

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 909 Pollution Control Standards and Liability
SPONSOR(S): Environment, Agriculture & Flooding Subcommittee, Payne and others
TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 1210

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|------------------|-----------|---------------------------------------|
| 1) Environment, Agriculture & Flooding Subcommittee | 14 Y, 3 N, As CS | Mamontoff | Moore |
| 2) State Affairs Committee | 18 Y, 5 N | Mamontoff | Williamson |

SUMMARY ANALYSIS

Risk-based corrective action (RBCA) (pronounced “Rebecca”) is a decision-making process used to assess and respond to incidents of contamination. The purpose of RBCA is to provide for a flexible site-specific cleanup process that reflects the intended use of the property following cleanup, while maintaining adequate protection of human health, safety, and the environment. The Department of Environmental Protection enforces RBCA principles when addressing contaminated sites in Florida with the goal of meeting cleanup target levels for contaminants.

Agricultural lands are lands that are used primarily for bona fide agricultural purposes. There are various factors that determine whether land use is bona fide agricultural, such as the length of time the land has been used for agricultural purposes and whether said use has been continuous.

The bill specifies that the Secretary of Environmental Protection has exclusive jurisdiction in setting standards or procedures for evaluating environmental conditions and assessing potential liability for the presence of contaminants on land that is classified as agricultural and is being converted to a nonagricultural use. The bill prohibits the Secretary from delegating such authority to a city, a county, or another unit of local government through a local pollution control program, but it does not preempt the enforcement authority of a local government through a local pollution control program.

The bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Risk-based Corrective Action

Risk-based corrective action (RBCA) (pronounced “Rebecca”) is a decision-making process used to assess and respond to incidents of contamination. The American Society of Materials and Testing established RBCA in 1994 based on guidance from the United States Environmental Protection Agency (EPA), which directs states to consider the current and prospective use of groundwater and the relative risk to human health and the environment when remediating contaminated sites.¹ A contaminated site is any contiguous land, sediment, surface water, or groundwater areas that contain contaminants that may be harmful to human health or the environment.²

The RBCA process uses a tiered approach that couples site assessment and response actions with human health, public safety, and environmental risk assessment to determine the extent and urgency of corrective action used in remediating contaminated sites. Alternative cleanup target levels,³ institutional⁴ and engineering controls,⁵ and remediation by natural attenuation⁶ are RBCA strategies used by the Department of Environmental Protection (DEP) on a case-by-case basis that allows the use of cost-effective remediation measures in lieu of conventional cleanup technologies. RBCA is implemented in all 50 states for the remediation of contaminated sites.⁷

Section 376.30701, F.S., was created in 2003 to apply RBCA principles to all contaminated sites (referred to as “Global RBCA”) resulting from a discharge of pollutants when site rehabilitation is required.⁸ DEP must develop a site rehabilitation program by rule that uses RBCA concepts. Specifically, the law requires DEP to:

- Consider current exposure and potential risk of exposure to humans and the environment;
- Establish the point of compliance at the source of the contamination;
- Ensure that site-specific cleanup goals are that all contaminated sites being cleaned ultimately achieve the applicable cleanup target levels;
- Allow the use of institutional or engineering controls at contaminated sites;
- Consider the additive effects of contaminants, including synergistic and antagonistic effects;
- Provide for the department to issue a “No Further Action” order;
- Establish appropriate cleanup target levels for soils;
- Allow for alternative cleanup target levels in conjunction with institutional and engineering controls; and
- Consider the additive effects of contaminants.

¹ EPA, Use of Risk-Based Decision-Making in UST Corrective Action Programs, OSWER Directive 9610.17-1 (1995) <http://www2.epa.gov/risk/human-health-risk-assessment> (last visited Jan. 31, 2022).

² Section 376.301(11), F.S.

³ Section 376.301(8), F.S., defines “cleanup target level” as “the concentration for each contaminant identified by an applicable analytical test method, in the medium of concern, at which a site rehabilitation program is deemed complete.”

⁴ Section 376.301(21), F.S., defines “institutional controls” as “the restriction on use or access to a site to eliminate or minimize exposure to petroleum products’ chemicals of concern, dry cleaning solvents, or other contaminants. Such restrictions may include, but are not limited to, deed restrictions, restrictive covenants, or conservation easements.”

⁵ Section 376.301(17), F.S., defines “engineering controls” as “modifications to a site to reduce or eliminate the potential for exposure to petroleum products’ chemicals of concern, dry cleaning solvents, or other contaminants. Such modifications may include, but are not limited to, physical or hydraulic control measures, capping, point of use treatments, or slurry walls.”

⁶ Section 376.301(25), F.S., defines “natural attenuation” as a “verifiable approach to site rehabilitation that allows natural processes to contain the spread of contamination and reduce the concentrations of contaminants in contaminated groundwater and soil. Natural attenuation processes may include the following: sorption, biodegradation, chemical reactions with subsurface materials, diffusion, dispersion, and volatilization.”

⁷ EPA, *supra* note 1, at 2-3.

⁸ Ch. 2003-173, s. 1, Laws of Fla.

DEP adopted ch. 62-780, F.A.C., in 2005 to implement these provisions and provide the procedures necessary to implement site rehabilitation for all sites using RBCA criteria. RBCA criteria are administered in conjunction with ch. 62-777, F.A.C., which provides the default groundwater, surface water, and soil cleanup target levels, as well as the natural attenuation default concentrations for groundwater, in order to determine the appropriate cleanup target levels for a contaminated site.

Local Pollution Control Programs

Current law authorizes cities and counties to establish and administer local pollution control programs if such programs:

- Are approved by DEP as adequate to meet pollution control requirements established by statute or DEP regulations.
- Provide by ordinance, regulation, or local law for requirements compatible with, or stricter or more extensive than those imposed by current law or DEP regulations.
- Provide for the enforcement of such requirements by appropriate administrative and judicial process.
- Provide for administrative organization, staff, financial and other resources necessary to effectively and efficiently carry out its program.⁹

DEP has the exclusive authority to require and issue permits, except that such authority may be delegated to local pollution control organizations if DEP finds it necessary or desirable to do so.¹⁰

Agricultural Land

Current law requires a property appraiser to classify for assessment purposes all lands within a county as agricultural or nonagricultural.¹¹ Unless subject to certain specified restrictions, only lands that are used primarily for bona fide agricultural purposes¹² may be classified as agricultural.

In determining whether the use of land for agricultural purposes is bona fide, the following factors may be taken into consideration:

- The length of time the land has been so used;
- Whether the use has been continuous;
- The purchase price paid;
- Size, as it relates to specific agricultural use, but a minimum acreage may not be required;
- Whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforestation, and other accepted agricultural practices;
- Whether the land is under lease and, if so, the effective length, terms, and conditions of the lease; and
- Such other factors as may become applicable.

Offering a property for sale does not constitute a primary use of land and may not be the basis for denying agricultural classification if the land continues to be used primarily for bona fide agricultural purposes while it is being offered for sale.¹³

Effect of the Bill

The bill specifies that the Secretary of Environmental Protection has exclusive jurisdiction in setting standards or procedures for evaluating environmental conditions and assessing potential liability for the

⁹ Section 403.182(1), F.S.

¹⁰ Section 403.182(2), F.S.

¹¹ Section 193.461, F.S.

¹² The term "bona fide agricultural purposes" is defined as good faith commercial agricultural use of land. Section 193.461(3)(b) The term "agricultural purposes" includes, but is not limited to, horticulture; floriculture; viticulture; forestry; dairy; livestock; poultry; bee; pisciculture, if the land is used principally for the production of tropical fish; aquaculture; algaculture; sod farming; and all forms of farm products and farm production.

¹³ Section 193.461(3)(b)2., F.S.

presence of contaminants on land that is classified as agricultural and is being converted to a nonagricultural use. The bill prohibits the Secretary from delegating such authority to a city, a county, or another unit of local government through a local pollution control program, but provides that the bill does not preempt the enforcement authority of a local government through a local pollution control program.

The bill specifies that the Secretary's exclusive jurisdiction includes defining what constitutes all appropriate inquiry consistent with federal law and guidance under 40 C.F.R. Part 312.

The bill does not apply to former agricultural land for which a permit has been approved by a local government to initiate development or for which development was completed on or before July 1, 2022.

B. SECTION DIRECTORY:

Section 1. Amends s. 403.182, F.S., relating to local pollution control programs.

Section 2. Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure 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:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.