

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

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BILL: CS/SB 1350

INTRODUCER: Environment and Natural Resources and Senator Baxley

SUBJECT: Contamination

DATE: February 17, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schreiber	Rogers	EN	<b>Fav/CS</b>
2.			FT	
3.			AP	

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 1350 makes the following changes pertaining to Florida's brownfield program:

- Revises a corporate income tax credit for 25 percent of the total rehabilitation costs for a brownfield site upon completion, not to exceed \$500,000, to remove the requirement that the tax credit be claimed in the final year of cleanup.
- Revises a corporate income tax credit for 50 percent of the solid waste removal costs for a brownfield site, not to exceed \$500,000, to require that the site was never used as a solid waste disposal area permitted under DEP's current rules for solid waste management facilities or the predecessor rules. The effect of this change is to authorize the credit for solid waste removal for unpermitted solid waste disposal areas regardless of whether the site was operated for monetary compensation.
- Limits statutory causes of action under s. 376.313(3), F.S., to only damages to real or personal property directly resulting from pollution, and requires that the pollution was not authorized by any government approval or permit.
- Describes defenses to causes of action under 376.313(3), F.S., as strict-liability exceptions instead of defenses.
- Adds to the liability protection in the brownfield program relief from statutory causes of action arising under s. 376.313(3), F.S., which impose strict liability for damages from pollution for certain sites.
- Provides the liability protection in the brownfield program to any subsequent property owner of a brownfield site.

- Requires subsequent property owners of brownfield sites to comply with applicable institutional or engineering controls required for site rehabilitation to retain liability protection.
- Authorizes governmental entities to propose brownfield area designations under designation criteria that may require adoption by the local government with jurisdiction.
- Broadens the procedures for negotiating brownfield site rehabilitation agreements so that a designation simply entitles any person to negotiate an agreement, rather than the person identified as the person responsible for brownfield site rehabilitation.
- Creates an exception to the brownfield program eligibility requirement of creating at least 10 new jobs if the project provides benefits including affordable housing, recreation areas, conservation areas, or parks, or cultural or historical preservation.

## II. Present Situation:

### Florida's Brownfield Program

A brownfield is a property of which the expansion, redevelopment, or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.<sup>1</sup> Unsafe levels of environmental contamination on a brownfield may result from past or current industrial, commercial, residential, agricultural, or recreational uses and practices.<sup>2</sup> Contaminants may be found in soil, water or air.

In 1995, the U.S. Environmental Protection Agency (EPA) initiated a program to empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and reuse brownfields.<sup>3</sup> Under the program, states and tribes use a risk-based approach to determine the required level of cleanup necessary at brownfield properties.<sup>4</sup> Cleaning up contaminants on a brownfield reduces or eliminates potential health risks to residents, workers, pets, and the surrounding environment. The degree of cleanup necessary depends on the specific contaminants found at the brownfield, the extent of contamination, and how the property will be reused.<sup>5</sup>

In 1997, the Legislature adopted the state's Brownfields Redevelopment Act (Act).<sup>6</sup> The Act was created to provide incentives for local governments and individuals to voluntarily clean up and redevelop brownfield sites.<sup>7</sup> The primary goals of the Act are to reduce public health and

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<sup>1</sup> EPA, *Overview of EPA's Brownfields Program*, <https://www.epa.gov/brownfields/overview-epas-brownfields-program> (last visited Feb. 12, 2020).

<sup>2</sup> EPA, *Cleaning Up Brownfield Sites* (2019), available at [https://www.epa.gov/sites/production/files/2019-10/documents/cleaning\\_up\\_brownfield\\_sites.pdf](https://www.epa.gov/sites/production/files/2019-10/documents/cleaning_up_brownfield_sites.pdf).

<sup>3</sup> EPA, *Overview of EPA's Brownfields Program*, <https://www.epa.gov/brownfields/overview-epas-brownfields-program> (last visited Feb. 12, 2020); EPA, *Brownfields Community Reinvestment Act (CRA) Fact Sheet*, <https://www.epa.gov/brownfields/brownfields-community-reinvestment-act-cra-fact-sheet> (last visited Feb. 12, 2020).

<sup>4</sup> EPA, *Cleaning Up Brownfield Sites* (2019), available at [https://www.epa.gov/sites/production/files/2019-10/documents/cleaning\\_up\\_brownfield\\_sites.pdf](https://www.epa.gov/sites/production/files/2019-10/documents/cleaning_up_brownfield_sites.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> Chapter 97-277, Laws of Fla; ss. 376.77–376.85, F.S.

<sup>7</sup> DEP, *Florida Brownfields Redevelopment Program, Annual Report: August 2019*, 3 (2019)[hereinafter *DEP Brownfields Report*], available at <https://floridadep.gov/sites/default/files/Florida%20Brownfields%20Annual%20Report%20August%201%2C%202019.pdf>.

environmental hazards on existing commercial and industrial sites that are abandoned or underused due to these hazards; create financial and regulatory incentives to encourage voluntary cleanup and redevelopment of sites; derive cleanup target levels and a process for obtaining a "No Further Action" letter using risk-based corrective action principles; and provide the opportunity for environmental equity and justice.<sup>8</sup> The Act authorizes the Department of Environmental Protection's (DEP) Brownfields Redevelopment Program. Participation in the program results in environmental cleanup, protection of public health, reuse of infrastructure, and job creation.<sup>9</sup>

### ***Brownfield Designations***

Under the Act, a brownfield area is defined as a contiguous area of one or more brownfield sites,<sup>10</sup> some of which may not be contaminated, and which has been designated by a local government resolution.<sup>11</sup> Brownfield areas may include all or portions of community redevelopment areas, enterprise zones, empowerment zones, other such designated economically deprived communities and areas, and EPA-designated brownfield pilot projects.<sup>12</sup>

For a property to participate in the program, the local government with jurisdiction over the property must first adopt a resolution designating the area as a brownfield area.<sup>13</sup> A brownfield area designation may be proposed by the jurisdictional local government or any person other than a governmental entity.<sup>14</sup> Different designation criteria may apply based on the entity proposing the designation, and the criteria for designations proposed by persons other than a governmental entity require the local government with jurisdiction to provide notice and adopt the resolution if a person establishes five particular criteria.<sup>15</sup> To designate a brownfield area, the jurisdictional local government must pass a resolution that includes a map clearly delineating the parcels to be included in the brownfield area.<sup>16</sup> If a property owner within the proposed area requests in writing to have his or her property removed from the proposed designation, then the local government must grant the request.<sup>17</sup> The governing bodies of municipalities and counties must notice and conduct hearings on proposed resolutions and adopt resolutions in accordance with the applicable statutory procedures.<sup>18</sup>

### ***Eligibility Criteria***

Any person who has not caused or contributed to the contamination of a brownfield site on or after July 1, 1997 is eligible to participate in the brownfield program, subject to conditions

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<sup>8</sup> DEP, *Brownfields Program*, <https://floridadep.gov/waste/waste-cleanup/content/brownfields-program> (last visited Feb. 12, 2020).

<sup>9</sup> *DEP Brownfields Report*, at 3.

<sup>10</sup> Section 376.79(4), F.S. "Brownfield sites" means real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination.

<sup>11</sup> Section 376.79(5), F.S.

<sup>12</sup> *Id.*

<sup>13</sup> Section 376.80(1), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> Section 376.80(2)(c), F.S.

<sup>16</sup> Section 376.80(1), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> Section 376.80(1)(c)2., F.S.; *see ss.* 125.66 and 166.041, F.S.

specified in the Act.<sup>19</sup> For example, persons who are subject to ongoing corrective action or enforcement under certain environmental laws are only eligible to participate in a brownfield site rehabilitation agreement if:

- The proposed brownfield site is currently idle or underutilized as a result of the contamination, and participation will immediately result in increased economic productivity at the site, including the creation of at least 10 new permanent jobs that are not part of implementing the brownfield site rehabilitation agreement; and
- The person is complying in good faith with the terms of an existing consent order or DEP-approved corrective action plan, or responding in good faith to an enforcement action, as evidenced by a determination issued by DEP or an approved local program.<sup>20</sup>

### ***Brownfield Site Rehabilitation Agreements (BSRA)***

Following designation of a brownfield area by resolution, the local government may identify a person responsible for brownfield site rehabilitation,<sup>21</sup> which simply entitles the identified person to negotiate a Brownfield Site Rehabilitation Agreement (BSRA) with DEP or an approved local pollution control program.<sup>22</sup> If actual contamination exists at the site, the responsible person must enter into such a BSRA.<sup>23</sup> A BSRA provides assurance to DEP and the public that site rehabilitation will be conducted in accordance with applicable legal requirements, and it provides limited liability protection for the responsible person.<sup>24</sup> BSRA's must include each of the following elements:

- A brownfield site rehabilitation schedule;
- A commitment to conduct site rehabilitation activities under the observation of professional engineers or geologists who are registered in accordance with applicable law;
- A commitment to conduct site rehabilitation in accordance with DEP quality assurance rules;
- A commitment to conduct site rehabilitation consistent with the brownfield site contamination cleanup criteria;<sup>25</sup>
- Timeframes for DEP's review of technical reports and plans submitted in accordance with the BSRA;
- A commitment to secure site access for DEP or the approved local program to all brownfield sites within the eligible brownfield area for activities associated with site rehabilitation;
- A commitment to consider appropriate pollution prevention measures and to implement those that are reasonable and cost-effective, taking into account the ultimate use or uses of the brownfield site;
- Certification that the person responsible for brownfield site rehabilitation has consulted with the local government about the proposed redevelopment of the brownfield site, that the local

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<sup>19</sup> Section 376.82, F.S.

<sup>20</sup> Section 376.82(1)(b), F.S.

<sup>21</sup> Section 376.79(15), F.S. The Act defines "person responsible for brownfield site rehabilitation" as "the individual or entity that is designated by the local government to enter into the brownfield site rehabilitation agreement with the department or an approved local pollution control program and enters into an agreement with the local government for redevelopment of the site."

<sup>22</sup> Section 376.80(2)(d), F.S.; *DEP Brownfields Report*, at 9. DEP has delegated authority to administer the program to three county governments: Broward, Hillsborough, and Miami-Dade counties.

<sup>23</sup> Section 376.80(5), F.S.

<sup>24</sup> *DEP Brownfields Report*, at 5.

<sup>25</sup> Section 376.81, F.S.; Fla. Admin. Code Ch. 62-780. This chapter contains cleanup criteria requirements that apply to site rehabilitation governed by a BSRA.

government approves the proposed redevelopment, and that the proposed redevelopment complies with applicable laws and requirements for such redevelopment; and

- Any other provisions that the person responsible for brownfield site rehabilitation and DEP agree upon.<sup>26</sup>

DEP issues site rehabilitation completion orders for sites that have completed cleanup of property to standards protective of human health and the environment and for which no further action is required at that time.<sup>27</sup> Since the program's inception in 1997, Florida has amassed 481 designated brownfield areas in 151 communities across the state, averaging 22 newly designated brownfield areas each year.<sup>28</sup> From those designations, 137 site rehabilitation orders have been issued, approximately 66,600 confirmed and projected direct and indirect jobs have been created, and \$2.86 billion in capital investment is projected in designated brownfield areas.<sup>29</sup>

### ***Liability Protection***

Any person, including his or her successors and assigns, who executes and implements to successful completion a BSRA is relieved of:

- Further liability for remediation of the contaminated site or sites to the state and to third parties.
- Liability in contribution to any other party who has or may incur cleanup liability for the contaminated site or sites.
- Liability for claims of property damages, including, but not limited to, diminished value of real property or improvements; lost or delayed rent, sale, or use of real property or improvements; or stigma to real property or improvements caused by contamination addressed by a BSRA.<sup>30</sup>

This liability protection takes effect upon execution of a BSRA and remains effective provided that the responsible person complies with the terms of the BSRA.<sup>31</sup> If the responsible person fails to comply with the BSRA, and the project is not returned to compliance with the BSRA or a modification cannot be negotiated, the immunity provisions are revoked.<sup>32</sup> Upon completion of site rehabilitation in compliance with the Act, no additional site rehabilitation is required unless certain conditions are demonstrated.<sup>33</sup>

<sup>26</sup> Section 376.80(5), F.S.

<sup>27</sup> *DEP Brownfields Report*, at 5; Fla. Admin. Code R. 62-780.680; *see also* s. 376.82(2)(e), F.S.

<sup>28</sup> *DEP Brownfields Report*, at 4.

<sup>29</sup> *Id* at 1, 5.

<sup>30</sup> Section 376.82(2)(a)1.-3. The relief of liability for claims of property damages applies to causes of action accruing on or after July 1, 2014, and does not apply to a person who discharges contaminants on property subject to a brownfield site rehabilitation agreement, who commits fraud in demonstrating site conditions or completing site rehabilitation of a property subject to a brownfield site rehabilitation agreement, or who exacerbates contamination of a property subject to a brownfield site rehabilitation agreement in violation of applicable laws which causes property damages.

<sup>31</sup> Section 376.82(2)(d), F.S.; *see s.* 376.82(2)(b) and (c), F.S. This liability protection does not limit the right of a third party other than the state to pursue an action for damages to persons for bodily harm; however, such an action may not compel site rehabilitation in excess of that required in the approved BSRA or otherwise required by DEP or a local program. Section 376.82, F.S., does not affect the ability or authority to seek contribution from any person who may have liability with respect to the contaminated site and who did not receive cleanup liability protection under the Act.

<sup>32</sup> Section 376.80(8), F.S.

<sup>33</sup> Section 376.82(3)(a)-(e), F.S.

### *Voluntary Cleanup Tax Credit*

In 1998, the Legislature created the voluntary cleanup tax credit to encourage participants to conduct voluntary cleanup of certain drycleaning-solvent-contaminated sites and brownfield sites in designated brownfield areas.<sup>34</sup> For participants meeting the eligibility criteria in the Act who have entered into a BSRA, DEP awards tax credit certificates valid against the Florida corporate income tax.<sup>35</sup> There are five types of such tax credits available.<sup>36</sup>

An annual site rehabilitation tax credit may be claimed in the amount of 50 percent of the costs of voluntary cleanup activity that is integral to site rehabilitation at a brownfield site in a designated brownfield area.<sup>37</sup> Eligible tax credit applicants may receive up to \$500,000 per site per year in tax credits.<sup>38</sup> Applicants for the site rehabilitation credit have an annual application deadline of January 31 of the year following the calendar year for which an applicant is claiming site rehabilitation costs.<sup>39</sup> By May 1 of each year, DEP must inform each applicant of their eligibility status and the amount of any tax credit due.<sup>40</sup>

To encourage the completion of site rehabilitation, an additional one-time tax credit may be claimed in the amount of 25 percent of the total site rehabilitation costs, not to exceed \$500,000, in the final year of cleanup as evidenced by DEP issuing a “No Further Action” order for the site.<sup>41</sup>

To encourage the construction of affordable housing, an additional one-time tax credit may be claimed in the amount of 25 percent of the total site rehabilitation costs, not to exceed \$500,000, for brownfield sites at which the land use is restricted to affordable housing.<sup>42</sup> In order to receive this tax credit, the applicant must provide a certification letter from a governmental agency that is a party to the use agreement indicating that the brownfield site has received a certificate of occupancy and has a recorded instrument limiting the use of the property to housing.<sup>43</sup>

To encourage the redevelopment of a brownfield site that is hindered by the presence of solid waste,<sup>44</sup> an additional one-time tax credit may be claimed in the amount of 50 percent of the costs, not to exceed \$500,000, for the complete costs of solid waste removal for the brownfield

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<sup>34</sup> DEP, *Voluntary Cleanup Tax Credit*, <https://floridadep.gov/waste/waste-cleanup/content/voluntary-cleanup-tax-credit> (last visited Feb. 12, 2020).

<sup>35</sup> *Id.*

<sup>36</sup> Sections 220.1845(2)(k) and 376.30781(3)(f), F.S. In addition to the four tax credits described below, a tax credit is available for the construction or operation of a health care facility or health care provider on a brownfield site.

<sup>37</sup> Sections 220.1845(2)(a) and 376.30781(3)(a), F.S.

<sup>38</sup> Sections 220.1845(2)(b) and 376.30781(3)(b), F.S.

<sup>39</sup> Section 376.30781(5)(a), F.S.; DEP, *Voluntary Cleanup Tax Credit*, <https://floridadep.gov/waste/waste-cleanup/content/voluntary-cleanup-tax-credit> (last visited Feb. 12, 2020).

<sup>40</sup> Section 376.30781(9), F.S.

<sup>41</sup> Sections 220.1845(2)(h) and 376.30781(3)(c), F.S.

<sup>42</sup> Sections 220.1845(2)(i) and 376.30781(3)(d), F.S.

<sup>43</sup> *Id.*

<sup>44</sup> Section 403.703(36), F.S. “Solid Waste” means sludge unregulated under the federal Clean Water Act or Clean Air Act, sludge from a waste treatment works, water supply treatment plant, or air pollution control facility, or garbage, rubbish, refuse, special waste, or other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations.

site.<sup>45</sup> The term “solid waste removal” includes removing or excavating, sorting or screening prior to removal, or depositing solid waste at a waste management facility.<sup>46</sup> To qualify for the tax credit, applicants must submit an affidavit to DEP, following consultation with DEP and appropriate local government officials, stating the brownfield site was never operated as a permitted solid waste disposal area or operated for monetary compensation.<sup>47</sup> “Solid waste disposal area” is defined as a landfill, dump, or other area where solid waste has been disposed.<sup>48</sup> “Monetary compensation” is defined as fees or assessments for the disposal of solid waste at a solid waste disposal area.<sup>49</sup>

The total amount of tax credits for all sites that may be granted by DEP each fiscal year is capped at \$10 million.<sup>50</sup> In the event that approved tax credit applications exceed the \$10 million annual authorization, remaining applications roll over into the next fiscal year to receive tax credits from the next year’s authorization.<sup>51</sup> As of July 1, 2018, there was approximately \$21.6 million in approved tax credits, with \$3.2 million carried over as the backlog.<sup>52</sup> DEP received 135 voluntary cleanup tax credit applications for 2018 calendar year expenses, and \$14.6 million of this was allocated for tax credits for 122 brownfield sites.<sup>53</sup>

### **Affordable Housing**

Affordable housing is generally defined in relation to the annual area median household income adjusted for family size. Section 420.0004, F.S., defines the term “affordable” to mean that monthly rents or monthly mortgage payments including taxes, insurance, and utilities do not exceed 30 percent of the amount that represents the percentage of the median adjusted gross annual income for:

- Extremely-low-income households, i.e., total annual household income does not exceed 30 percent of the median annual adjusted gross income for households within the state;<sup>54</sup>
- Very-low-income households, i.e., total annual gross household income does not exceed 50 percent of the median annual income within the state or the metropolitan statistical area, whichever is greater;<sup>55</sup>
- Low-income households, i.e., total annual gross household income does not exceed 80 percent of the median annual income within the state or the area, whichever is greater;<sup>56</sup>

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<sup>45</sup> Sections 220.1845(2)(j) and 376.30781(3)(e), F.S.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Sections 220.1845(2)(f) and 376.30781(4), F.S.

<sup>51</sup> DEP, *Voluntary Cleanup Tax Credit*, <https://floridadep.gov/waste/waste-cleanup/content/voluntary-cleanup-tax-credit> (last visited Feb. 12, 2020).

<sup>52</sup> *DEP Brownfields Report*, at 7.

<sup>53</sup> *Id.*

<sup>54</sup> Section 420.0004(9), F.S. The Florida Housing Finance Corporation may adjust this amount annually by rule to provide that in lower income counties, extremely low income may exceed 30 percent of area median income and that in higher income counties, extremely low income may be less than 30 percent of area median income.

<sup>55</sup> Section 420.0004(17), F.S.

<sup>56</sup> Section 420.0004(11), F.S.

- Moderate-income households, i.e., total annual gross household income does not exceed 120 percent of the median annual income within the state or the area, whichever is greater.<sup>57</sup>

According to the Florida Housing Finance Corporation, Florida housing records indicate there are currently a number of affordable housing projects financed through the corporation that are located within brownfield boundaries.<sup>58</sup>

### **Water Quality Assurance Act**

In 1983, the Legislature passed the Water Quality Assurance Act.<sup>59</sup> These sections of law outline a comprehensive administrative procedure to clean up contaminated sites.<sup>60</sup>

Section 376.313(3), F.S., creates a private cause of action for all damages resulting from a discharge<sup>61</sup> or other condition of pollution which is covered by the Water Quality Assurance Act.<sup>62</sup> Section 376.313(3), F.S., imposes strict liability for such pollution, as it is not necessary to show negligence, it is only necessary to show that the prohibited discharge or other pollutive condition occurred.<sup>63</sup> The section allows for joint and several liability.<sup>64</sup> The only defenses to such statutory causes of action are those specified in s. 376.308, F.S. These defenses include: an act of war; an act of government; an act of God, meaning an unforeseeable act of the violence of nature without the interference of human agency; or an act or omission of a third party.<sup>65</sup> These defenses create exceptions to the strict liability imposed by the statute.<sup>66</sup>

The Water Quality Assurance Act does not define the term “damages.” In a 2010 case involving a claim arising under s. 376.313(3), F.S., the Florida Supreme Court applied a definition from a different portion of ch. 376, F.S., which defines damages as “the documented extent of any destruction to or loss of any real or personal property, or the documented extent...of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant.”<sup>67</sup> In 2019, the Florida Supreme Court

<sup>57</sup> Section 420.0004(12), F.S.

<sup>58</sup> Florida Housing Finance Corporation, *2020 Agency Legislative Bill Analysis: SB 1350, 2* (2020)(on file with the Senate Environment and Natural Resources Committee).

<sup>59</sup> Chapter 83-310, Laws of Fla.; ss. 376.30–376.317, F.S.

<sup>60</sup> *Irizarry v. Orlando Utilities Comm'n*, 393 F. Supp. 3d 1110, 1118 (M.D. Fla. 2019).

<sup>61</sup> Section 376.301(13), F.S. “Discharge” includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing, or dumping of any pollutant or hazardous substance which occurs and which affects lands and the surface and ground waters of the state not regulated by the Water Quality Assurance Act.

<sup>62</sup> Section 376.313(3), F.S.

<sup>63</sup> *Id.* Certain exceptions exist for suits involving petroleum storage systems or drycleaning facility or wholesale supply facility; see *Irizarry*, 393 F. Supp. 3d 1110 at 1116 (explaining that to state a plausible claim under s. 376.313(3), F.S., a plaintiff must allege: (1) a prohibited discharge or other pollutive condition occurred; and (2) damages).

<sup>64</sup> Section 376.313(3), F.S.; see BLACK’S LAW DICTIONARY 997 (9th ed. 2009). Joint and several liability generally means liability that may be apportioned among two or more parties.

<sup>65</sup> Section 376.308, F.S. The section contains additional defenses, including those involving discharges of petroleum or drycleaning solvents.

<sup>66</sup> See *Gen. Dynamics Corp. v. Brottem*, 53 So. 3d 334, 337 (Fla. Dist. Ct. App. 2010)(describing the defenses as “fault-focused defenses or, put another way, strict liability exceptions”).

<sup>67</sup> *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1221 (Fla. 2010); s. 376.031(5), F.S.



receded from the application of this definition, and held that the meaning of “all damages” in s. 376.313(3), F.S., includes personal injury damages.<sup>68</sup>

In addition to providing a statutory cause of action, s. 376.313(3), F.S., expressly preserves common law causes of action.<sup>69</sup> This means a plaintiff may also pursue common law causes of action to obtain relief for damages resulting from pollution covered by the Water Quality Assurance Act.<sup>70</sup> However, the strict liability provisions applying to statutory causes of action arising under s. 376.313(3), F.S., would not apply to causes of action arising under common law.

### **Solid Waste Disposal Facilities**

DEP is responsible for implementing and enforcing Florida’s solid waste management laws in ch. 403, F.S.<sup>71</sup> These statutes provide the authority for ch. 62-701, F.A.C., which are DEP’s current rules for solid waste management facilities.<sup>72</sup> The rules define solid waste management facilities as any solid waste disposal area, transfer station, materials recovery facility, or other facility (including landfills), the purpose of which is resource recovery or the disposal, recycling, processing, or storage of solid waste.<sup>73</sup> No person may store, process, or dispose of solid waste except as authorized at a permitted solid waste management facility.<sup>74</sup> A permit from DEP is required for the construction, operation, or closure of a solid waste management facility.<sup>75</sup>

DEP’s rules for landfills require compliance with water quality and air quality standards, and they establish minimum requirements for water quality monitoring.<sup>76</sup> Landfills that close must comply with DEP’s requirements for closure permitting and long-term care.<sup>77</sup> Consultation with DEP is required prior to conducting any activities at closed landfill areas.<sup>78</sup> DEP provides guidance on requirements and recommendations for disturbing or using old, closed landfills or disposal areas.<sup>79</sup> These areas include old waste disposal areas that were operated and closed without permits and which may have had few or no records available of their operations.<sup>80</sup> In these old waste disposal areas, DEP prefers uses such as recreational facilities instead of residential housing, and discourages some construction due to issues such as landfill gas and settlement problems.<sup>81</sup>

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<sup>68</sup> *Charles L. Lieupo v. Simon’s Trucking, Inc.*, 286 So. 3d 143, 147 (Fla. 2019).

<sup>69</sup> Section 376.313(3), F.S.; see *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045, 1050 (Fla. Dist. Ct. App. 2001)(stating that section 376.313(3), F.S. preserves common law causes of action by its very terms).

<sup>70</sup> *Irizarry*, 393 F. Supp. 3d at 1118.

<sup>71</sup> Section 403.704, F.S.; see DEP, *Solid Waste Section*, <https://floridadep.gov/waste/permitting-compliance-assistance/content/solid-waste-section> (last visited Feb. 13, 2020).

<sup>72</sup> Fla. Admin. Code Ch. 62-701.

<sup>73</sup> Fla. Admin. Code R. 62-701.200(112).

<sup>74</sup> Fla. Admin. Code R. 62-701.300.

<sup>75</sup> Section 403.707, F.S.; Fla. Admin. Code R. 62-701.320. The rule specifies certain exemptions.

<sup>76</sup> Fla. Admin. Code Rules 62-701.340 and 62-701.510.

<sup>77</sup> Fla. Admin. Code Rules 62-701.600 and 62-701.620.

<sup>78</sup> Fla. Admin. Code R. 62-701.610(1).

<sup>79</sup> DEP, *Guidance For Disturbance and Use of Old Closed Landfills or Waste Disposal Areas in Florida, Version 2.3*, 1 (Apr. 2, 2019), available at [https://floridadep.gov/sites/default/files/Old\\_Dump\\_Guidance-02Apr2019.pdf](https://floridadep.gov/sites/default/files/Old_Dump_Guidance-02Apr2019.pdf).

<sup>80</sup> *Id.* at 2.

<sup>81</sup> *Id.* at 16-18.

### III. Effect of Proposed Changes:

**Section 1** amends s. 376.30781, F.S., which authorizes various tax credits for rehabilitation of brownfield sites.

The bill changes from May 1 to June 1 the date on or before which the Department of Environmental Protection (DEP) must inform each applicant for the annual site rehabilitation tax credit of the applicant's eligibility status and the amount of any tax credit due.

The bill revises the one-time tax credit for 25 percent of the total site rehabilitation costs for a brownfield site, not to exceed \$500,000, for site rehabilitation completion. To be eligible for the tax credit, DEP must have approved the applicant's annual site rehabilitation applications and issued a "No Further Action" order for the site. The bill also requires the applicant to submit the claim within 2 years of receipt of the order and deletes the requirement that the claim be made in the final year of cleanup.

The bill revises the one-time tax credit for an additional 25 percent of the total site rehabilitation costs for a brownfield site, not to exceed \$500,000, which limits the use of the property to housing. The bill requires the applicant to have a certification letter indicating that the construction on the brownfield site, instead of the brownfield site itself, has a properly recorded instrument limiting the use of the property to housing.

The bill revises the one-time tax credit for 50 percent of the costs for solid waste removal on a brownfield site, not to exceed \$500,000. The bill deletes requirements that applicants for this credit must submit an affidavit making certain statements, after consultation with appropriate local government officials and DEP, and to the best of the applicant's knowledge based upon such consultation and available historical records. The bill requires the applicant to meet eligibility requirements for participation in the brownfield program, and requires that the site has never been used as a permitted solid waste disposal area under DEP's current rules regulating solid waste management facilities<sup>82</sup> or the predecessor rules. The bill deletes the requirement that the site was never operated for monetary compensation. The effect of these changes is to authorize credits for unpermitted solid waste disposal areas (often sites that existed before the current regulatory scheme was in place) even if those solid waste disposal areas received monetary compensation.

**Section 2** amends s. 376.313(3), F.S., which provides a cause of action and defenses for damages resulting from pollution.

The bill limits causes of action arising under s. 376.313(3), F.S., to damages to real or personal property directly resulting from pollution, and requires that the pollution was not authorized by any government approval or permit. The effect of this change is to remove personal injury from the types of damages that may be recovered through causes of action arising under s. 376.313(3), F.S., overturning the Florida Supreme Court's recent decision in *Lieupo v. Simon's Trucking*.<sup>83</sup>

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<sup>82</sup> Fla. Admin. Code Ch. 62-701.

<sup>83</sup> *Lieupo*, 286 So. 3d at 147.

The bill changes the description from “defenses” to “strict-liability exceptions,” since s. 376.313(3), F.S., imposes strict liability.

The bill adds to the defenses for a cause of action arising under s. 376.313(3), F.S., the liability protection provided to any person who executes and implements to successful completion a Brownfield Site Rehabilitation Agreement (BSRA). This liability protection would also apply to the successors and assigns of the person who executed and implemented the BSRA, as well as subsequent property owners of the brownfield site.

**Section 3** amends s. 376.78, F.S., which provides the legislative intent for the Brownfields Redevelopment Act.

The bill expands the first legislative finding to state that the reduction of public health and environmental hazards on any existing sites is vital to their use and reuse. This broadens the existing language, which only applies to commercial and industrial sites.

**Section 4** amends s. 376.80, F.S., which establishes the general procedures that apply to Florida’s brownfield program.

The bill allows government entities and trusts to propose brownfield area designations under the designation criteria that, in existing law, apply to any person other than a governmental entity. The bill changes the heading for the applicable criteria to “brownfield area designation proposed by specified persons,” removing language that does not allow that criteria to apply to governmental entities.<sup>84</sup>

The bill revises the procedures for negotiating BSRAs. The bill states that the designation of a brownfield area simply entitles a person to negotiate a BSRA with DEP or a local program. This broadens the existing language which states that designating the brownfield area “and the identification of a person responsible for brownfield site rehabilitation simply entitles the *identified* person to negotiate”<sup>85</sup> a BSRA with DEP or a local program.<sup>86</sup> The effect of this language may be to authorize “a person,” not just the person identified as responsible for brownfield site rehabilitation, to negotiate the BSRA.

The bill revises the respective procedures required for municipalities and counties to adopt resolutions designating brownfield areas, applying the specified procedures only to the notices for the public hearings and not all of the procedures for the public hearings. This removes requirements for municipalities and counties to follow certain specific procedures for public hearings on proposed resolutions.

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<sup>84</sup> Section 376.79(16), F.S. The definition of “person” in the Brownfields Redevelopment Act expressly includes any governmental entity.

<sup>85</sup> Emphasis added.

<sup>86</sup> Section 376.79(15), F.S. The Act defines “person responsible for brownfield site rehabilitation” as “the individual or entity that is designated by the local government to enter into the brownfield site rehabilitation agreement with the department or an approved local pollution control program and enters into an agreement with the local government for redevelopment of the site.”

The bill provides a clarifying definition for the term “brownfield area” as used in the procedures for local government-proposed brownfield area designations outside specified redevelopment areas.<sup>87</sup>

**Section 5** amends s. 376.82, F.S., which establishes eligibility criteria and liability protection for Florida’s brownfield program.

The bill revises the list of liability protections for persons who execute and implement to successful completion a BSRA. The bill adds relief from statutory causes of action arising under s. 376.313(3), F.S., to the list of liability protections. This protects those who execute and implement BSRAs, and their successors and assigns and any subsequent property owners, from statutory causes of action regarding damages to real or personal property directly resulting from pollution in which a strict liability standard is imposed.

The bill also expands the other liability protection for persons who execute and implement BSRAs to any subsequent property owner of the brownfield site, in addition to the person who cleans up the site and their successors or assigns.

The bill provides that the liability protection becomes effective upon execution of a BSRA and remains effective as to any person responsible for brownfield site rehabilitation. Each person responsible for brownfield site rehabilitation must comply with the BSRA, and any subsequent property owner of the brownfield site must maintain compliance with any applicable institutional or engineering controls required for site rehabilitation to retain the liability protections for brownfield site cleanups.

The bill revises the participation eligibility requirement for persons subject to ongoing corrective action or enforcement of environmental law to create at least 10 new permanent jobs that are not associated with implementing the BSRA. The job creation requirement does not apply to the rehabilitation and redevelopment of a brownfield site that will provide affordable housing<sup>88</sup> or create recreational areas, conservation areas, or parks, or be maintained for cultural or historical preservation purposes.

**Section 6** states that the act takes effect July 1, 2020.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

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<sup>87</sup> Section 376.79(5), F.S. In this context, the bill defines “brownfield area” as the following: “a contiguous area of one or more brownfield sites, some of which may not be contaminated, and which has been designated by a local government by resolution. Such areas may include all or portions of community redevelopment areas, enterprise zones, empowerment zones, other such designated economically deprived communities and areas, and Environmental Protection Agency-designated brownfield pilot projects.”

<sup>88</sup> Section 420.0004, F.S. The bill references this section for the definition of “affordable housing.”

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The revenue estimating conference performed an analysis of the changes to the Corporate Income Tax credits in HB 1001, the House of Representatives' companion to SB 1350.<sup>89</sup> The analysis found that the bill is expected to have no impact, because, regardless of expected growth of the applicant pool, the available tax credits are still capped at \$10 million.<sup>90</sup>

**VI. Technical Deficiencies:**

In existing law, ss. 376.30781(3)(c)-(e) and 220.1845(2)(h)-(j), F.S., are identical, and together they authorize certain tax credits. Lines 39-117 of the bill amend s. 376.30781(3)(c)-(e), F.S., but the bill does not make the same amendments to s. 220.1845(2)(h)-(j), F.S. Revising the bill to make the same changes in both of these sections of law, so that the aforementioned subsections remain identical, is recommended.<sup>91</sup>

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<sup>89</sup> Office of Economic and Demographic Research, Revenue Estimating Conference, *HB 1001, Section 2*, 251-253 (Jan. 17, 2020), available at [http://edr.state.fl.us/Content/conferences/revenueimpact/archives/2020/\\_pdf/Impact0117.pdf](http://edr.state.fl.us/Content/conferences/revenueimpact/archives/2020/_pdf/Impact0117.pdf).

<sup>90</sup> *Id.* at 253.

<sup>91</sup> See Department of Revenue, *2020 Agency Legislative Bill Analysis: SB 1350*, 5 (2020)(on file with the Senate Environment and Natural Resources Committee).

Lines 84-85 refer to ch. 62-701, F.A.C. It is preferable that bills not include references to specific administrative rules.<sup>92</sup> According to the Florida Senate Manual for Drafting Legislation, because of the rule of statutory construction governing specific cross-references, a law that incorporates an agency's rule by specific reference prevents the agency from later amending that rule.<sup>93</sup> Therefore, revising the bill to refer to rules adopted under s. 403.704, F.S., regarding permitting solid waste management facilities is recommended.

The title of the bill does not mention that the bill provides the brownfield program liability protection to subsequent property owners of brownfield sites or that relief from statutory causes of action arising under s. 376.313(3), F.S., is added to this liability protection. Amending the title to include these changes is recommended.

## VII. Related Issues:

Lines 43-45 require that DEP has approved the applicant's annual site rehabilitation applications for eligibility for the rehabilitation completion tax credit. Given the bill's current language, this is a requirement for an applicant to receive a credit, not a modification or clarification of the amount of the credit. If the intent was for DEP to use the annual applications to determine which costs are eligible for the 25 percent tax credit calculation then the following language or a similar clarification is recommended: the site rehabilitation costs for the purposes of this paragraph consist of those costs that the Department of Environmental Protection has approved as part of the applicant's annual site rehabilitation applications.

## VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 212.08, 376.30781, 376.313, 376.78, 376.80, and 376.82.

## IX. Additional Information:

### A. Committee Substitute – Statement of Substantial Changes: (Summarizing differences between the Committee Substitute and the prior version of the bill.)

#### **CS by Environment and Natural Resources Committee on February 17, 2019:**

- Removes the expanded application of the sales tax exemption for building materials to the construction of affordable housing projects on lands abutting brownfield areas where the developer sets aside at least 20 percent of housing units for affordable housing, and the construction of mixed-use units on lands in and abutting brownfield areas where the developer sets aside at least 20 percent of the project's square footage for low- and moderate-income housing.
- Removes the expanded application of the corporate income tax exemption for affordable housing on brownfield sites to projects with mixed uses and projects that include market-rate housing, where the developer sets aside at least 20 percent of the housing units for affordable housing, and the tax credit is based on a pro rata share of

<sup>92</sup> Florida Senate, Office of Bill Drafting Services, *Manual for Drafting Legislation*, 82 (2009), available at <http://intranet.flsenate.gov/Document?filePath=/Publications%20and%20Forms/Publications/&fileName=Bill%20Drafting%20Manual.pdf>.

<sup>93</sup> *Id.*

affordable housing compared to the overall square footage or market-rate housing units.

- Removes the change to the definition of “sold waste disposal area” for the corporate income tax credit for solid waste removal from a brownfield site.
- Limits statutory causes of action under s. 376.313(3), F.S., to damages to real or personal property directly resulting from the pollution.
- Revises the statutory cause of action in s. 376.313(3), F.S., requiring that the pollution at issue was not authorized by any government approval or permit, as opposed to not authorized under ch. 403, F.S.
- Changes the description of the defenses to s. 376.313(3), F.S., to “strict-liability exceptions” instead of defenses.
- Changes the title of the bill from “brownfields” to “contamination.”

**B. Amendments:**

None.