HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 787 Recycled and Recovered Materials
SPONSOR(S): Agriculture & Natural Resources Subcommittee; Peters
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 912

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	11 Y, 0 N, As CS	Gregory	Blalock
2) Judiciary Committee	17 Y, 0 N	Aziz	Havlicak
3) State Affairs Committee			

SUMMARY ANALYSIS

Economically recovering material and energy resources from solid waste can eliminate unnecessary waste and slow the depletion of natural resources. The Legislature declared that the maximum recycling and reuse of resources are considered high-priority goals of the state. In 2013, 11,845,600 tons of municipal solid waste was recycled in Florida.

Under current law, the following persons can be held liable for all costs of removal or remedial action incurred by the Department of Environmental Protection (DEP) and damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from the release or threatened release of a hazardous substance:

- Owners and operators of a facility;
- Persons who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substance was disposed of;
- Any person who by contract arranged for the disposal of a hazardous substance; and
- Any person who accepts or has accepted any hazardous substances for transport to disposal or treatment facilities or sites.

These persons may only use the defenses available in the statutes. To avoid liability persons must plead and prove the occurrence was solely the result of an act of war, act of government, act of God, or an act or omission of a third party.

The bill:

- Provides that a person who sells, transfers, or arranges for the transfer of recycled and recovered materials to a facility owned or operated by another person for the purpose of reclamation, recycling, manufacturing, or reuse of such materials is relieved from liability for hazardous substances released or threatened to be released from the receiving facility;
- Creates an exception or limitation to the relief from liability if the person arranging for the transfer of the recycled material fails to exercise reasonable care with respect to the management and handling of the material, or if the recycling of such materials was not expected to be “legitimate” based on the information generally available to the person at the time of the arrangement;
- Defines “recycled and recovered materials” to include scrap paper; scrap plastic; scrap glass; scrap textiles; scrap rubber, other than whole tires; scrap metal; or spent lead-acid or nickel-cadmium batteries or other spent batteries; and
- States that the newly created defense applies to causes of action accruing on or after July 1, 2015 and applies retroactively to causes of action accruing before July 1, 2015, for which a lawsuit has not been filed.

The bill may have a negative fiscal impact on DEP because there is a potential that if there were a release of hazardous substances and a viable responsible party successfully claims the newly created liability defense, the state may incur the associated cleanup costs if no other viable responsible party exists.

The bill is effective on July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Recycled and Recovered Materials

Economically recovering material and energy resources from solid waste can eliminate unnecessary waste and slow the depletion of natural resources.[1] The Legislature declared that the maximum recycling and reuse of resources are considered high-priority goals of the state.[2] In 2013, 11,845,600 tons of municipal solid waste was recycled in Florida.[3]

Recovering and recycling scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber, scrap metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries not only eliminate unnecessary waste and slow the depletion of natural resources, but may also be economically beneficial.[4] There are approximately 186 recovered materials dealers in Florida.[5] However, these activities may be discouraged and impeded as an unintended consequence of the hazardous substance liability provisions of Florida law.

Contamination Liability and Defenses – State

A "hazardous substance" is a substance, element, compound, mixture, solution, hazardous waste, or toxic pollutant listed by the Environmental Protection Agency (EPA) which, when released into the environment may present substantial danger to the public health or welfare or the environment.[6] Under ss. 376.308(1)(b) and 403.727(4), F.S., the following persons can be held liable for all costs of removal or remedial action incurred by the Department of Environmental Protection (DEP) and damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from the release or threatened release of a hazardous substance:

- Owners and operators of a facility;
- Persons who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substance was disposed of;
- Any person who by contract arranged for the disposal of a hazardous substance; and
- Any person who accepts or has accepted any hazardous substances for transport to disposal or treatment facilities or sites.[7]

DEP does not need to plead or prove negligence in any form or matter in these cases.[8] DEP must only plead and prove that the prohibited discharge or other polluting condition occurred.[9] Thus, this is a strict liability statute. Even though a person may not make critical decisions as to how, when, and by whom a hazardous substance is disposed of, a person may be held liable for cleanup costs if there is evidence the person was the party responsible for "otherwise arranging" for disposal of hazardous substance.[10]

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[1] Section 403.7032(1), F.S.
[2] Id.
[3] Florida Department of Environmental Protection, *Florida Municipal Solid Waste Collected and Recycled (2013)*, http://www.dep.state.fl.us/waste/categories/recycling/SWreportdata/13_data.htm (last visited March 18, 2015).
[4] Presentation by Florida Recycling Partnership, Agriculture and Natural Resources Subcommittee, March 3, 2015, available at http://myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?CommitteeId=2852.
[5] Florida Department of Environmental Protection, *Recycling Business Assistance Center*, http://www.dep.state.fl.us/waste/rbac/pages/directory.htm (last visited March 18, 2015).
[6] Sections 376.301(20) and 403.703(12), F.S. citing 42 U.S.C. § 9601(14); 42 U.S.C. § 9602(a).
[7] Section 403.727(4), F.S.
[8] Section 376.308(1), F.S.
[9] Id.; Aramark v. Easton 894 So.2d 20, 26 (Fla. 2004)
[10] Florida Power & Light Co. v. Allis Chalmers Corp. et al., 893 F.2d 1313, 1318 (11th Cir. 1990).

Whenever two or more persons release a hazardous substance and the damage is indivisible, those persons may be held jointly and severally liable.[11] Joint and several liability is liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion.[12] Thus, each liable party is individually responsible for the entire obligation.[13] A paying party may have a right of contribution and indemnity from nonpaying parties.[14] However, if damage from the release of hazardous substances is divisible and may be attributed to a particular violator or violators, each violator is liable only for that damage attributable to his or her violation.[15]

Persons potentially liable for a discharge, polluting condition, or release may only use the defenses set forth in the statutes.[16] To avoid liability persons must plead and prove the occurrence was solely the result of:

- An act of war;
- An act of government;
- An act of God[17]; or
- An act or omission of a third party.[18]

While the first three defenses are straight forward to plead and prove, the third party defense may only be used when the defendant proves by a preponderance of the evidence that:

- The defendant exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such biomedical or hazardous waste, in light of all relevant facts and circumstances; and
- The defendant took precautions against foreseeable acts or omissions of any such third party and against the consequences that could foreseeably result from such acts or omissions.

These requirements are imposed on owners of contaminated sites because they are in the best position to protect themselves from the indemnities of the seller through pre-purchase due diligence and negotiation.[19]

In addition to these defenses, in the case of a discharge of petroleum, petroleum products, or drycleaning solvents, the owner of the facility may escape liability by demonstrating that he or she did not cause or contribute to the discharge, and that he or she did not know of the polluting condition at the time the owner acquired title.[20] Under this "innocent landowner defense," the defendant must prove by a preponderance of the evidence that that he or she undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability.[21] When considering whether to apply the innocent landowner defense, a judge must take into account:

- Any specialized knowledge or experience on the part of the defendant;
- The relationship of the purchase price to the value of the property if uncontaminated;
- Commonly known or reasonably ascertainable information about the property;
- The obviousness of the presence or likely presence of contamination at the property; and
- The ability to detect such contamination by appropriate inspection.[22]

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[11] Section 403.141(2), F.S.
[12] Black's Law Dictionary 926 (7th ed. 1999).
[13] Id.
[14] Id.; Section 403.727(8), F.S.
[15] Section 403.141(2), F.S.
[16] Sections 376.308(1) and 403.727(4), F.S.; Aramark, 894 So.2d at 24.
[17] An "act of God" is an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight. 42 U.S.C. § 9601(1).
[18] Sections 376.308(2) and 403.727(5), F.S.
[19] Aramark Uniform and Career Apparel, Inc., et al. vs. Easton, 894 So.2d 20, 25 (Fla. 2004)
[20] Section 376.308(1)(c), F.S.; Under federal law, this defenses applies to all releases of hazardous substances. 42 U.S.C. § 9601(35)(B)(i).
[21] Id.
[22] Id.

Contamination Liability and Defenses – Federal

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as Superfund, to directly respond to releases or threatened releases of hazardous substances that may endanger public health or the environment.[23] CERCLA provides for liability of persons responsible for releases of hazardous substances.[24]

CERCLA and Florida's contamination liability statutes have very similar provisions regarding the liability and available defenses to liability for the release of hazardous substances that may contaminate surface or ground waters of the state.[25] When the Legislature models legislation upon federal law, courts gives the Florida legislation the same construction as the federal courts give the federal legislation.[26] Thus, courts have interpreted Florida's contamination liability statutes in the same manner as the federal law.[27]

Notably, Florida law does not contain ones of the defenses found in CERCLA. The Superfund Recycling Equity Act (SREA), 42 U.S.C. § 9627, exempts certain persons who "arranged for recycling of recyclable materials" from CERCLA liability. This defense only applies to persons who:

- By contract, arranged for the disposal of a hazardous substance; or
- Accepts or has accepted any hazardous substances for transport to disposal or treatment facilities or sites.[28]

The federal defense does not affect the CERCLA liability of an owner or operator for a release of a hazardous substance on their site.[29]

Congress created the defense to:

- Promote the reuse and recycling of scrap material in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment;
- Create greater equity in the statutory treatment of recycled versus virgin materials; and
- Remove the disincentives and impediments to recycling created as an unintended consequence of the Superfund liability provisions.[30]

Arrangers and transporters of recyclable material may not use the defense if they fail to meet the listed criteria:[31]

- The items must be a "recyclable material" which is scrap paper, scrap plastic, scrap glass, scrap textiles, scrap rubber (other than whole tires), scrap metal, or spent lead-acid, spent nickel-cadmium, and other spent batteries, as well as minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use prior to becoming scrap. "Recyclable material" does not include:
    - Shipping containers of a capacity from 30 liters to 3,000 liters; or
    - Any item of material that contained polychlorinated biphenyls at a concentration in excess of 50 parts per million;
- Transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber (other than whole tires) are deemed to be "arranging for recycling" if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of

[23] Environmental Protection Agency, *Land and Cleanup*, http://www2.epa.gov/regulatory-information-topic/land-and-cleanup#superfund (last visited March 18, 2015).
[24] 42 U.S.C. § 9607.
[25] Department of Environmental Protection v. Allied Scrap Processors, Inc., 724 So.2d 151, 152 (Fla. 1998).
[26] Id.
[27] Id.
[28] 42 U.S.C. § 9627(a)(1).
[29] 42 U.S.C. § 9627(g).
[30] S. 1948, § 6001(a), Pub. L. No. 106-113, 113 Stat. 1536, 1537.
[31] 42 U.S.C. § 9627(a)(2).

recyclable material) can demonstrate by a preponderance of the evidence that all of the following criteria were met at the time of the transaction:
    - The recyclable material met a commercial specification grade;
    - A market existed for the recyclable material;
    - A substantial portion of the recyclable material was made available for use as feedstock for the manufacture of a new saleable product;
    - The recyclable material could have been a replacement or substitute for a virgin raw material, or the product to be made from the recyclable material could have been a replacement or substitute for a product made, in whole or in part, from a virgin raw material; and
    - The person exercised reasonable care to determine that the facility where the recyclable material was handled, processed, reclaimed, or otherwise managed by another person (hereinafter referred to as a "consuming facility") was in compliance with substantive provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with recyclable material. Whether a person exercised "reasonable care" is determined by:
        - The price paid in the recycling transaction;
        - The ability of the person to detect the nature of the consuming facility's operations concerning its handling, processing, reclamation, or other management activities associated with recyclable material; and
        - The result of inquiries made to the appropriate Federal, State, or local environmental agency (or agencies) regarding the consuming facility's past and current compliance with substantive (not procedural or administrative) provisions of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, storage, or other management activities associated with the recyclable material.
- Transactions involving scrap metal[32] are be deemed to be "arranging for recycling" if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction:
    - The person met the criteria set forth for transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber section (above) in respect to the scrap metal;
    - The person was in compliance with any applicable regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of scrap metal; and
    - The person did not melt the scrap metal prior to the transaction.
- Transactions involving spent lead-acid batteries, spent nickel-cadmium batteries, or other spent batteries are be deemed to be "arranging for recycling" if the person who arranged for the transaction (by selling recyclable material or otherwise arranging for the recycling of recyclable material) can demonstrate by a preponderance of the evidence that at the time of the transaction;
    - The person met the criteria set forth for transactions involving scrap paper, scrap plastic, scrap glass, scrap textiles, or scrap rubber section (above) in respect to the spent batteries; and
    - The person was in compliance with applicable Federal environmental regulations or standards regarding the storage, transport, management, or other activities associated with the recycling of spent batteries.[33]

The exclusions from liability does not apply if the person had an objectively reasonable basis to believe at the time of the recycling transaction:

[32] "Scrap Metals" are bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled, except for scrap metals excluded from this definition by federal regulation. 42 U.S.C. § 9627(d)(3).

[33] 42 U.S.C. § 9627(b)-(e).

- That the recyclable material would not be recycled;
- That the recyclable material would be burned as fuel, or for energy recovery or incineration; or
- That the consuming facility was not in compliance with a substantive (not procedural or administrative) provision of any Federal, State, or local environmental law or regulation, or compliance order or decree issued pursuant thereto, applicable to the handling, processing, reclamation, or other management activities associated with the recyclable material.[34]

Persons seeking the exemption from CERCLA liability under the SREA defense, must prove they meet the criteria.[35]

Effect of the Proposed Changes

The bill amends s. 403.727, F.S., to provide that persons that sell, transfer or arrange for the transfer of recycled materials to a facility owned and operated by another person for the purpose of reclamation, recycling, manufacturing, or reuse of such materials is relieved from liability for hazardous substances released or threatened to be released from the receiving facility.

The bill also provides a limitation to the relief from liability if the person arranging for the transfer of the recycled material fails to exercise reasonable care with respect to the management and handling of the material, or if the recycling of such materials was not expected to be "legitimate" based on the information generally available to the person at the time of the arrangement.

In addition, the bill defines "recycled and recovered materials" as scrap paper; scrap plastic; scrap glass; scrap textiles; scrap rubber, other than whole tires; scrap metal; or spent lead-acid or nickel-cadmium batteries or other spent batteries. The term also includes minor amounts of material incident to or adhering to the scrap material as a result of its normal and customary use before becoming scrap. The term does not include hazardous waste.

Lastly, the bill states that the defense applies to causes of action accruing on or after July 1, 2015 and applies retroactively to causes of action accruing before July 1, 2015, for which a lawsuit has not been filed.

B. SECTION DIRECTORY:

Section 1. Amends s. 403.727, F.S., relating to violations, defenses, penalties, and remedies.

Section 2. Provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a potential negative fiscal impact on DEP because, if there is a release of hazardous substances, the state may incur the associated cleanup costs if no liable responsible party exists.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

[34] 42 U.S.C. § 9627(f).
[35] Gould Inc. v. A&M Battery & Tire Service, 176 F.Supp.2d 324, 327 (M.D. Penn. 2001).

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may remove potential impediments to recycling in Florida by providing the exemption from liability for the release or threatened release of hazardous substances.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Comparison to Federal Recycling Defense

The proposed defense is similar to the SREA defense available under federal law. However, the proposed defense appears to only apply to persons that sell, transfer or arrange for the transfer of recycled materials to another facility. By the use of different terms, the defense in the bill does not appear to apply to potentially liable persons under Florida's contamination liability statutes who "arrange for disposal" or "who accepts or has accepted any hazardous substances for transport to disposal or treatment facilities or sites" like the SREA defense.

Further, the federal law is more detailed in describing what a person must demonstrate in order to avail themselves of the liability defense. For instance, to qualify for the federal defense, a person that arranged for recycling is specifically required to show that they took reasonable care to determine the environmental compliance status of the facility to which the recyclable material was sent.[36] While not as specific, the defense in the bill would also consider whether reasonable care was provided in the handling and management of the recycled and recovered materials, and whether the recycling was expected to be legitimate.

The definition of the term "recycled and recovered materials" provided in the bill is also similar to the definition in the federal law under SREA, 42 U.S.C. § 9627(b). However, the definition in the bill includes the phrase "[t]he term does not include hazardous waste." It is unclear what this phrase adds to the meaning of "recycled and recovered materials."

[36] 42 U.S.C. § 9627(b)-(e).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 24, 2015, the Agriculture & Natural Resources Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment changed the defense to apply to the release or threatened release of "hazardous substances," rather than the release or threatened release of "solid waste." This makes the bill more consistent with federal law.

This analysis is drafted to the bill as amended and passed by the Agriculture & Natural Resources Subcommittee