." As Florida is not an approved program state, it operates under a Memorandum of Agreement between EPA Region IV and the State of Florida, dated August 31, 2007. Under this Memorandum of Agreement, Florida is required to notify EPA of any "State changes that would affect FDEP's ability to implement the State's petroleum clean-up and discharge prevention program...including funding modifications that could negatively affect FDEP's ability to implement the State's program."

Diversion of IPTF revenues from the approved uses of the Fund may jeopardize the status of the Fund as an approved financial responsibility program for the PLIRP insureds. (The extent to which other state restoration program participants have any vested rights to fund proceeds is a subject for a different day.)

The 2007 GAO study underscores substantial issues facing DEP. As of January 1, 2007, FDEP stated it had cleaned up about 350 sites with public funding. *Id.* at 18. The state expected a "particularly sizeable decline []" in public clean-ups as Florida site owners or operators rely more on private sources of funding. *Id.* at 20. Nonetheless:

Although the state's financial assurance fund stopped producing financial responsibility coverage for new releases in 1998, it is having difficulty paying for all of its clean-ups. The state fund is only able to actively conduct clean-up work at about one-third of the 12,000 remaining sites. The approximately 8,000 other sites in the Fund's backlog await clean-up. These clean-ups will not occur

until money becomes available for them, or potentially, the risk posed by the sites increases so much that they require more urgent clean-up.

Id. at 28. This was before the 2009 Legislature diverted significantly more money from the IPTF.

GAO emphasized that a state fund must have sufficient money “available to clean-up releases in a timely and appropriate manner” in order to be financially sound. *Id.* at 29, citing EPA memorandum issued in 1993. Failure to ensure timely clean-up would mean “EPA would be concerned about the financial soundness of the fund.” *Id.* The GAO focused on the impact of diversions of \$20 million in 2002 from Florida’s fund:

As a result, financial assurance fund managers had to adjust the threshold for clean-up, meaning that the cleanup of less urgent releases, which otherwise would have been addressed, was delayed

.....

Id. at 31. Again, these impacts arose from a far smaller diversion than occurred this past session.

Regardless of the legalities, what public policy considerations are raised by the diversion of IPTF revenues? A review of the legislative history behind the IPTF indicates a clearly collaborative effort in the late 1980s among various sectors of the regulated community (the major oil companies, petroleum marketers, property owners, and lenders, amongst others) in creating the IPTF as a tax on industry to solve an industry problem that could only be solved collectively because of the Past (the contamination problem was largely historical), the Present (insurance coverage was unavailable or unaffordable) and the Future (see the Present). Thus, the IPTF is the ultimate “user tax.” Nonetheless, there is no IPTF “lock box.” Given the seeming availability of the IPTF, its \$200 million per year revenue stream an enticing target in down revenue years, how can the regulated community and the legislature ever again attempt to find a targeted, public solution to a matter of as urgent public importance as protection of the state’s drinking water and natural resources, when ultimately, the deal comes undone? That is the unfortunate message of the 2009 Session for the IPTF. Either safeguards need to be built into the process or this public/private partnership will be unwound. Even if the fund is not sunsetted, it requires daunting, not diminishing, sums to meet its, and RCRA’s public purpose.

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