

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

DEP would be required to create additional rules for the implementation of this act.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Over the past seven years, the Florida Legislature has adopted Risk-Based Corrective Action (RBCA, pronounced "Rebecca") principles to apply to cleanups conducted at petroleum-contaminated sites, brownfield sites in designated brownfield areas, and drycleaning-solvent-contaminated sites (often collectively referred to as "program" sites), as well as contaminated sites on lands owned by the state university system (SUS), and contaminated sites being cleaned up by district school boards to be used for K-12 school construction sites. [See ss. 376.3071(5), 376.81, 376.3078(4), 376.051(6), and 1013.365, F.S., respectively.]

RBCA is a site cleanup process that provides a consistent level of protection of public health and the environment, and provides flexibility in the means to achieve protection. RBCA uses risk analysis to determine what level of cleanup is appropriate at a given site. When supervising the cleanup of sites that will have unrestricted access after cleanup is complete, DEP is directed to use existing water quality standards, and for contaminants that have no current water or soil standards, to establish default cleanup target levels (CTL's) based on a one-in-one million cancer risk level. There are different ways to achieve the one-in-one million level of protection, such as complete cleanup to DEP's default CTL's to allow unrestricted land use (e.g., residential), or lesser cleanup to meet site-specific alternative CTL's combined with engineering and/or institutional controls (e.g., surface cap and/or deed restriction to prohibit ground water use) to prevent unsafe exposure to contaminants. Generally, RBCA is embraced as a more flexible and cost-efficient process to achieve a protective cleanup.

Currently, sites that fall outside the program areas in which RBCA has been adopted are subject to one of two cleanup processes. The most common of these is often referred to as the CAP/RAP (Contamination Assessment Plan/Remedial Action Plan) process, wherein site cleanups are generally completed by registered environmental professionals in accordance with the DEP's Model Corrective Actions for Contaminated Sites guidance document. This document provides recommended procedures for the development and approval of work plans and reports. The DEP's cleanup criteria are based on applicable ground water and surface water standards, ground water guidance concentrations, contaminant leachability factors and soil exposure guidelines. The DEP's CAP/RAP process has always incorporated general notions of risk-based cleanup but without the clear direction and authority provided by the statute for the true RBCA programs. The other cleanup process is included in the Federal Resource Conservation and Recovery Act (RCRA) program, which the department has been authorized by the USEPA to administer in Florida. RCRA cleanups in Florida are governed by federal regulations adopted as Florida rules, where they are equivalent or more stringent, and federal program guidance.

Under current law, contaminated sites owned by counties and municipalities are treated just as any other contaminated site in Florida. In some cases, these contaminated sites are eligible for one of the state-funded cleanup programs [either the Drycleaning Solvent Cleanup Program (DSCP) or one of the various state-funded programs within the Petroleum Cleanup Program]. If the site is eligible for a state-funded cleanup, the county or municipality is not liable for cleanup on its own. DEP will not pursue enforcement to compel cleanup; instead the site will be cleaned up in priority order based on its threat to public health and the environment. In some cases, cleanup may not occur for many years while cleanups at other higher priority sites receive the available funding from that year's appropriation.

If a local-government-owned contaminated site is not eligible for one of the state-funded cleanup programs, then it will be subject to the traditional enforcement process or, perhaps, be cleaned up voluntarily by the county or municipality. If the local government does not voluntarily clean up the site, then the appropriate department district office staff will review the threat presented by the site and exercise that district's enforcement discretion to decide whether pursuit of an enforcement action is appropriate (i.e., issuance of a Notice of Violation, negotiation of a Consent Order, pursuit of court-ordered site rehabilitation, etc.) Based on evaluation of the site's threat and DEP resource limitations, the district may not choose to aggressively pursue enforcement at a local-government-owned contaminated site; and therefore, cleanup may not occur for some time.

When cleanup is conducted at such a site, either voluntarily or pursuant to the enforcement process, the type of contaminant involved and the type of site determines the cleanup process that applies. As explained above, if the site is a "program-site" (petroleum or drycleaning solvent contamination, regardless of whether it is eligible for a state-funded cleanup), or it is located in a designated Brownfield Area or is a K-12 school construction site, then the RBCA cleanup process applies pursuant to current law. If the contaminants present are constituents other than petroleum, petroleum products, or drycleaning solvents, and the site is not a K-12 school site or in a Brownfield Area, then the traditional CAP/RAP or RCRA cleanup process applies (see above).

The timing of the cleanup is largely driven by the willingness of the responsible party. Generally, a decision to conduct voluntary site cleanup is driven by economic factors such as inability to develop or sell the property in its contaminated state, or a desire to avoid potential third-party liability lawsuits for property damage or personal injury (e.g., if the contamination migrates off-site to an adjacent land owner's property.) If no such business/economic reasons exist to encourage cleanup, then quite often the responsible party will be reluctant to initiate cleanup quickly. In some enforcement cases, the department encounters resistance and stalling on the part of the responsible party, as well as claims of inability to pay. In the case of counties and municipalities, often struggling with limited budgets, decisions to clean up contaminated sites may be delayed indefinitely in favor of using the available budget for other government services.

Effect of the Proposed Changes

HB 651 provides for the Public Resource Protection Act and provides that counties and municipalities that own sites with soil contamination shall remediate sites using RBCA as required for brownfield sites under s. 376.81, F.S. The bill provides for the DEP to adopt rules and issue such orders as necessary to carry out the provisions of the act. Lastly, HB 685 provides that if a conflict exists between this act or rules adopted pursuant thereto and any existing rule, state law, or local ordinance, then the provisions of this act or rules adopted pursuant to the act shall control; however, local governments are not prohibited from adopting and enforcing more stringent provisions.

C. SECTION DIRECTORY:

Section 1. Provides that the act shall be known as the Public Resource Protection Act.

Section 2. Provides that counties and municipalities that own sites with soil or water contamination shall remediate such sites to the same extent as is required for brownfield sites under s. 376.81, F.S.

Section 3. Authorizes the DEP to adopt rules and issue orders to carry out the provisions of this act.

Section 4. Cites to existing DEP enforcement authority that can be used to enforce the provisions of this act.

Section 5. Provides that if a conflict exists between this act or rules adopted pursuant thereto and any existing rule, state law, or local ordinance, then the provisions of this act or rules adopted pursuant thereto shall control; however, local governments are not prohibited from adopting and enforcing more stringent provisions.

Section 6. Provides that the act shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

A. Non-recurring Effects: HB 685 includes rulemaking authority to implement the bill's provisions. Rulemaking costs will be insignificant and non-recurring. These costs include DEP's efforts to publicize a proposed rule through mail-outs and public workshops around the state, as well as costs associated with publication and process requirements pursuant to Chapter 120, F.S.

B. Recurring Effects: If HB 685 is interpreted to mean that local governments must immediately commence cleanup at every contaminated site they own at their own expense, including program-eligible sites that would otherwise receive a state-funded cleanup, then the state may receive a positive fiscal impact by not having to pay for the cleanup of those contaminated sites.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

DEP would be required to create additional rules for the implementation of this act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Issue- State Prioritized Cleanup

The bill could be interpreted that cleanup must commence immediately. This interpretation is supported by Section 4 of the bill. HB 651 states that the provisions of the bill may be enforced pursuant to the DEP's existing enforcement authority in chapters 120, 376 and 403, F.S. The bill could be interpreted to mean that DEP must initiate cleanup at all of their city- and county-owned sites upon the bill becoming a law. HB 651 could result in a potential conflict with existing law for those sites eligible for state-funded cleanup due to the requirement to clean up such sites in priority order based on threat. The bill is unclear whether the counties and municipalities would have to waive their state-funded cleanups and proceed with cleanup at their own expense. The local governments would likely assert that they are entitled to the state-funded cleanup, regardless of whether a site is cleaned up ahead of its priority order, particularly in light of Section 5 of the bill that states that if a conflict exists in rule or law, the provisions of the Public Resource Protection Act shall control. HB 685 could result in a negative environmental impact because it would require expenditure of state cleanup funding at sites that present less of a threat to human health and the environment than other sites higher on the state's priority ranking lists.

Issue- Statutory Reference

HB 685 does not include any indication of where these new provisions would ultimately appear in the Florida Statutes. Because the phrase "sites with soil or water contamination" are not defined, this may create confusion and implementation may be difficult. In chapters 376 and 403, F.S., there are a number of definitions relating to this subject, including "contamination," "contaminated site," "contaminant," "pollution," "source removal," "site rehabilitation," etc. HB 651 directs the DEP to establish rules and issue orders to implement the provisions of the act. Since HB 685 does not provide for statutory authority, it is unclear how DEP would implement those rule set forth and thus would result in rule challenges.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES