

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: CS/SB 1350

SPONSOR: Regulated Industries Committee and Senator Bennett

SUBJECT: Mold Remediation

DATE: March 11, 2004

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sumner</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>FT</u>	_____
3.	_____	_____	<u>AGG</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill:

- Provides a statutory section that gives authority to the Department of Business and Professional Regulation, Construction Industry Licensing Board (board) to regulate individuals and companies who hold themselves out to the public to perform mold assessment or mold remediation for compensation.
- Exempts engineers and pest control operators operating within the scope of their respective licenses. It also exempts authorized employees of the U.S., state, city and county governments performing mold assessment or mold remediation within the scope of their employment.
- Requires that the board shall provide by rule when and in what manner a licensee may perform both mold assessment and mold remediation on the same contract or project.
- Provides for licensure of business organizations practicing mold assessment or mold remediation.
- Provides that if a mold remediation of residential property has been conducted within a reasonable time prior to the sale or lease of residential property, the seller shall clearly and accurately disclose to the purchaser or lessee the results of the remediation.
- Precludes any civil action alleging mold or fungal damages to property or injuries to persons claimed in excess of \$25,000, if that person has acted within acceptable codes and acceptable industry protocols. However, this provision does not apply to actions involving gross negligence.

This bill creates Part IV of chapter 489, consisting of the following sections of the Florida Statutes: 489.601, 489.602, 489.603, 489.604, 489.605, 489.606, 489.607, 489.608, 489.609,

489.61, 489, 611, 489.612, 489.613, 489.614, 489.615, 489.616, 489.617, 489.618, and 489.619. The bill amends section 489.107 of the Florida Statutes.

II. Present Situation:

The Committee on Regulated Industries stated in its 2004 interim report¹ that there has been a heightened awareness of the effects of exposure to mold. The report attributed the heightened awareness, in part, to an increase in litigation over mold related issues, the insurance companies responding by limiting coverage for mold damage, and hundreds of businesses (just in South Florida) sprouting up and touting their services as mold remediators.

An individual, company, or employee of the United States, state, city, and county government that engages or offers to engage in the business or profession of performing any mold-related activity for compensation is not regulated in the state. However, engineers and persons engaging in the business of pest control under chs. 471 and 482, F.S., who perform mold-related activities in the scope of their licensure, are regulated.

Licensed engineers practicing engineering is defined, in part, by s. 471.005, F.S., to mean a person engaged in any service or creative work, the adequate performance of which requires engineering education, training and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to such services, insofar as they involve safeguarding life, health, or property.

Persons engaged in the business of pest control are defined in s. 482.021, F.S., as a “licensee” regulated by the Department of Agriculture and Consumer Services. “Pest control” includes all phases of fumigation to treat various different pests including fungi.

III. Effect of Proposed Changes:

Section 1.

The bill creates a Part IV of ch. 489, F.S., entitled “Mold Assessment and Mold Remediation.”

Section 2. Legislative Purpose

Section 489.601, F.S., provides that the Legislature finds it necessary in the interest of the public health, safety, and welfare in order to prevent damage to the real and personal property of the residents of this state and to avert economic injury to the residents of this state to regulate individuals and companies that hold themselves out to the public as qualified to perform mold-related activities.

Section 3. Scope of the Act

Section 489.602, F.S., applies to individuals and companies conducting mold assessment and mold remediation for compensation.

Section 4. Exemptions

Section 489.603 F.S., exempts from licensure engineers and pest control operators operating within the scope of their respective licenses. It also exempts authorized employees of the United

¹ Interim Project Report 2004-158.

States, state, city, and county governments performing mold assessment or mold remediation within the scope of their employment and full-time employees engaged in routine maintenance of public and private buildings, structures, and facilities as long as the employee does not hold out for hire or otherwise engage in mold assessment or mold remediation.

While not specifically stated, those employees who encounter mold in the normal course of their duties, i.e. insurance adjustors, would not need to be licensed since their employment does not involve mold assessment nor mold remediation as defined in this act.

Section 5. Definitions

Section 489.609, F.S., defines the following terms relating to mold assessment and mold remediation:

- **Board** means the Construction Industry Licensing Board.
- **Business organization** means any partnership, corporation, business trust, joint venture, or other business organization.
- **Department** means the Department of Business and Professional Regulation.
- **Mold** means any living or dead fungi or related products or parts, including spores, hyphae, and mycotoxins.
- **Mold assessment** means:
 - a. An inspection, investigation, or survey of a dwelling or other structure to provide the owner or occupant with information regarding the presence, identification, or evaluation of mold;
 - b. The development of a mold management plan or remediation protocol; or
 - c. The collection or analysis of a mold sample.
- **Mold assessor** means any person or business organization who performs a mold assessment.
- **Mold remediation** means the removal, cleaning, sanitizing, demolition, or other treatment, including preventive activities, of mold or mold-contaminated matter that was not purposely grown at that location.
- **Mold remediator** means any person or business organization that performs mold remediation. A mold remediator may not perform any work that requires a license under ch. 489 unless the mold remediator is also licensed under that chapter.
- **Primary qualifying agent** means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility, to supervise, direct, manage, and control the mold assessment or mold remediation activities of the business organization with which he or she is connected; who has the responsibility to supervise, direct, manage, and control mold assessment or mold remediation activities on a job for which he or she has obtained the building permit; and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the department.
- **Secondary qualifying agent** means a person who possesses the requisite skill, knowledge, and experience, and has the responsibility to supervise, direct, manage, and control mold assessment and mold remediation activities on a job for which he or she has obtained a permit, and whose technical and personal qualifications have been determined by investigation and examination as provided in this part, as attested by the department.

Section 6. Fees

Section 489.605, F.S., provides the board shall by rule, establish reasonable fees to be paid for applications, examinations, licensing and renewal, recordmaking, and recordkeeping. Fees for application, initial licensure, license renewal, for mold assessors or mold remediators may not exceed \$500 per applicant.

Section 7. Examination

Section 489.606, F.S., provides the examination requirements for persons desiring to be licensed as mold assessor or mold remediator with the department.

Section 8. Licensure

Section 489.607, F.S., provides that the department shall license any applicant who the board certifies is qualified to practice mold assessment or mold remediation and who:

- Pays the initial licensing fee;
- Submits with the application for licensure as a mold assessor or a mold remediator evidence that he or she has successfully completed the department-approved courses as prescribed by rule;
- Provides evidence of financial stability; and
- Passes a department-approved examination of qualifications and knowledge relating to mold assessment and mold remediation; or
- In lieu of passing a department-approved examination, shows proof that he or she has been certified by an organization that requires the same testing and examination as the department requires.

Section 9. Licensure of business organizations; qualifying agents

Section 489.608, F.S., provides that if an individual proposes to engage in mold remediation or mold assessment in that individual's own name, the license may be issued only to that individual. If an applicant proposes to engage in mold remediation or mold assessment as a business organization in any name other than the applicant's legal name, the business organization must apply for licensure through a qualifying agent or the individual applicant must apply for licensure under the fictitious name. It also provides for application requirements for financially responsible officers and secondary qualifying agents for business organizations.

Section 10. Responsibilities

Section 489.609, F.S., provides for the responsibilities qualifying agents and financially responsible officers for business organizations. Primary qualifying agents for a business organization are jointly and equally responsible for supervision of all operations of the business organization; for all field work at all sites; and for financial matters both for the organization in general and for each specific job.

Upon approval by the board, a business organization may designate a financially responsible officer for purposes of licensure. A financially responsible officer shall be responsible for all financial aspects of the business organization and may not be designated as the primary qualifying agent.

Section 11. Continuing education

Section 489.61, F.S., provides that a licensee must annually complete 15 hours of continuing education courses as prescribed by department rule.

Section 12. Approval of mold assessor and mold remediator training courses and providers

Section 489.611, F.S., provides that the board:

- Shall approve training courses and the providers of such courses.
- Shall approve training courses and the providers of such courses who offer training for persons who are exempt from licensure.
- Shall, by rule, prescribe criteria for approving training courses and course providers and may, by rule, modify the required training.
- May enter into agreements with other states for the reciprocal approval of training courses or the providers of training courses.
- Shall, by rule, establish reasonable fees in an amount not to exceed the cost of evaluation, approval, and recordmaking and recordkeeping of training courses and providers of training courses.
- May impose against a provider of training courses any penalty that it may impose against a licensee under this part or s. 455.227, F.S., may decline to approve courses, and may withdraw approval of courses proposed by a provider who has, or whose agent has, been convicted of, pled guilty or nolo contendere to, or entered into a stipulation or consent agreement relating to, without regard to adjudication, any crime or administrative violation in any jurisdiction which involves fraud, deceit, or false or fraudulent representations made in the course of seeking approval of or providing training courses.

Section 13. Renewal of license

Section 489.612, F.S., provides that the department shall renew a license upon receipt of the renewal application and fee, upon proof of compliance with the continuing education requirements of s. 489.61, F.S., and if a demonstration of competency is required by law or rule, upon certification by the board that the licensee has satisfactorily demonstrated his or her competence in mold assessment and mold remediation.

Section 14. Reactivation

Section 489.613, F.S., provides that the board shall prescribe by rule continuing education requirements for reactivating a license which may not exceed 15 classroom hours for each year the license was inactive and shall adopt rules relating to licenses that have become inactive and for the renewal of inactive licenses and shall prescribe a fee not to exceed \$50 for reactivation or renewal.

Section 15. Disciplinary proceedings

Section 489.614(1), F.S., provides that the board may revoke, suspend, or deny the issuance or renewal of a license, reprimand, censure, or place on probation any mold assessor or mold remediator; require financial restitution to a consumer; impose an administrative fine not to exceed \$5,000 per violation; require continuing education; or assess costs associated with any investigation and prosecution, if the mold assessor or mold remediator is found guilty of the following acts:

- Obtaining a license or certificate of authority by fraud or misrepresentation.
- Being convicted or found guilty of, or entering a plea of nolo contendere regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of mold assessment or mold remediation or the ability to practice mold assessment or mold remediation.
- Violating any provision of ch. 455, F.S.
- Performing any act which assists a person or entity in engaging in the prohibited unlicensed practice of mold assessment or mold remediation, if the licensee knows or has reasonable grounds to know that the person or entity was unlicensed.
- Knowingly combining or conspiring with an unlicensed person by allowing his or her license, or certificate of authority to be used by the unlicensed person with intent to evade the provision of this part. When a licensee allows his or her license to be used by one or more business organizations without having any active participation in the operations, management, or control of such business organizations, such act constitutes prima facie evidence of an intent to evade the provisions of this part.
- Acting in the capacity of a mold assessor or mold remediator under any license issued under this chapter except in the name of the licensee as set forth on the issued license.
- Committing mismanagement or misconduct in the practice of mold assessment or mold remediation that causes financial harm to a customer. Financial mismanagement or misconduct occurs when:
 - Valid liens have been recorded against the property of a mold assessor's or mold remediator's customer for supplies or services ordered by the mold assessor or mold remediator for the customer's job; the mold assessor has received funds from the customer to pay for the supplies or services; and the mold assessor or mold remediator has not had the liens removed from the property, by payment or by bond, within 75 days after the date of such liens;
 - The mold assessor or mold remediator has abandoned a customer's job and the percentage of completion is less than the percentage of the total contract price paid to the mold assessor or mold remediator as of the time of abandonment, unless the contractor is entitled to retain such funds under the terms of the contract or refunds the excess funds within 30 days after the date the job is abandoned; or
 - The mold assessor's or mold remediator's job has been completed, and it is shown that the customer has had to pay more for the contracted job than the original contract price, as adjusted for subsequent change orders, unless such increase in cost was the result of circumstances beyond the control of the mold assessor or mold remediator, was the result of circumstances caused by the customer, or was otherwise permitted by the terms of the contract between the mold assessor or mold remediator and the customer.
- Being disciplined by any municipality or county for an act or violation of this part.
- Failing in any material respect to comply with the provisions of this part., or violating a rule or lawful order of the department.
- Abandoning a mold assessment or mold remediation project in which the mold assessor or mold remediator is engaged or under contract as a mold assessor or mold remediator. A project may be presumed abandoned after 20 days if the mold assessor or mold

- remediator terminates the project without just cause and without proper notification to the owner, including the reason for termination; if the mold assessor or mold remediator fails to reasonably secure the project to safeguard the public while work is stopped; or if the mold assessor or mold remediator fails to perform work without just cause for 20 days.
- Signing a statement with respect to a project or contract falsely indicating that the work is bonded; falsely indicating that payment has been made for all subcontracted work, labor, and materials which results in a financial loss to the owner, purchaser, or mold assessor or mold remediator; or falsely indicating that workers' compensation and public liability insurance are provided.
 - Committing fraud or deceit in the practice of mold assessment or mold remediation.
 - Committing incompetency or misconduct in the practice of mold assessment or mold remediation.
 - Committing gross negligence, repeated negligence, or negligence resulting in a significant danger to life or property in the practice of mold assessment or mold remediation.
 - Failing to satisfy, within a reasonable time, the terms of a civil judgment obtained against the licensee, or the business organization qualified by the licensee, relating to the practice of the licensee's profession.

Section 489.614(2), F.S., provides that if a mold assessor or mold remediator disciplined under subsection (1) is a qualifying agent for a business the department may impose an additional administrative fine not to exceed \$5,000 if the violation was performed in connection with any mold remediation, or mold remediation-related activities, or mold assessment or mold assessment-related activities.

Section 489.614(3), F.S., provides that the board may, by rule, specify the acts or omissions that constitute violations of the section.

Section 489.614(4), F.S., provides that in recommending penalties in any proposed recommended final order, the department shall follow the penalty guidelines established by the board by rule. The department shall advise the administrative law judge of the appropriate penalty, including mitigating and aggravating circumstances, and the specific rule citation.

Section 489.614(5), F.S., provides that the board may not reinstate the license or certificate of authority of, or cause a license or certificate of authority to be issued to, a person or business organization that the board has determined is unqualified or whose license or certificate of authority the board has suspended, until it is satisfied that the person or business organization has complied with all the terms and conditions set forth in the final order and is capable of competently engaging in the business of mold assessment or mold remediation.

Section 489.614(6), F.S., provides that the board may assess interest or penalties on all fines imposed under this chapter against any person or business organization which has not paid the imposed fine by the due date established by rule or final order. The provisions of chapter 120 do not apply to such assessment. Interest rates to be imposed shall be established by rule and shall not be usurious.

Section 489.614(7), F.S., provides that the board shall not issue or renew a license, or certificate of authority to any person or business organization that has been assessed a fine, interest, or costs associated with investigation and prosecution, or has been ordered to pay restitution, until such fine, interest, or costs associated with investigation and prosecution or restitution are paid in full or until all terms and conditions of the final order have been satisfied.

Section 489.614(8), F.S., provides that any person licensed pursuant to this part who has had his or her license revoked shall not be eligible to be a partner, officer, director, or trustee of a business organization defined by this section or be employed in a managerial or supervisory capacity for a 5-year period. Such person shall also be ineligible to reapply for certification or registration under this part for a period of 5 years after the effective date of the revocation.

Section 489.614(9), F.S., provides that if a business organization or any of its partners, officers, directors, trustees, or members is or has previously been fined for violating subsection (2) the board may, on that basis alone, revoke, suspend, place on probation, or deny issuance of a license to a qualifying agent or financially responsible officer of that business organization.

Section 489.614(10), F.S., provides that notwithstanding the provisions of chapters 120 and 455, upon receipt of a legally sufficient consumer complaint alleging a violation of this part, the department may provide by rule for binding arbitration between the complainant and the certificateholder or registrant, provided the following conditions exist:

- There is evidence that the complainant has suffered or is likely to suffer monetary damages resulting from the violation of this part;
- The licensee does not have a history of repeated or similar violations;
- Reasonable grounds exist to believe that the public interest will be better served by arbitration than by disciplinary action; and
- The complainant and licensee have not previously entered into private arbitration, and no civil court action based on the same transaction has been filed.

The licensee and the complainant may consent in writing to binding arbitration within 15 days following notification of this process by the department. The department may suspend all action in the matter for 45 days when notice of consent to binding arbitration is received by the department. If the arbitration process is successfully concluded within the 60-day period, the department may close the case file with a notation of the disposition and the licensee's record shall reflect only that a complaint was filed and resolved through arbitration.

Where a complaint meets the criteria for arbitration set forth in paragraph (a) and the damages at issue are less than \$2,500, the department shall refer the complaint for mandatory arbitration.

The arbitrator's order shall become a final order of the board if not challenged by the complainant or the certificateholder or registrant within 30 days after filing. The board's review of the arbitrator's order shall operate in the manner of the review of recommended orders pursuant to s. [120.57\(1\)](#) and shall not be a de novo review.

Section 489.614(11), F.S., provides that when an investigation of a mold assessor or mold remediator is undertaken, the department shall promptly furnish to the mold assessor or mold

remediator or the mold assessor's or mold remediator's attorney a copy of the complaint or document that resulted in the initiation of the investigation. The department makes the complaint and supporting documents available to the mold assessor or mold remediator. The complaint or supporting documents contains information regarding the specific facts that serve as the basis for the complaint. The mold assessor or mold remediator may submit a written response to the information contained in such complaint or document within 20 days after service to the mold assessor or mold remediator of the complaint or document. The mold assessor's or mold remediator's written response is considered by the probable cause panel. The right to respond does not prohibit the issuance of a summary emergency order, if necessary, to protect the public. However, if the secretary, or the secretary's designee, and the chair of the board or the chair of the probable cause panel agree in writing that such notification would be detrimental to the investigation, the department may withhold notification. The department may conduct an investigation without notification to a mold assessor or mold remediator if the act under investigation is a criminal offense.

Section 16. Prohibitions; penalties

Section 489.615, F.S., provides that a person may not:

- Falsely hold himself or herself or a business organization out as a licensee,
- Falsely impersonate a licensee;
- Present as his or her own the license, or certificate of authority of another;
- Knowingly give false or forged evidence to the board or a member thereof;
- Use or attempt to use a license, or certificate of authority which has been suspended or revoked;
- Engage in the business or act in the capacity of a mold assessor or mold remediator or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a mold assessor or mold remediator without being duly licensed or having a certificate of authority;
- Operate a business organization engaged in mold assessment or mold remediation after 60 days following the termination of its only qualifying agent without designating another primary qualifying agent, except as provided in ss. 489.608 and 489.609;
- For purposes of this subsection, a person or business organization operating on an inactive or suspended license, or certificate of authority is considered unlicensed.

The subsection provides that any unlicensed person who violates any of the provisions of subsection (1):

- Commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
- After having been previously found guilty of such violation commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.
- During the existence of a state of emergency declared by executive order of the Governor commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

The subsection also provides that a licensed mold assessor or mold remediator may not:

- Enter into an agreement, oral or written, whereby his or her license number is used, or to be used, by a person who is not licensed as provided for in this chapter, or used, or to be

- used, by a business organization that is not duly qualified as provided for in this chapter to engage in the business, or act in the capacity, of a mold assessor or mold remediator.
- Knowingly allow his or her license number to be used by a person who is not licensed as provided for in this chapter, or used by a business organization that is not qualified as provided for in this chapter to engage in the business, or act in the capacity of, a mold assessor or mold remediator.

Section 17. Multiple services

Section 489.616, F.S., provides that the board shall, by rule, provide when and in what manner a licensee may perform both mold assessment and mold remediation on the same contract or project.

Section 18. Sale or lease of residential property

Section 489.618, F.S., provides that if a mold remediation of residential property is conducted, within a reasonable time, as determined by the Florida Real Estate Commission, before executing the contract for sale or lease of the residential property, the seller shall clearly and accurately disclose to the purchaser or lessee the results of the remediation.

Section 19. Liability

Section 489.619, F.S., provides that notwithstanding any law to the contrary, a civil action does not lie against a person alleging mold or fungal damages to property or injuries to persons claimed in excess of \$25,000, if that person has acted within acceptable codes and acceptable industry protocols. The limitation does not apply to actions alleging gross negligence. There is also a rebuttable presumption that all work performed in accordance with applicable building codes and accepted industry protocols is not negligent.

Section 20. Severability

This section provides that if any provision of the act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of the act are severable.

Section 21. Construction Industry Licensing Board

Section 489.107, F.S., is amended to add an additional member to the board who is primarily engaged in business as a mold assessor or mold remediator.

Section 22. Effective date

The bill provides that the act shall take effect October 1, 2004

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, section 21 of the State Constitution provides that “[t]he courts shall be open to every person for redress for any injury, and justice shall be administered without sale denial, or delay.” The Legislature, however, may restrict access to courts under certain circumstances:

[W]here a right of access to courts for redress for a particular injury has been provided by statutory law predating the adoption of Declaration of Rights of constitution of Florida, or where such right has become a part of common law of state, legislature is without power to abolish such a right without providing a reasonable alternative to protect rights of people of state to redress for injuries, unless legislature can show an overpowering public necessity can be shown. *See Kluger v. White*, 281 So.2d 1, 4 (1973).

Since the bill provides for a cap on liability in civil actions, it raises questions about possible infringements on the right of access to the courts.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

The licensure fee may not exceed \$500 per applicant. The licensure renewal fee is set by rule and the reactivation fee is not to exceed \$50.00

B. Private Sector Impact:

Citizens and insurance companies may save money due to tighter safeguards provided by the regulation of the professions.

C. Government Sector Impact:

Preliminary estimates from the department indicate that there will be approximately 2500 licenses with start up costs of \$1 million for exams and program development. These costs will not be recurring after the initial 2 year period.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
