

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.)

BILL: SB 472

SPONSOR: Senators Smith and Pruitt

SUBJECT: Mining Activities

DATE: February 17, 2003 REVISED: 02/18/03 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Roberts</u>	<u>JU</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>BI</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides an exclusive administrative remedy in the Division of Administrative Hearing for recovery of damages to real and personal property caused by construction mining activities, including mandatory nonbinding mediation, an optional expedited summary hearing and limited recovery of costs and attorneys' fees. This bill provides security bond requirements for persons using explosives, grants rulemaking authority to the State Fire Marshal and redefines "construction materials mining activities."

This bill amends section 552.30 of the Florida Statutes. The bill creates sections 552.32, 552.34, 552.36, 552.38, 552.40, 552.42, and 552.44 and these sections are cumulatively entitled the "Florida Construction Materials Mining Activities Act."

II. Present Situation:

Background

In Florida, large quantities of limestone aggregate and other materials are mined for use in the construction of roads, highway embankments, and pavements. Mines in the Miami-Dade County area supply more than half of the construction grade rock, sand, and limestone aggregate used by the state Department of Transportation, other governmental entities and the construction industries for their projects.¹ The aggregate and other materials are mined using explosives. The

¹ The Miami-Dade County deposit spreads under the urban areas and out into the wetlands of the water conservation areas. Most of the Miami-Dade County rock is mined in a narrow strip of land located between the urban areas and the conservation areas called the Miami-Dade County Lake Belt Area. The Lake Belt Area is an 89 square mile area located between the Everglades and the urbanized areas of Miami-Dade County. The Lake Belt produces about 35-40 million tons of rock annually, transforming about 300 acres of melaleuca-infested wetlands into lakes 80 feet deep, surrounded by manmade wetlands.

use of explosives in mining activities is regulated by the federal, state and, to a lesser extent, local governments.

Law

At the federal level, Title 30 of the U.S. Code and its various implementing regulations establish basic safety, health, certification, reporting, and environmental requirements for the use of explosives in mining operations.

At the state level, chapter 552, F.S., governs the requirements and the enforcement for the manufacture, distribution, and use of explosives.² The Division of State Fire Marshal within the Department of Financial Services is responsible for enforcing this chapter. In 2000, the Florida Legislature gave the State Fire Marshal (SFM) sole and exclusive authority to regulate the use of explosives in mining activities for construction materials such as limestone and sand.³ In addition to its pre-existing regulatory authority, the State Fire Marshal is authorized to set standards or limits for ground vibration, frequency, intensity, blast pattern and air blast, as well as time, date, occurrence, and notice restrictions. Specifically, any statewide ground vibration limits to be set by the SFM are to conform to certain U.S. Bureau of Mines standards. The new section of law also allowed the SFM to delegate monitoring and enforcement of its blasting regulations to local governments.

At the local level, local governments exercised some regulatory authority, governing the use of explosives and blasting activities within their corporate limits for which permits had be secured from the local county or city in which the specific blasting operation took place. However, as of 2000, state law pre-empts any local regulation regarding standards, limits or other matters regarding the use of explosives in conjunction with construction materials mining activities.

Licenses and permits

The SFM issues licenses for companies and individuals who are manufacturers/distributors, dealers, and users of explosives, and issues permits for blasters.⁴ In addition, the SFM requires accurate record keeping of the use and storage of explosives, and adherence to minimum general safety standards. Licenses and permits issued by the division must include minimum statutory information including the purpose for which the license or permit is to be used in relation to explosives and any restrictions placed upon the licensee or permittee by the division. *See s. 552.094, F.S.* A blaster's permit is valid only for use by the permit holder in the course of his or her employment with a licensed user.

In 2002, there were 202 licensed users of explosives. Once the division issues a license to a user of explosives, the division does not issue permits to the licensee to prepare explosives or to conduct particular blasting operations. Under state regulations, however, a user or blaster is

² Chapter 4A-2, Florida Administrative Code, implements those laws.

³ See s.30, ch.2000-266, Laws of Florida (an act relating to the Department of Transportation); s. 552.30, F.S. (2000).

⁴ A manufacturer-distributor means a person engaged in the manufacture, compounding, combing, production, or distribution of explosives. A dealer is a person engaged in the wholesale or retail business of buying and selling explosives. A user is a dealer or manufacturer-distributor who uses an explosive as an ultimate consumer or a person who, as an ultimate consumer purchases such explosive from a dealer or manufacturer-distributor. A blaster is a person employed by a user who detonates or otherwise effects the explosion of an explosive.

required to keep an accurate blasting log for each blasting operation if there is even a remote possibility of damage to private or public property. *See* Fla. Admin. Code R. 4A-2.019.

Administrative Rules

The division is statutorily required to adopt and enforce rules relating to minimum general standards covering the manufacture, transportation, use, sale, handling, and storage of explosives. *See* Fla. Admin. Code, chapter 4A- 2; s. 552.13, F.S. The division is also authorized to restrict the “quantity and use of explosives at any location within the state when the division deems the use of such explosives is likely to cause injury to life or property.” *See* s. 552.211(3), F.S. The SFM also can (but is not required to) perform on-site inspections of explosive storage sites; investigate blasting scenes and storage facilities for explosives to determine compliance with statutes; and restrict the quantity and use of explosives at any location when it determines the use of such explosives is likely to cause injuries or property damage. The division, however, has not adopted any rules relating to financial responsibility requirements for users of explosives. The Department of Financial Services adopted the Florida Fire Prevention Code and the Life Safety Code which became effective January 1, 2002. These Codes are to be updated every three years thereafter.⁵ According to the division, the proposed Florida Fire Prevention Code and the Life Safety Code incorporate by reference restrictions and standards (based on the National Fire Protection Association’s 495) for use of explosives relating to ground vibration, air blast, and flyrock relative to distance set-backs for all blasting operations *See* F.A.C. 4A-3.012 Standards of the National Fire Protection Association Adopted. There are no other specific rules relating to prescribed minimum set-back distances between residential or commercial structures or buildings and the use of explosives. However, the division has adopted in rules a distance schedule relating to the storage of explosives. *See* Fla. Admin. Code R. 4A-2.006. There are now rules in place governing ground vibration air blast or flyrock from use of explosives adopted in 2002.⁶

Penalties

There are civil penalties for violations of the chapter or any rules thereunder. The division may issue a cease-and-desist order, assess an administrative fine not to exceed \$1,000 per violation, suspend or revoke a license or permit for explosives, or secure temporary or permanent injunctive relief. *See* ss. 552.151, 552.161, 552.171, and 552.23, F.S., respectively. Criminal penalties are also available for specified offenses ranging from second degree felony for

⁵ *See* ch. 98-287, *L.O.F.* The Florida Fire Prevention Code and the Life Safety Code are referenced in chapter 633, F.S., relating to fire prevention and control. In actuality these codes are composites of other national standard codes incorporated by reference in statute. Therefore, the Florida Fire Prevention Code is based in part on the National Fire Protection Association’s (NFPA) Standard 1, Fire Prevention Code. *See* s. 633.0215, F.S. There is no separate statutory section entitled the “Life Safety Code.” The term “Life Safety Code” appeared for the first time in statute in 1998 in connection with the statutory development of a uniform building code. *See* ch. 98-287, *L.O.F.*; s. 633.0215(2), F.S. The Life Safety Code actually refers to and is to be based on the current edition of the NFPA’s Life Safety Code. *See* NFPA 101, Life Safety Code, 2000 ed. The 2000 edition of the NFPA Fire Prevention Code does include by reference the NFPA’s Explosives Materials Code (NFPA 495). Article 8 of NFPA 495 deals with blasting operations at any dwelling, public building, school, church or commercial or institutional building adjacent to a blasting site.

⁶ Under the final rules, vibration limits for the use of explosives in limestone mining were to be consistent with federal standards and state law. The rules require lower vibration levels near neighborhoods, with the limit set at .5 inches per second compared to the prior .75 inches per second. The .75 inches per second will still apply to areas other than neighborhoods. The rules also require higher standards of objectivity for seismologists measuring ground vibrations near residential areas. *See* F.A.C. 4A-2.024.

violation by a person who manufactures, stores, or possesses explosives with the intent to harm life, limb or property to a first degree misdemeanor for violation by a license or permit holder for abandonment of explosive material. *See* s. 552.22, F.S.

Civil Action and Liability

Liability in connection with the manufacture, storage, use, or transportation of explosives may be predicated on negligence, nuisance, violation of state or local law, and strict liability based on the ultrahazardous or abnormally dangerous aspect of explosives.⁷ There is no established forum or process within the Division of State Fire Marshall to handle complaints by residents or commercial entities and their structures as affected by the use of explosives in construction mining activities. The SFM currently responds on a complaint-by-complaint basis to specific complaints, especially involving the use of explosives near residential structures. The SFM typically enters into stipulation agreements with the users of the explosives to establish conditions for their use such as placing limitations on the maximum ground vibrations relative to distance, restrictions on the time of day for the explosions, and other related conditions.

There is no express statutory provision for temporary or permanent injunctive relief in chapter 552, F.S., for persons who are threatened or who continue to suffer irreparable personal injury or property damage for which no other adequate remedy at law is available. However, a person can seek temporary and permanent injunctive relief by filing an affidavit or verified pleading with the court stating specific facts showing that immediate and irreparable injury, loss, or damages will result before the adverse party can be heard in opposition.⁸ The affidavit and verified pleading must also show that the person's attorney made efforts to give notice and show the reasons why notice should not be required beforehand. A bond is required by the court although a bond is not required for a temporary injunction issued solely to prevent physical injury or abuse of a person.

The issue of blasting by construction materials companies has been the subject of residential and commercial entity complaints at the local government level and pending litigation in the last several years, particularly recently down in the southern part of Florida.⁹

III. Effect of Proposed Changes:

The bill creates the Florida Construction Materials Mining Activities Act. The Act establishes an exclusive administrative process within the Division of Administrative Hearing for recovery of damages to real and personal property caused by construction materials mining activities. As relates to claims, recovery or other similar procedure, this Act pre-empts the authority of municipalities, counties or other local governmental entities to regulate matters relating to the use of explosives in their respective corporate limits as provided under s. 555.25, F.S.

⁷ *See* Poole v. Lowell Dunn Co., 573 So.2d 51 (Fla. 3rd DCA 1990); Morse v. Henry Corp., 200 So.2d 816 (Fla. 2nd DCA 1967).

⁸ *See* Fla.R.Civ.P. 1.610.

⁹ Galaraza, Milton D. Carrero, Miami-Dade mining blamed for damaging hundreds of Miramar Homes, Sun-Sentinel, October 23, 2002; McNeal, Natalie P., Miramar in uproar over blasting, Miami Herald, October 24, 2002; *See* Pizzi v. CSR Rinker Mat'l and White Rock Quarries, Mendoza v. CSR Rinker, Dade County Circuit Court.

Legislative findings and public purposes are listed to justify the creation of the specific administrative remedy for complaints arising from the use of explosives in construction materials mining. Any claims for damages other than to real and personal property such as personal injury, emotional distress, nuisance or punitive damages are not subject to the administrative process and must be bifurcated from the claim for damages to the real or personal property.

Bond requirements: The bill requires persons seeking or renewing a user license for use of explosives with construction materials mining activities to get a bond or letter of credit as a security. The bond or letter can be no less than \$100,000. The bond or letter may be released when the user license expires or 181 days after the final use of explosives under the license occurs, whichever is later. However, this release period does not apply if the licensee has been identified as a respondent in a pending claim for damages and if the licensee is renewing his or her user license. The State Fire Marshall is given discretionary rulemaking authority regarding administration of the security bond requirements.

Filing: Within 180 days after an alleged damage has occurred, a person may initiate an administrative action for recovery of real or personal property damage by filing a petition with the Division of Administrative Hearings. A \$100 filing is required except in those cases where a person files an affidavit of indigence based the person’s annual income being 150 percent below the federal poverty guidelines.¹⁰

Mediation: An administrative law judge must issue a procedural order within 5 business days from receipt of the petition and a mediation order. The parties are required to select jointly a mediator and a location for the mediation. If the parties fail to do so within 30 days after the mediation order is issued, then the assigned administrative law judge designates the mediator and the location of the mediation. The cost of mediation is split equally between the petitioner and the respondent. If the petitioner qualified for a filing fee waiver, the respondent bears the full

¹⁰ The following poverty guidelines are one of two versions of the federal poverty measure. They are issued each year in the Federal Register by the Department of Health and Human Services (HHS). The guidelines are a simplification of the poverty For family units with more than 8 members, \$3,080 is added for each additional member.

Size of Family Unit	48 Contiguous States and D.C.	Alaska	Hawaii
1	\$ 8,860	\$11,080	\$10,200
2	11,940	14,930	13,740
3	15,020	18,780	17,280
4	18,100	22,630	20,820
5	21,180	26,480	24,360
6	24,260	30,330	27,900
7	27,340	34,180	31,440
8	30,420	38,030	34,980
For each additional person, add	3,080	3,850	3,540

SOURCE: *Federal Register*, Vol. 67, No. 31, February 14, 2002, pp. 6931-6933

cost of the mediation. Unless the parties agree to a different date, the mediation must be completed within 60 days after a mediator is designated.

Hearing: If the parties have not settled within 30 days after the mediation concludes, the matter must be set for formal hearing as soon as possible thereafter. Alternatively, the parties can agree to a summary hearing within 15 days after the mediation concludes. The formal administrative hearing and the summary hearing must be held at a location in the county where the damage occurred. The hearings are governed by procedures set forth in s. 120.574, F.S.

Recovery of damages: A preponderance of the evidence is required to award the petitioner damages attributable to the respondent. The damages must be paid within 30 days after the final order is issued. A final order must contain precise findings as to damages or liability or lack thereof.

Recovery of attorneys' fees and costs: The prevailing party is entitled to recovery of reasonable taxable costs, including expert witness fees and reasonable attorney's fees. There is an aggregate cap of \$15,000. The \$15,000 cap does not apply if the administrative law judge finds that the claim or the defense of the nonprevailing party was not supported by material facts, not supported by the application of then-existing law, or was frivolous and brought to harass or cause unnecessary delay or costs "to the opposition."

The nonprevailing party has 120 days to pay the total amount of attorneys' fees and taxable costs assessed. The recovery of attorneys' fees and costs do not apply to a person who qualified for the filing fee waiver.

Appeal: A final order is appealable. An appeal and appropriate fee must be filed in the appellate court with jurisdiction in accordance with the appellate court rules. Pending appeal, any payment of an award is stayed.

This bill also expands the definition of "construction materials mining activities" to include "road base materials for shipment offsite."

This exclusive administrative remedy created under this bill does not apply to claims pending in any tribunal on the effective date of the law. This act becomes effective upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The authority of local governmental entities to provide its residents with the use of existing procedures or to establish procedures in ordinances or regulations for resolution of claims for damages as addressed by this bill is pre-empted.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

To the extent this bill may be construed to abrogate a cause of action in tort that existed at common law or by statute prior to the adoption of the Florida Constitution, this bill may raise a constitutional issue regarding right to sue and denial of access to the courts under s.21 of article I of the Florida Constitution. However, the Legislature can abolish a judicial remedy provided a reasonable alternative remedy, commensurate benefit or overpowering public necessity for the abolishment is shown and there is no alternative method for meeting that public necessity. *See Kluger v. White*, 281 So.2d 1 (Fla. 1973); *Psychiatric Assoc. v. Siegel*, 610 So.2d 419 (1992). In this case, a formal and expedited administrative process with attendant due process protections is provided.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

This bill may provide a more cost-effective, expedient and mutually beneficial administrative resolution to the traditional judicial process for resolution of damages arising from explosives in construction materials mining activities. Anecdotally it is reported that claim amounts range typically from \$500 to \$1500 or more. It is unknown how many residential or commercial real or personal properties have been allegedly damaged or will be damaged by the use of explosives in these activities across the state.

It is also unknown how many persons would qualify for indigence status in order to obtain the filing fee and mediation fee waiver, and avoid assessment of taxable costs and attorneys' fees if they do not prevail. A nonprevailing petitioner will still be subject to all costs and fees attendant with any appeal including the cost of transcripts.

This bill will also affect licensed users of explosives who will now be required to post a bond as provided under the bill.

C. Government Sector Impact:

This bill will have an indeterminate fiscal and workload impact on the Division of Administrative Hearings which is designated as the exclusive jurisdictional tribunal for resolving claims for damages against real or personal property resulting from explosives in construction materials mining activities.

VI. Technical Deficiencies:

On page 8, line 24, the term “decision” is used incorrectly in lieu of the appropriate “final order” for purposes of an appeal.

VII. Related Issues:

The bill requires a security to be posted by explosives user licensees. The bond may be in the form of a bond or letter of credit. It is unknown whether this requirement would foreclose other forms of financial responsibility such as a trust fund, casualty insurance, corporate guaranty or combination thereof. Additionally, the security amount must be no less than \$100,000. It is unknown whether that minimum amount will be sufficient to recover claims against the guarantor as may be provided under this bill. As it is, there is no current bond requirement.

The bill requires a \$100 filing fee for persons using the administrative process unless the person or entity qualifies for waiver. A petition filed in court typically averages \$200 or more. Currently, there is no filing fee involved with other petitions filed with the Division of Administrative Hearings but that is because typically the action involves a private individual or commercial entity filing an administration complaint against a governmental entity, not between private parties. The bill does not indicate where the filing fees should be deposited and for what use.

It is unknown whether the redefinition of “construction materials mining activities” is a substantive expansion or clarification of existing activities engendered under the phrase.

VIII. Amendments:

#1 by Judiciary:

Designates the Administrative Trust Fund of the Division of Administrative Hearings as the repository of filing fees for purposes of defraying cost and expense of administrative hearing process for specific claims. (WITH TITLE AMENDMENT)