

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 753 Contaminated Site Cleanup

SPONSOR(S): Government Accountability Committee, Ways & Means Committee and Natural Resources & Public Lands Subcommittee, Stone

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1018

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Natural Resources & Public Lands Subcommittee	15 Y, 0 N, As CS	Gregory	Shugar
2) Ways & Means Committee	18 Y, 0 N, As CS	Dobson	Langston
3) Government Accountability Committee	22 Y, 0 N, As CS	Gregory	Williamson

SUMMARY ANALYSIS

Pollution Notification

Most statutes and rules related to notification of pollution releases require an owner or operator to notify the Department of Environmental Protection (DEP) either directly or through the State Watch Office within 24 hours of discovery. In 2016, DEP issued an emergency rule and commenced rulemaking to make a permanent rule. DEP's proposed rule was deemed an invalid exercise of delegated legislative authority. The bill requires DEP to publish on a publicly accessible website any report of unauthorized releases or discharges of pollution submitted to the State Watch Office within 24 hours after receipt of such report.

Payment of Petroleum Restoration Program (PRP) Subcontractors

Under current law, when a contractor receives payment from a state agency, he or she must remit payment to any subcontractors and suppliers within seven working days. Contractors who fail to comply with the payment deadline must pay a penalty. The bill requires contractors participating in the PRP to pay their subcontractors and suppliers within 30 days of receiving payment from DEP before penalties are applicable.

Advanced Cleanup of Redevelopment Sites

Over the years, DEP implemented different eligibility programs to provide state financial assistance to certain site owners and responsible parties for rehabilitation of sites contaminated with petroleum. Advanced Cleanup allows an eligible site to receive state rehabilitation funding even if the site's priority score does not fall within the threshold DEP currently funds. The bill expands the advanced cleanup program to allow redevelopment sites to apply for advanced cleanup funding if they meet certain criteria. Redevelopment site applicants for advanced cleanup funding will not be required to meet cost share requirements. DEP will accept applicants on a first-come first-served basis. The bill increases DEP's contracting authority for advanced cleanup work from \$25 million to \$30 million and reserves \$5 million of that authority for cleanup of individual redevelopment sites.

Advanced Site Assessment for the Drycleaning Solvent Cleanup Program

The Drycleaning Solvent Cleanup Program facilitates remedial measures for property contaminated with drycleaning solvents. The bill allows real property owners eligible for site rehabilitation at an eligible facility under the Drycleaning Solvent Cleanup Program to request a site assessment in advance of the priority ranking if they meet certain criteria. Funding for each site may not exceed \$70,000. The bill reserves ten percent of the Water Quality Assurance Trust Fund appropriation for the drycleaning solvent cleanup program to fund advanced site assessment.

The bill will not affect the amount of state spending, though composition of that spending may shift to the activities authorized by the bill.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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DATE: 4/20/2017

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

POLLUTION NOTIFICATION

Present Situation

Most statutes and rules related to notification of pollution releases require an owner or operator to notify the Department of Environmental Protection (DEP) either directly to a specific office or through the State Watch Office, also known as the State Warning Point, at 1-800-320-0519,¹ within 24 hours of discovery. For instance, for a release of hazardous substances,² an owner or operator is required to notify DEP, through the State Warning Point, within 24 hours of the discovery if such is required by the United States Environmental Protection Agency (EPA).³ For a release of petroleum, unless it is a de minimis discharge, an owner or operator must submit a Discharge Report Form, form 62-761.900(1), F.A.C., to the county within 24 hours.⁴ Releases of drycleaning solvents, greater than one quart outside of a containment structure, must be reported by the owner or operator to the State Warning Point immediately upon the discovery of the spill.⁵

As a general permit condition, a permittee must report to DEP any noncompliance that may endanger health or the environment orally within 24 hours from the time the permittee becomes aware of the circumstances. The permittee must also follow up with a written submission to DEP within five days.⁶ For releases or spills of treated or untreated wastewater that exceed 1,000 gallons per incident, or where information indicates that public health or the environment will be endangered, a permittee must report to DEP by calling the State Warning Point, as soon as practical, but no later than 24 hours from the time the permittee becomes aware of the discharge, and must provide enumerated information.⁷ A permittee who releases excess air emissions must immediately notify DEP.⁸

Other than certain public notification for pollution found off-site,⁹ general public notice is reserved for public water systems (e.g., precautionary boil water notices).¹⁰

Governor Scott's Directive

On August 27, 2017, monitoring systems at Mosaic's New Wales facility, which produces phosphate fertilizer and animal feed ingredients, located in Mulberry, Polk County, revealed a change in water level in one of two cells atop the west compartment of its South gypsum. Additional testing on August 28, 2017, confirmed water loss from the process pond and Mosaic notified DEP, EPA, and Polk County. The loss was attributed to a sinkhole that formed under the cell.¹¹ In September 2016, following

¹ State Emergency Response Team, *Response - Florida State Watch Office*, <http://www.floridadisaster.org/Response/Operations/swp.htm> (last visited Mar. 13, 2017).

² Section 376.301(21), F.S., defines "hazardous substances."

³ Section 403.161(1)(d), F.S.; r. 62-150.300(1), F.A.C.

⁴ Rules 62-761.450, 62-761.451, and 62-780.560, F.A.C.

⁵ Section 376.3078(9), F.S.; r. 62-780.210(2), F.A.C.

⁶ Rule 62-620.610(20), F.A.C.

⁷ *Id.*

⁸ Sections 403.061(13), and 403.088, F.S.; rr. 62-4.130, and 62-210.700(5), F.A.C.

⁹ Sections 376.30701, and 376.30702, F.S.; r. 62-780.220, F.A.C.

¹⁰ Sections 376.30(3)(c), and 381.006(3)(c), F.S.; rr. 62-555.340(5), 62-555.350(10), and 62-560.400, F.A.C.

¹¹ Mosaic. *Frequently Asked Questions*, http://www.mosaicco.com/florida/new_wales_water_loss_incident_faq.htm (last visited Mar. 13, 2017); Mosaic. *New Wales*,

http://www.mosaicco.com/Who_We_Are/locations_directory_locations_by_continent_north_america_locations_new_wales.htm (last visited Mar. 13, 2017); Mosaic. *September 15, 2016 Report*, <http://www.mosaicco.com/florida/3998.htm> (last visited Mar. 13, 2017).

Hurricane Hermine, the City of St. Petersburg reported to DEP a release of approximately 150 million gallons of untreated and partially-treated domestic wastewater into Tampa Bay and Boca Ciega Bay.¹²

Following these incidents, Governor Scott, on September 26, 2016, issued a directive to DEP to issue an emergency rule establishing new requirements for the public to be notified of pollution incidents and to simultaneously begin the formal rulemaking process to gather public input and create a permanent rule.¹³ On September 26, 2016, DEP issued its emergency rule.¹⁴ DEP commenced rulemaking to make the rule permanent, but this effort resulted in an administrative challenge and a finding by the administrative law judge that DEP did not have the delegated legislative authority to enact the proposed rule.¹⁵ The emergency rule remains in effect.¹⁶ DEP also maintains a website where the public may access pollution incidents reported pursuant to the emergency rule.¹⁷

Effect of the Bill

The bill amends s. 376.051, F.S., to require DEP to publish on a publicly accessible website any report of unauthorized releases or discharges of pollution submitted to the State Watch Office within 24 hours after receipt of such report.

ADVANCED CLEANUP FOR PETROLEUM CONTAMINATED SITES

Present Situation

Petroleum is stored in thousands of underground and aboveground storage tank systems throughout Florida. Releases of petroleum into the environment may occur as a result of accidental spills, storage tank system leaks, or poor maintenance practices. These discharges pose a significant threat to groundwater quality, the source of 90 percent of Florida's drinking water. The identification and cleanup of petroleum contamination is particularly challenging due to the diverse geology in Florida, diverse water systems, and the complex dynamics between contaminants and the environment.

In 1983, Florida began enacting legislation to regulate underground and aboveground storage tank systems in an effort to protect Florida's groundwater from past and future petroleum releases.¹⁸ DEP regulates these storage tank systems.¹⁹ Further, DEP may establish criteria for the prioritization, assessment and cleanup, and reimbursement for cleanup of areas contaminated by leaking underground petroleum storage tanks.²⁰ The Petroleum Restoration Program (PRP) establishes the requirements and procedures for cleaning up contaminated land, as well as the circumstances under which the state will pay for the cleanup.²¹

An owner of contaminated land or the person who caused the discharge is responsible for rehabilitating the land, unless the site owner can show that the contamination resulted from the activities of a previous owner or other third party (responsible party), who is then responsible.²² Over the years, DEP

¹² Governor Scott. *Gov. Scott Directs DEP to Investigate St. Petersburg Sewage Spill*, <http://www.flgov.com/2016/09/21/gov-scott-directs-dep-to-investigate-st-petersburg-sewage-spill/> (last visited Mar. 13, 2017); St. Petersburg. *State of Florida Department of Environmental Protection Draft Consent Order*, <http://www.stpete.org/water/docs/Agreement%20DRAFT%20Consent%20Order%20&%20Exhibit%201%20Provided%20by%20FDEP%2020161201.pdf> (last visited Mar. 13, 2017).

¹³ Governor Scott. *Gov. Scott: I Am Directing Immediate Change to Public Notification Laws Following Pollution Incidents*, <http://www.flgov.com/2016/09/26/gov-scott-i-am-directing-immediate-change-to-public-notification-laws-following-pollution-incidents/> (last visited Mar. 13, 2017).

¹⁴ Rule 62ER16-1, F.A.C., <https://www.flrules.org/gateway/ruleNo.asp?id=62ER16-1> (last visited Mar. 13, 2017).

¹⁵ Division of Administrative Hearings. *Final Order*, <https://www.doah.state.fl.us/ROS/2016/16006889.pdf> (last visited Mar. 13, 2017).

¹⁶ Rule 62ER16-1, F.A.C., <https://www.flrules.org/gateway/ruleNo.asp?id=62ER16-1> (last visited Mar. 13, 2017).

¹⁷ DEP. *Notice of an Incident or Discovery of Pollution*, <http://dep.state.fl.us/pollutionnotice/> (last visited Mar. 13, 2017).

¹⁸ Chapter 83-310, Laws of Fla.

¹⁹ Sections 376.30(3)(a) and 376.303, F.S.

²⁰ Section 376.3071(5), F.S.

²¹ DEP, *Petroleum Restoration Program*, <http://www.dep.state.fl.us/waste/categories/pcp/default.htm> (last visited February 23, 2017).

²² Section 376.308, F.S.

has implemented different eligibility programs to provide state financial assistance to certain site owners and responsible parties for site rehabilitation. To receive rehabilitation funding assistance, a site must qualify for one of the Petroleum Cleanup Eligibility Programs:

- Early Detection Incentive Program (EDI), s. 376.3071(10), F.S.;
- Petroleum Liability and Restoration Insurance Program (PLRIP), s. 376.3072, F.S.;
- Abandoned Tank Restoration Program (ATRP), s. 376.305(6), F.S.;
- Innocent Victim Petroleum Storage System Restoration Program (Innocent Victim Program), s. 376.30715, F.S.;
- Petroleum Cleanup Participation Program (PCPP), s. 376.3071(13), F.S.; and
- Consent Order (aka “Hardship” or “Indigent”), s. 376.3071(8)(e), F.S.

To fund the cleanup of contaminated sites, the Legislature created the Inland Protection Trust Fund (IPTF).²³ An excise tax per barrel on petroleum and petroleum products in or imported into the state funds the IPTF.²⁴ The amount of the excise tax per barrel is determined by a formula that is dependent upon the unobligated balance of the IPTF.²⁵ Each year, the Legislature deposits approximately \$200 million from the excise tax into the IPTF to fund restoration of petroleum contaminated sites.²⁶

DEP provides funding for site rehabilitation on a relative risk scoring system.²⁷ Each funding-eligible site receives a numeric score based on the threat the site contamination poses to the environment or to human health, safety, or welfare.²⁸ Sites currently in the PRP range in score from five to 115 points. DEP funds the rehabilitation of sites in priority order beginning with the highest score, with available budget.²⁹ DEP sets the priority score funding threshold, which is the minimum score a site must achieve to receive restoration funding at a particular point in time. The threshold is periodically raised or lowered depending on the Petroleum Restoration Program’s current budget, projected expenditures for the remainder of the fiscal year, and the next fiscal year’s anticipated budget of the PRP. Currently, the threshold is set at 30 points.³⁰

Once a PRP site is approved for funding, a qualified contractor³¹ or the party responsible for contamination completes the restoration work. Restoration contractors may be selected by the property owner, the responsible party or by DEP via competitive procurement.³² DEP may also use a lead contractor, who works directly with DEP.³³ Under current law, when a contractor receives payment from a state agency, he or she must remit payment to any subcontractors and suppliers within seven

²³ Sections 376.3071(3) and (4), F.S.

²⁴ Sections 206.9935(3) and 376.3071(7), F.S.

²⁵ The amount of the excise tax per barrel is based on the following formula: 30 cents if the unobligated balance is between \$100 million and \$150 million; 60 cents if the unobligated balance is above \$50 million, but below \$100 million; and 80 cents if the unobligated balance is \$50 million or less; s. 206.9935(3), F.S.

²⁶ DEP, Agency Analysis of 2017 HB 753, p. 2 (March 3, 2017).

²⁷ Section 376.3071(5)(a), F.S.

²⁸ Rule 62-771.100, F.A.C.

²⁹ Rule 62-771.300(6), F.A.C.

³⁰ DEP, *Petroleum Restoration Program Priority Score Funding Threshold History*,

<http://www.dep.state.fl.us/waste/categories/pcp/pages/prioritiescorefunding.htm> (last visited January 24, 2017).

³¹ In addition to all licensure and certification requirements, each contractor must:

1. Comply with applicable Occupational Safety and Health Administration regulations.
2. Maintain workers’ compensation insurance for employees as required by the Florida Workers’ Compensation Law.
3. Maintain comprehensive general liability and comprehensive automobile liability insurance with minimum limits of at least \$1 million per occurrence and \$1 million annual aggregate to pay claims for damage for personal injury, including accidental death, as well as claims for property damage that may arise from performance of work under the program, which insurance designates the state as an additional insured party.
4. Maintain professional liability insurance of at least \$1 million per occurrence and \$1 million annual aggregate.
5. Have the capacity to perform or directly supervise the majority of the rehabilitation work.

Section 376.3071(6)(c), F.S.

³² DEP, *Petroleum Restoration Program*, <http://www.dep.state.fl.us/waste/categories/pcp/default.htm> (Last visited March 31, 2017).

³³ *Id.*

working days.³⁴ If the contractor receives partial payment, remittances to subcontractors and suppliers must be pro-rated in accordance with the value of services or supplies provided.³⁵ Contractors who fail to comply with the payment deadline must pay their subcontractors and suppliers a penalty equal to 0.5 percent of the amount owed for each day the payment is late.³⁶

As of January 2017, 19,927 eligible discharges existed throughout the state. DEP completed 9,240 sites. DEP is currently working on the following discharges categories: Assessment 4,531; Active Remediation 1,044; and Passive Remediation 1,368.³⁷

The Legislature created Advanced Cleanup (formerly known as Preapproved Advanced Cleanup) in 1996 to allow an eligible site to receive state rehabilitation funding even if the site's priority score does not fall within the threshold currently being funded.³⁸ The purpose of creating Advanced Cleanup was to facilitate property transactions or public works projects on contaminated sites.³⁹ To participate in Advanced Cleanup, a site must be eligible for state rehabilitation funding under the EDI, PLRIP, ATRP, the Innocent Victim program, or PCPP.⁴⁰

To apply for Advanced Cleanup, a site owner or responsible party must bid a cost share of the total site rehabilitation.⁴¹ Applicants may submit bids for an individual site or may aggregate five or more sites.⁴² The cost share must be at least 25 percent of the total cost of rehabilitation.⁴³ For the PCPP sites, the cost share must be at least 25 percent of the state's share of the rehabilitation, because the site owner or responsible party is already required to pay for 25 percent of the total cost of rehabilitation to be eligible for the PCPP.⁴⁴ Alternatively, an applicant may use a commitment to pay, a demonstrated cost savings to DEP, or both, to meet this requirement if the application proposes a performance-based contract for the cleanup of five or more sites.⁴⁵

In bid cycle years, DEP accepts bids in two windows of May 1 through June 30 and November 1 through December 31.⁴⁶ DEP awards contracts based solely on the proposed highest cost share percentage and not on the estimated dollar amount of that cost share.⁴⁷ DEP may enter into Advanced Cleanup contracts for a total of up to \$25 million per fiscal year, and no more than \$5 million per fiscal year may be approved for rehabilitation work at a facility⁴⁸ or for an individual applicant who bundles multiple sites.⁴⁹ DEP cost shared \$8.1 million for Advanced Cleanup applications for Fiscal Year 2015-16, with a cost savings of 32 percent.⁵⁰

Effect of the Bill

The bill amends s. 376.3071, F.S., by requiring contractors participating in the PRP to pay their subcontractors and suppliers within 30 days of receiving payment from DEP before penalties are applicable.

³⁴ Section 87.0585(1), F.S.

³⁵ *Id.*

³⁶ *Id.*

³⁷ DEP, Agency Analysis of 2017 HB 753, p. 2 (March 3, 2017).

³⁸ Section 376.30713(2), F.S.

³⁹ Section 376.30713(1), F.S.

⁴⁰ Section 376.30713(1)(d), F.S.

⁴¹ Section 376.30713(2)(a), F.S.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Sections 376.30713(1)(d) and (2)(a), F.S.

⁴⁵ Section 376.30713(2)(a)1., F.S.

⁴⁶ Section 376.30713(2)(a), F.S.

⁴⁷ Section 376.30713(2)(b), F.S.

⁴⁸ A "facility" is defined in s. 376.30713(4), F.S.

⁴⁹ Section 376.30713(4), F.S.

⁵⁰ DEP, Agency Analysis of 2017 HB 753, p. 3 (March 3, 2017).

The bill amends s. 376.30713, F.S., to encourage advanced cleanup of individual redevelopment sites that are eligible for petroleum restoration funding by:

- Amending s. 376.30713(1)(a), F.S., to declare that the inability to conduct site rehabilitation in advance of a site's priority ranking may impede property redevelopment;
- Amending s. 376.30713(1)(c), F.S., to declare it is in the public interest and of substantial economic benefit to fund site rehabilitation of certain sites in advance of their priority ranking in order to encourage redevelopment;
- Creating s. 376.30713(2)(c), F.S., to allow redevelopment sites to apply for advanced cleanup funding and requiring DEP to accept individual redevelopment site applications on a first-come, first-served basis instead of only accepting applications during the two windows of May 1 through June 30 and November 1 through December 31. This provision also excludes redevelopment site applicants from the 25 percent contribution and cost sharing requirements that other sites must meet in order to qualify for Advanced Cleanup funding. Redevelopment sites must instead meet the criteria in the newly created sections described below.
- Creating s. 376.30713(2)(c), F.S., to require redevelopment site applicants for Advanced Cleanup funding to provide as part of their application:
 - A nonrefundable review fee of \$250 to cover the administrative costs associated with DEP's review of the application;
 - A limited containment assessment report, sufficient to support the course of action and estimate the costs. This provision also specifies that preparation of the containment assessment report is not an expense that may be refunded from the IPTF;
 - A proposed course of action for cleanup of the site;
 - If the applicant is not the property owner for any of the sites contained in the application, a DEP site access agreement, or similar agreements approved by DEP that do not violate state law, entered into with the property owner or owners, as applicable, and evidence of authorization from such owner or owners for petroleum site rehabilitation program tasks consistent with the proposed course of action;
 - Certification to DEP stating the applicant has authority to enter into an advance cleanup contract with DEP. The advanced cleanup contract must include redevelopment and site rehabilitation milestones;
 - Documentation in the form of a letter from the local government having jurisdiction over the area where the proposed redevelopment site is located that states the local government is in agreement with or approves the proposed site redevelopment and the proposed redevelopment complies with applicable laws and requirements for such redevelopment; and
 - Reasonable assurance that the applicant has the financial resources necessary to implement and complete the redevelopment project;
- Amending s. 376.30713(4), F.S., to increase DEP's contracting authority for Advanced Cleanup work from \$25 million to \$30 million. The bill reserves \$5 million of the expanded contracting authority for advanced cleanup of individual sites scheduled for redevelopment. Further, the bill limits an individual facility or individual site scheduled for redevelopment from receiving more than \$1 million in any fiscal year;
- Amending s. 376.30713(4)(c), F.S., to require DEP to reserve the right to terminate or amend a voluntary cost share agreement if the property owner or responsible party fails to submit an application to bundle any site, not already covered by an advance cleanup contract, under such voluntary cost share agreement within three subsequent open application periods or 18 months, whichever period is shorter; and
- Amending s. 376.30713(4)(c), F.S., to require the property owner or responsible party to conduct limited site assessments on the identified sites within 12 months after execution of the voluntary cost share agreement.

DRYCLEANING SOLVENT CLEANUP

Present Situation

Drycleaning solvents are any and all nonaqueous solvents used in the cleaning of clothing and other fabrics. Solvents may include perchloroethylene (also known as tetrachloroethylene) and petroleum-based solvents, and their breakdown products.⁵¹ Drycleaning solvents can be safely used if managed properly. However, drycleaning solvents can harm people, animals, and plants if released into the environment by contaminating soil and water.⁵²

In response to significant discharges of drycleaning solvents at drycleaning facilities⁵³ as part of the normal operation of these facilities, the Legislature created the Drycleaning Solvent Cleanup Program (program) because these discharges pose a significant threat to the quality of the state's groundwater and inland surface water.⁵⁴ The program facilitates remedial measures, provides reliable alternative sources of water, encourages real property owners⁵⁵ to voluntarily cleanup property contaminated with drycleaning solvents, and improves the marketability and use of property contaminated with drycleaning solvents.⁵⁶

The program pays for the cleanup of properties contaminated as a result of the operation of drycleaning facilities or wholesale supply facilities.⁵⁷ DEP may use funds from the Water Quality Assurance Trust Fund (WQATF) to rehabilitate contaminated facilities.⁵⁸ The WQATF receives its funds from taxes collected on gross receipts on all charges imposed by the drycleaning facility or the dry drop-off facility for the drycleaning or laundering of clothing or other fabrics; taxes collected on each gallon of perchloroethylene sold; and fees collected for registration of drycleaning facilities and wholesale supply facilities.⁵⁹ During Fiscal Year 2016-17, the Legislature appropriated \$8.5 million to the WQATF.⁶⁰

The program also limits the liability of an eligible real property owner, nearby real property owner, or person who owns or operates, or who otherwise could be liable as a result of the operation of a facility.⁶¹ The liability protection extends to administrative or judicial actions brought by any state or local government or agency thereof or by or on behalf of any person to compel rehabilitation or pay for the costs of rehabilitation of environmental contamination resulting from the discharge of drycleaning solvents.⁶² To be eligible for liability protection and funding to cleanup properties contaminated as a result of the operation of facilities, the facility must:

- Be registered with DEP if operating after October 1, 1994;
- Be in compliance, or was in compliance, with DEP rules regulating drycleaning solvents, drycleaning facilities, or wholesale supply facilities on or after November 19, 1980, as determined by DEP;
- Not have been operated in a grossly negligent manner⁶³ at any time on or after November 19, 1980;

⁵¹ Section 376.301(15), F.S.

⁵² United States Environmental Protection Agency, *State Coalition for Remediation of Drycleaners, A Citizen's Guide to Drycleaner Cleanup*, https://drycleancoalition.org/download/citizens_guide_drycleaner_cleanup.pdf (last visited February 1, 2017).

⁵³ A "drycleaning facility" is defined in s. 376.301(14), F.S.

⁵⁴ Sections 376.3078(1)(a) and (b), F.S.

⁵⁵ A "real property owner" is defined in s. 376.301(38), F.S.

⁵⁶ Sections 376.3078(1)(c) through (f), F.S.

⁵⁷ A "wholesale supply facility" is defined in s. 376.301(18), F.S.

⁵⁸ Section 376.3078(2)(b), F.S.

⁵⁹ Section 376.3078(2)(a), F.S.

⁶⁰ DEP, Agency Analysis of 2017 HB 753, p. 3 (March 3, 2017).

⁶¹ Section 376.3078(3)(a), F.S.

⁶² *Id.*

⁶³ A facility was operated in a grossly negligent manner if DEP determines that the owner or operator of the facility: 1. willfully discharged drycleaning solvents onto the soils or into the waters of the state after November 19, 1980, with the knowledge, intent, and purpose that the discharge would result in harm to the environment or to public health or result in a violation of the law; 2. willfully concealed a discharge of drycleaning solvents with the knowledge, intent, and purpose that the concealment would result in harm to

- Not be identified to qualify for listing, nor is listed, on the National Priority List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986; and
- Not be under an order from the United States Environmental Protection Agency pursuant to s. 3008(h) of the Resource Conservation and Recovery Act, or has not obtained and is not required to obtain a permit for the operation of a hazardous waste treatment, storage, or disposal facility, a post closure permit, or a permit pursuant to the federal Hazardous and Solid Waste Amendments of 1984.⁶⁴

The liability protection does not extend to drycleaning facilities owned or operated by the state or federal government.⁶⁵ Further, eligibility in this program does not relieve the owner, operator, or real property owner from federal actions or from current waste management requirements.⁶⁶

In return for the liability protection,⁶⁷ the owner, operator, and real property owner of facilities are required to:

- Jointly register all operating drycleaning and wholesale supply facilities with DEP;⁶⁸
- Provide site access to DEP to implement the dry cleaning program;⁶⁹
- Install secondary containment at their facilities to prevent contamination from the drycleaning solvents;⁷⁰
- Immediately report a spill of more than one quart of drycleaning solvents outside a containment structure to the State Warning Point;⁷¹
- Immediately initiate and complete actions to abate the source of any spill reported to the State Warning Point;⁷²
- Remove spilled drycleaning solvent from all indoor and outdoor surface areas, including any septic tank or catch basin in which the solvent has accumulated. Affected soils must also be removed;⁷³
- Purchase third party liability insurance;⁷⁴ and
- Pay certain taxes and fees related to operating facilities and dry cleaning solvents. The state collects fees and taxes and places them into the program fund to pay for costs associated with the cleanup of drycleaning solvent contamination.⁷⁵

Like the PRP, DEP scores each facility to determine the order in which it will begin site rehabilitation activities.⁷⁶ Each facility's score is based on fire risk, threat to drinking water supplies, groundwater vulnerability, aquifer classification, conditions favoring continual scoring, and environmental setting.⁷⁷ Facilities with the highest score receive the highest priority for rehabilitation.⁷⁸ The state pays for the costs incurred for site rehabilitation from the WQATF, minus a deductible paid by the applicant or

the environment or to public health or result in a violation of the law; or 3. willfully violated a local, state, or federal law or rule regulating the operation of facilities with the knowledge, intent, and purpose that the act would result in harm to the environment or to public health or result in a violation of the law; s. 376.3078(3)(d), F.S.

⁶⁴ Sections 376.3078(3)(b) and (c), F.S.

⁶⁵ Section 376.3078(3)(j), F.S.

⁶⁶ Section 376.3078(3)(q), F.S.

⁶⁷ See Metro. Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 497 (Fla. 1999).

⁶⁸ Section 376.3078(3)(b), F.S.

⁶⁹ Section 376.3078(3)(f), F.S.

⁷⁰ Sections 376.3078(9)(a) and (b), F.S.

⁷¹ Section 376.3078(9)(c), F.S.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Section 376.3078(10), F.S.

⁷⁵ Section 376.3078(3)(p), F.S.

⁷⁶ Sections 376.3078(7) and (8), F.S.

⁷⁷ Section 376.3078(7), F.S.

⁷⁸ Section 376.3078(8)(a), F.S.

current real property owner.⁷⁹ The facilities are rehabilitated using the principles of risk based corrective action found in chapter 62-780, F.A.C.⁸⁰ There are 1,422 eligible facilities. DEP has rehabilitated 178 facilities and initiated cleanup activities at 408 sites. DEP estimates that most site cleanups cost between \$185,000 and \$580,000 per site.⁸¹

The application period for entry into the program ended December 31, 1998. DEP no longer accepts applications to the program.⁸²

Real property owners may voluntarily conduct rehabilitation activities at a facility, at any time, regardless of the facility's eligibility in the program.⁸³ Such real property owners receive limited liability protection similar to the facilities in the program if a real property owner conducts a voluntary cleanup, provided the real property owner conducts cleanup activities consistent with state and federal laws and rules; conducts such site rehabilitation in a timely manner according to an approved schedule; and does not deny DEP access to the site.⁸⁴

Effect of the Bill

The bill amends s. 376.3078, F.S., to allow real property owners eligible for site rehabilitation at an eligible facility under the program to request site assessment in advance of their priority ranking if they meet certain criteria by:

- Creating s. 378.3078(14), F.S., to declare it is in the public interest, and of substantial environmental and economic benefit, to perform site assessment on a limited basis at contaminated sites in advance of their ranking in the program;
- Creating s. 376.3078(14)(a), F.S., to allow real property owners eligible for site rehabilitation at an eligible facility under the program to request site assessment in advance of the priority ranking if:
 - The site assessment information would provide new information that would be sufficient for DEP to better evaluate the actual risk of the contamination, thereby reducing the risk to public health and the environment;
 - The property owner agrees to implement the appropriate institutional controls⁸⁵ in accordance with DEP rules⁸⁶ adopted at the time the property owner requests the advanced site assessment and to implement and maintain, upon completion of the cleanup, the required institutional controls, or a combination of institutional and engineering controls, when the site meets the site rehabilitation criteria for closure with controls in accordance with DEP rules;⁸⁷
 - Current conditions at the site allow the site assessment to be conducted in a manner that will result in cost savings to the WQATF;
 - There is sufficient money in the annual WQATF appropriation for the program to pay for the site assessment; and
 - DEP has been provided with access to the site and the applicant or current property owner pays a deductible;
- Creating s. 376.3078(14)(b), F.S., to authorize DEP to perform site assessment out of priority order in the program, if it determines the site assessment will provide a cost savings;
- Creating s. 376.3078(14)(c), F.S., to require that advanced site assessment in the program must follow the risk-based corrective action principles found in ch. 62-780, F.A.C.⁸⁸ Such

⁷⁹ Section 376.3078(3)(e), F.S.

⁸⁰ Section 376.3078(4), F.S.

⁸¹ DEP, Agency Analysis of 2017 HB 753, p. 3 (March 3, 2017).

⁸² Section 376.3078(3)(e)4., F.S.

⁸³ Section 376.3078(11), F.S.

⁸⁴ *Id.*

⁸⁵ "Institutional controls" are defined in s. 376.301(22), F.S.

⁸⁶ These rules can be found in r. 62-780.680, F.A.C.

⁸⁷ *Id.*

⁸⁸ The goal of risk-based corrective action is to provide for a flexible site-specific cleanup process that reflected the intended use of the property following cleanup, while maintaining adequate protection of human health, safety, and the environment. Ralph A. DeMeo,

assessment must be sufficient to estimate the cost and determine the proposed course of action for site cleanup. Advanced site assessment activities performed under the program must be designed to affirmatively demonstrate that the site meets one of the following criteria:

- Recommend remedial action to mitigate risks that, in the judgment of DEP, are a threat to human health or where failure to prevent migration of drycleaning solvents would cause irreversible damage to the environment;
 - Recommend additional groundwater monitoring to support natural attenuation⁸⁹ monitoring or long-term groundwater monitoring; or
 - Recommend "no further action," with or without institutional controls or institutional and engineering controls for those sites that meet the "no further action" criteria in accordance with DEP rules;⁹⁰
- If the site does not meet one of the criteria described, DEP must notify the property owner in writing of this decision, and the site must be returned to its priority ranking order in accordance with its score;
 - Creating s. 376.3078(14)(d), F.S., to assign the advanced site assessment program to the program. The bill authorizes DEP to assign a site assessment task for the program based on determination of contractor logistics, geographical considerations, and other criteria that DEP determines are necessary to achieve the most cost effective approach;
 - Creating s. 376.3078(14)(e), F.S., to limit funding available for advanced site assessment under the program to no more than ten percent of the WQATF appropriation for the program;
 - Creating s. 376.3078(14)(f), F.S., to limit funding for any one site to not exceed \$70,000; and
 - Creating s. 376.3078(14)(g), F.S., to authorize DEP to prioritize requests for advanced site assessment, based on the date of receipt and the environmental and economic value to the state, until 10 percent of the annual WQATF appropriation is obligated.

B. SECTION DIRECTORY:

Section 1. Amends s. 376.051, F.S., relating to the powers and duties of DEP.

Section 2. Amends s. 376.3071, F.S., relating to PRP Contractors.

Section 3. Amends s. 376.30713, F.S., relating to redevelopment sites for advanced cleanup funding.

Section 4. Amends s. 376.3078, F.S., relating to drycleaning facility restoration, funds, use, liability, and recovery of expenditures.

Section 5. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill will not affect the amount of state spending, though composition of that spending may shift to activities authorized by the bill.

Michael P. Petrovich, and Christopher M. Teal, *Risk-Based Corrective Action In Florida: How Is It Working?*, The Florida Bar Journal, January 2015, at 47.

⁸⁹ "Natural attenuation" is defined in s. 376.301(26), F.S.

⁹⁰ These rules can be found in r. 62-780.680, F.A.C.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Overall Restoration Funding Availability

The bill appears to have an indeterminate positive economic impact on the private sector because more contaminated sites will be eligible to receive financial assistance to facilitate advanced cleanup for redevelopment sites or advanced site assessment for dry cleaning contaminated sites. Further, more funding will be available to pay for advanced cleanup of petroleum contaminated sites and advanced site assessment for drycleaning-solvent contaminated sites will now be eligible for funding.

Advanced Cleanup for Petroleum Contaminated Sites

The bill has a positive economic impact on individual redevelopment site cleanup applicants by not requiring them to participate in the 25 percent copayment or cost share requirements that exist under current law. The bill may also have an indeterminate positive economic impact on these same applicants by allowing them to receive site rehabilitation ahead of their priority ranking.

Advanced Site Assessment for the Drycleaning Solvent Cleanup Program

The bill may have an indeterminate positive economic impact on real property owners of drycleaning-solvent contaminated sites by allowing them to apply for advanced site assessment ahead of their priority ranking if they meet certain criteria.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

DEP possesses sufficient rulemaking authority to amend its rules to conform to changes made in the statutes.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 20, 2017, the Natural Resources & Public Lands Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Removed the amendment to s. 376.3078(8)(h), F.S., which granted to DEP the authority to perform site assessments out of priority order if, in the opinion of the Department, it was warranted for health or environmental reasons. This language was duplicative of language found in the bill's creation of s. 376.3078(14), F.S.;
- Removed the creation of s. 376.86(9), F.S., that granted to DEP the authority to allow funds not pledged by the Brownfields Areas Loan Guarantee Council for loan guarantees or as loan loss reserves to be available annually for the VCTC for Drycleaning Solvent Cleanup Program eligible sites, real property owners who voluntarily conduct site rehabilitation at drycleaning-solvent contaminated sites, and brownfield sites in a designated brownfield area; and
- Added amendments to ss. 220.1845(2)(f) and 376.30781(4), F.S., to increase the VCTCs available from \$5 million annually to \$10 million annually.

On March 29, 2017, the Ways & Means Committee adopted three amendments and reported the bill favorably as a committee substitute. The amendments:

- Required PRP Contractors to pay their subcontractors and suppliers within 30 days of receiving payment from DEP.
- Revised the procedures individual site redevelopment applicants must follow when applying to the Advance Cleanup Program. The amendment allowed individual site redevelopment applicants to apply outside of the May 1-June 30 and November 1-December 31 windows and exempts them from cost sharing requirements. The amendment modified the application requirements by:
 - Specifying that costs associated with creating limited containment assessment reports may not be refunded by the IPTF.
 - Requiring the applicant to certify he or she has authority to enter into the agreement and that the redevelopment contract includes progress milestones.
 - Allowing applicants to show local government consent via a simple agreement letter instead of building permits or other legally recorded documents.
 - Clarifying that mere eligibility does not guarantee advanced cleanup or continued restoration funding.
 - Removing the requirement that individual site applicants and applicants proposing the cleanup of five or more sites be ranked based on the percentage of cost share.
- Removed a \$5 million increase to tax credits available under the VCTC Program.

On April 19, 2017, the Government Accountability Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Required DEP to publish on a publicly accessible website any report of unauthorized releases or discharges of pollution submitted to the State Watch Office within 24 hours after receipt of such report.;
- Required PRP contractors to pay their subcontractors and suppliers within 30 days of receiving payment from DEP before penalties are applicable;
- Required applicants for advanced cleanup of redevelopment sites to submit a proposed course of action for cleanup of the site, rather than merely a proposed course of action; and
- Required DEP to reserve, rather than reserve to DEP, the right to terminate or amend a voluntary cost share agreement if the property owner or responsible party fails to submit an application to bundle any site, not already covered by an advance cleanup contract, under such voluntary cost share agreement within three subsequent open application periods or 18 months, whichever period is shorter.

This analysis is drawn to the committee substitute reported favorably by the Government Accountability Committee.