

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 789 Environmental Management

SPONSOR(S): Infrastructure Strategies Committee, Water Quality, Supply & Treatment Subcommittee, Overdorf and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 738

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Water Quality, Supply & Treatment Subcommittee	17 Y, 0 N, As CS	Guy-Hudson	Curtin
2) Agriculture & Natural Resources Appropriations Subcommittee	10 Y, 5 N	Byrd	Pigott
3) Infrastructure Strategies Committee	16 Y, 7 N, As CS	Guy-Hudson	Harrington

SUMMARY ANALYSIS

Florida averages 40-60 inches of rainfall a year, depending on the location, with approximately two-thirds falling between June and October. Because stormwater runoff contains pollutants including sediment, nutrients (such as nitrogen and phosphorous) and other chemicals, effective stormwater treatment systems should be designed to reduce nonpoint source pollution and protect surface water resources.

Stormwater ponds are one of the most widely used stormwater treatment controls and, in Florida, are often designed with side slopes no steeper than a 4:1 horizontal-to-vertical ratio to a depth of at least two feet below the control elevation. Statewide regulations include this maximum ratio but individual water management districts (WMDs) may include additional or differing requirements.

The Water Quality Assurance Act (WQAA) creates a private cause of action for all damages resulting from a pollutant discharge or other condition of pollution covered under the WQAA if the discharge was not authorized by a governmental approval or permit pursuant to ch. 403, F.S., relating to environmental control. The WQAA defines pollution and pollutants according to ch. 376, F.S., relating to pollutant discharge prevention and removal. The WQAA imposes strict liability, meaning it is not necessary to show negligence, only that the prohibited discharge or other pollutive condition occurred. The WQAA allows for joint and several liability and provides that the only defenses to such a cause of action are those specified in s. 376.308, F.S.: an act of war; an act of government; an act of God; or, an act or omission of a third party.

The bill sets, for purposes of water quality, a maximum side slope design requirement of a 4:1 horizontal-to-vertical ratio to a depth of at least two feet below the control elevation for a nonindustrial stormwater management system that is accessible to the general public and is in or adjacent to residential or urban areas. The side slope must be stabilized with vegetation to prevent erosion and provide for pollutant removal. The bill provides that a side slope may be designed with a steeper ratio if the slope incorporates erosion prevention and sediment control best management practices.

The bill limits a cause of action under the WQAA to damages for real or personal property directly resulting from pollution which was not authorized by any government approval or permit pursuant to ch. 373, F.S., relating to water resources, ch. 376, F.S., relating to pollutant discharge prevention and removal and ch. 403, F.S. The bill provides that the strict liability exceptions to such a cause of action include those specified in s. 376.308, F.S., and adds s. 376.82, F.S., relating to the rehabilitation of a brownfields site.

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

The bill provides an effective date of July 1, 2024.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

According to a recent national water quality study, Florida ranks first for lakes impaired for swimming and aquatic life and second for lakes classified as impaired for any use.¹ Nationwide, polluted stormwater runoff is considered to be the greatest threat to clean water.² Nonpoint sources³ associated with stormwater account for over 40 percent of polluted waters.⁴ Stormwater is the flow of water resulting from, and immediately following, a rainfall event.⁵ When stormwater falls on pavement, buildings and other impermeable surfaces, the runoff flows quickly and can pick up sediment, nutrients (such as nitrogen and phosphorous), chemicals and other pollutants.⁶ Florida averages 40-60 inches of rainfall a year, depending on the location, with approximately two-thirds falling between June and October.⁷

A stormwater management system is a system designed "...to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution. . . ."⁸ Most activities that create new impervious surfaces or alter surface water flows involve a stormwater management system.⁹

Effective stormwater management reduces nonpoint source pollution and protects surface water resources from stormwater pollution from existing and new land uses.¹⁰ These pollutants adversely impact drinking water supplies, recreation, fisheries and wildlife.¹¹ Inadequate stormwater management increases stormwater flows and velocities, contributes to erosion, overtaxes the carrying capacity of streams and other conveyances, reduces ground water recharge and threatens public health and safety.¹² Stormwater is the primary source of pollutant loading entering Florida's rivers, lakes and estuaries.¹³

¹ Environmental Integrity Project, *The Clean Water Act at 50*, p. 7 (Mar. 17, 2022), <https://environmentalintegrity.org/wp-content/uploads/2022/03/CWA@50-report-3-17-22.pdf> (last visited Feb. 12, 2024).

² South Florida Water Management District (SFWMD), *Your Impact on the Environment*, <https://www.sfwmd.gov/community-residents/what-can-you-do> (last visited Feb. 12, 2024).

³ Nonpoint source pollution may come from land runoff, rain or hydrologic modification, among other diffuse sources. Environmental Protection Agency (EPA), *Polluted Runoff: Nonpoint Source (NPS) Pollution*, *Basic Information about Nonpoint Source (NPS) Pollution* (last updated Dec. 24, 2023), [Basic Information about Nonpoint Source \(NPS\) Pollution | US EPA](https://www.epa.gov/basic-information-about-nonpoint-source-nps-pollution) (last visited Feb. 12, 2024).

⁴ Department of Environmental Protection (DEP), *Stormwater Support* (last updated Aug. 4, 2023), <https://floridadep.gov/water/engineering-hydrology-geology/content/stormwater-support> (last visited Feb. 12, 2024). Traditional point sources (i.e., wastewater treatment plants) account for approximately 10 percent of these polluted or impaired waters.

⁵ DEP, *Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental)*, p. 2-10 (Dec. 22, 2020) Modified Document, 1/6/2021, <https://www.flrules.org/gateway/reference.asp?No=Ref-12078> (last visited Feb. 12, 2024).

⁶ EPA, Source Water Protection, *Urbanization and Stormwater Runoff* (last updated Feb. 7, 2024), <https://www.epa.gov/sourcewaterprotection/urbanization-and-stormwater-runoff#:~:text=Stormwater%20runoff%20is%20generated%20from%20rain%20and%20snowmelt,chemicals%2C%20and%20dirt%20Fsediment%20into%20streams%2C%20lakes%2C%20and%20groundwater> (last visited Feb. 12, 2024).

⁷ University of Florida Institute of Food and Agricultural Sciences (UF/IFAS), *Florida Rainfall Data Sources and Types*, (Oct. 9, 2023), <https://edis.ifas.ufl.edu/publication/AE517> (last visited Feb. 12, 2024).

⁸ S. 373.403(10), F.S. See s. 403.031(18), F.S., relating to pollution control.

⁹ DEP, *Modernizing Florida's Stormwater Rules*, Presentation to the House Water Quality, Supply & Treatment Subcommittee, pp. 1-5 (Jan. 10, 2024), <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3251&Session=2024&DocumentType=Meeting+Packets&FileName=wst+1-10-24.pdf> (last visited Feb. 12, 2024).

¹⁰ R. 62-40.431(1), F.A.C.

¹¹ EPA, *Polluted Runoff: Nonpoint Source (NPS) Pollution*, *Basic Information about Nonpoint Source (NPS) Pollution*, *supra* note 3.

¹² R. 62-40.431(2)(b), F.A.C.

¹³ *Id.*

Stormwater ponds

A best management practice for pollutant removal, stormwater ponds are one of the most widely used stormwater treatment controls¹⁴ and are defined as either retention or detention ponds.¹⁵ Wet retention ponds retain all the water within them and allow the water to percolate into the soil and prevent it from moving to other surface waters.¹⁶ Pollutant removal is achieved by biological activity in the pond and associated soil.¹⁷ Wet retention ponds are traditionally used for large scale development projects.¹⁸ A dry detention pond captures stormwater runoff and temporarily stores it before slowly releasing the water downstream.¹⁹ Requiring at least 10 or more acres, dry detention ponds are typically used for flood control and may be less effective for water quality improvement as they allow pollutants to settle.²⁰ The Department of Environmental Protection (DEP) and water management districts (WMDs) provide requirements, respectively, for side slope horizontal-to-vertical ratio and depth (see *Side Slope Ratios* below).

Environmental Resource Permitting

The Clean Water Act (CWA) is the primary federal law that regulates water pollution in the United States and it prohibits the discharge of any pollutant²¹ into waters of the United States (WOTUS).²² The discharge of dredged or fill material into WOTUS, including wetlands, is regulated by a program established in Section 404 of the CWA.²³ States may apply to the U.S. Environmental Protection Agency (EPA) to assume the federal dredge and fill permitting program; Florida assumed the 404 permitting program in 2020.²⁴ DEP's Submerged Lands and Environmental Resources Coordination Program is responsible for the consistent implementation of both the State 404 Program and the Environmental Resource Permit (ERP) Program.²⁵

DEP regulates surface water flows via the ERP Program, a permitting process that addresses and regulates impacts to the landscape including clearing, grading, construction of structures and filling and dredging, whether the work occurs in uplands, wetlands or other surface waters.²⁶ An ERP permit may be issued by DEP, a WMD or a local government to which DEP delegated ERP permitting authority.²⁷ ERPs are designed to prevent flooding, protect wetlands and other surface waters and protect Florida's water quality from stormwater pollution.²⁸

While the State 404 Program and the ERP Program are separate programs, approximately 85 percent of review requirements of the two programs overlap.²⁹ Both programs require avoidance and minimization measures to reduce impacts to wetlands and any remaining adverse impacts to be offset by mitigation. The methodology ratified by the Legislature for identifying and delineating the extent of

¹⁴ EPA, *Stormwater Best Management Practices: Dry Ponds*, (Dec. 2021), [NPDES: Stormwater Best Management Practices, Dry Detention Ponds \(epa.gov\)](#) (last visited Feb. 12, 2024).

¹⁵ EPA, *Stormwater Best Management Practices: Wet Ponds*, (Dec. 2021), [NPDES: Stormwater Best Management Practice, Wet Ponds \(epa.gov\)](#) (last visited Feb. 12, 2024).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ EPA, *Dry Ponds*, *supra* note 14.

²⁰ *Id.*

²¹ 33 U.S.C. § 1311(a). The definition of the term “pollutant” is quite broad. 33 U.S.C. § 1362(6).

²² 33 U.S.C. § 1362(12)(A). “The term ‘navigable waters’ means the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

²³ EPA, *Section 404 of the Clean Water Act, Permit Program under CWA Section 404* (last updated Mar. 31, 2023), <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404> (last visited Jan. 21, 2024).

²⁴ 40 C.F.R. § 233.1. *See also* DEP, *State 404 Program* (last updated Feb. 1, 2024), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/state-404-program> (last visited Jan. 21, 2024).

²⁵ DEP, *Submerged Lands and Environmental Resources Coordination Program*, <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination> (last visited Feb. 12, 2024).

²⁶ DEP, *Environmental Resource Permitting Online Help* (last updated Feb. 8, 2022), <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/environmental-resource-0> (last visited Feb. 12, 2024).

²⁷ *Id.*

²⁸ *Id.*

²⁹ DEP, *State 404 Program*, *supra* note 24.

wetlands and surface waters³⁰ is also the methodology used to establish the boundary of state-assumed waters under the State 404 Program.³¹ Provisions of state law that conflict with federal requirements under the CWA do not apply to state-administered 404 permits.³²

ERP permitting for stormwater management systems as well as dams, reservoirs and water impoundment is governed by s. 373.4131, F.S. DEP implements this section of law in ch. 62-330, F.A.C., which provides for the permitting rules, application process and standards by which applications are considered and approved or denied. The ERP Applicant's Handbook, which is incorporated by reference into DEP rules, provides guidance on DEP's ERP program, which includes all permitted activities governed by ch. 373, part IV, F.S., relating to management and storage of surface waters, as well as stormwater management systems-specific activities.³³ Applicants for an ERP must adhere to requirements in both the Applicant's Handbook, Volume I, which governs general permitting while WMD-specific permitting requirements are contained in the Applicant's Handbook, Volume II, for which there is one per WMD.³⁴

Side Slope Ratios

In Florida, generally, stormwater ponds are designed with side slopes no steeper than a 4:1 horizontal-to-vertical ratio to a depth of at least two feet below the control elevation.³⁵ Florida's Clean Waterways Act³⁶ required DEP and the WMDs to initiate rulemaking for Rule Chapter 62-330, F.A.C., to update stormwater design and operation regulations and the ERP Applicant's Handbook using the most recent scientific information available.³⁷ The adopted ERP Applicant Handbook, Vol. I, includes a maximum of 4:1 horizontal-to-vertical ratio for side slopes of stormwater treatment system easements.³⁸ Graphics included in the appendices depict a typical side slope ratio of: 4:1 for dry retention systems; 6:1 for wet detention systems; and, 2:1 for wet detention slopes below the control elevation.³⁹

Each WMD has specific side slope requirements contained within the ERP Applicant Handbook, Vol. II. With respect to side slope requirements, some of the WMDs' Applicant Handbook, Vol II, contain additional and/or differing requirements despite state law requiring statewide, consistent ERP regulations.⁴⁰ For example, the South Florida WMD (SFWMD) provides alternative criteria for golf courses,⁴¹ while other WMDs include exceptions for fenced ponds⁴² or ponds with slopes that incorporate erosion and sediment control best management practices.⁴³ In addition, some WMDs require the stabilization of pond side slopes with vegetation⁴⁴ or the creation of vegetative littoral

³⁰ S. 373.4211, F.S.

³¹ R. 62-331.010(3), F.A.C.

³² S. 373.4146(3), F.S.

³³ R. 62-330.010(4), F.A.C. See DEP, *Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental)*, *supra* note 5, p. 1-4.

³⁴ DEP, *ERP Stormwater* (last updated June 7, 2022), [ERP Stormwater | Florida Department of Environmental Protection](#) (last visited Feb. 12, 2024).

³⁵ Northwest Florida Water Management District (NFWFMD), *ERP Applicant's Handbook: Vol. II*, Figure 5.1-1, p.8-10 (Sept. 30, 2013), <https://www.flrules.org/Gateway/reference.asp?No=Ref-03172> (last visited Feb. 12, 2024); SFWMD, *ERP Applicant's Handbook: Vol. II*, s. 5.4.2, p. 27 (Dec. 16, 2013), <https://www.flrules.org/Gateway/reference.asp?No=Ref-02528> (last visited Feb. 12, 2024); St. Johns River Water Management District (SJRWMD), *ERP Applicant's Handbook: Vol. II*, s. 2.6.1, p. 2-7 (Feb. 27, 2014) <https://www.flrules.org/Gateway/reference.asp?No=Ref-03181> (last visited Feb. 12, 2024); Suwannee River Water Management District (SRWMD), *ERP Applicant's Handbook: Vol. II*, s. 4.5.1, (Aug. 30, 2013), <https://www.flrules.org/Gateway/reference.asp?No=Ref-03182> (last visited Feb. 12, 2024); Southwest Florida Water Management District (SWFMD), *ERP Applicant's Handbook: Vol. II*, s. 5.4.1 (Sept. 23, 2014) <https://www.flrules.org/Gateway/reference.asp?No=Ref-03176> (last visited Feb. 12, 2024).

³⁶ Ch. 2020-150, Laws of Fla.

³⁷ Rule Chapter 62-300, F.A.C., requires legislative ratification to become effective.

³⁸ DEP, *Environmental Resource Permit Applicant's Handbook Volume I (General and Environmental)*, p. 12-9, [TABLE OF CONTENTS \(state.fl.us\)](#) (last visited Feb. 12, 2024).

³⁹ DEP, *Environmental Resource Permit Applicant's Handbook Volume I (Appendix L through Appendix P)*, ss. P-5, P-6, [Appendices L-P_1.pdf \(floridadep.gov\)](#) (last visited Feb. 12, 2024).

⁴⁰ S. 373.4131(1)(a), F.S.

⁴¹ SFWMD, *ERP Applicant's Handbook: Vol. II*, s. 5.4.2(e), *supra* note 35, p. 27.

⁴² SJRWMD, *ERP Applicant's Handbook, Vol. II*, *supra* note 35.

⁴³ SRWMD, *ERP Applicant's Handbook: Vol. II*, *supra* note 35.

⁴⁴ *Id.*

zones.⁴⁵ Where necessary, littoral zones are generally required to have slopes with a horizontal-to-vertical ratio of 6:1 or flatter.⁴⁶

Water Quality Assurance Act

The Water Quality Assurance Act (WQAA)⁴⁷ creates a private cause of action for all damages resulting from a discharge⁴⁸ or other condition of pollution covered under the WQAA if the discharge was not authorized pursuant to ch. 403, F.S., relating to environmental control.⁴⁹ The WQAA defines pollution as “the presence on the land or in the waters of the state of pollutants in quantities that are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation.”⁵⁰ The definition of pollutants includes any commodity made from oil or gas, pesticides, ammonia, chlorine and derivatives thereof, excluding liquefied petroleum gas.⁵¹

The WQAA imposes strict liability, meaning it is not necessary to show negligence; it is only necessary to show the prohibited discharge or other pollutive condition occurred.⁵² The WQAA expressly imposes strict liability on an owner or operator or a person who caused a discharge or other polluting condition at a facility, stationary tank or nonresidential location at the time of the discharge.⁵³ Strict liability is also imposed on any hazardous waste generator, transporter or facility owner or operator⁵⁴ who discharges a hazardous substance.

The WQAA allows for joint and several liability⁵⁵ and provides that the only defenses to such a cause of action are those specified in s. 376.308, F.S.: an act of war;⁵⁶ an act of government;⁵⁷ an act of God;⁵⁸ or, an act or omission of a third party under certain conditions.⁵⁹ In addition to these defenses, the section also provides a defense for an owner of a petroleum storage facility or a drycleaning or wholesale supply facility⁶⁰ when the owner can establish that he or she acquired property that was contaminated by the activities of a previous owner or operator, did not know about the contamination at the time he or she acquired the property and, that he or she did not contribute to the contamination.⁶¹ In

⁴⁵ A littoral zone is a portion of a wet detention pond which is designed to contain rooted aquatic plants. SJRWMD, *ERP Applicant's Handbook: Vol. II*, s. 2.1, *supra* note 35, p. 2-4. See SJRWMD, *ERP Applicant's Handbook: Vol. II*, s. 8.6, *supra* note 35, p. 8-8; NFWMD, *ERP Applicant's Handbook: Vol. II*, s. 8.6, *supra* note 35, p. 8-3.

⁴⁶ *Id.*

⁴⁷ Ss. 376.30-376.317, F.S.

⁴⁸ S. 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.”

⁴⁹ S. 376.313(3), F.S. Chapter 403, F.S., relates to environmental control, including pollution control, environmental regulation, water supply and water treatment plants, among other things.

⁵⁰ S. 376.301(37), F.S.

⁵¹ S. 376.301(36), F.S.

⁵² S. 376.313(3), F.S. Certain exceptions exist for suits involving petroleum storage systems or drycleaning facility or wholesale supply facility; see *Irizarry v. Orlando Utils. Comm'n*, 393 F. Supp. 3d 1110, 1116 (M.D. Fla. 2019) (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).

⁵³ S. 376.308(1)(a), F.S.

⁵⁴ See s. 403.727, F.S., which provides criminal penalties and fines for hazardous waste facility operations, transport and generation. This section also provides specific liability defenses.

⁵⁵ S. 376.313(3), F.S. Joint and several liability generally means liability that may be apportioned among two or more parties. See BLACK'S LAW DICTIONARY 997 (9th ed. 2009).

⁵⁶ S. 376.308(2)(a), F.S.

⁵⁷ S. 376.308(2)(b), F.S. This includes state, federal, or local acts of government, unless the person claiming the defense is a governmental body, in which case the defense is available only by acts of other governmental bodies.

⁵⁸ S. 376.308(2)(c), F.S. This includes only unforeseeable acts exclusively occasioned by the violence of nature without the interference of any human agency.

⁵⁹ S. 376.308(2)(d), F.S. This does not include acts or omissions by an employee or agent of the defendant or one whose act or omission occurs in connection with a contractual relationship. An exception may apply when the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier or by rail.

⁶⁰ “‘Wholesale supply facility’ means a commercial establishment that supplies drycleaning solvents to drycleaning facilities.” S. 376.301(50), F.S.

⁶¹ S. 376.308(1)(c), F.S.

addition, in a lawsuit against an owner or operator of a drycleaning or wholesale supply facility when liability protections in s. 376.308, F.S., do not apply, the WQAA provides liability protection if it can be proven that, at the time of discharge, the facility complied with DEP rules.⁶²

DEP operates a drycleaning facilities restoration program that provides funds to clean up properties contaminated by drycleaning solvents and facilities' operations.⁶³ This program provides liability protection for facilities' owners and operators participating in the program⁶⁴ as well as those who undertake voluntary clean up according to the program's requirements.⁶⁵ Facilities' owners and operators are prohibited from participating in the program if the facility was operated in a "grossly negligent" manner and provides the conditions upon which DEP would make that determination.⁶⁶ Thus, a facility determined to have been operated in a grossly negligent manner would not be subject to liability protections described above. For gross negligence or regulatory violations committed prior to January 1, 1990, the program provides a defense to liability if the real property owner satisfies specific conditions.⁶⁷ This defense does not apply to any liability under a federally delegated program.⁶⁸

The WQAA does not define the term "damages" and, "[t]raditionally, damages for personal injuries were not allowed under the WQAA."⁶⁹ In a 2010 case involving a claim arising under s. 376.313(3), F.S., the Florida Supreme Court applied a definition of damages from a sister act in 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, pursuant to s. 376.121, 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."⁷⁰

In 2019, the Court receded from this definition and held the meaning of "all damages" in s. 376.313(3), F.S., includes personal injury damages.⁷¹ The Court relied on the plain meaning of the term "all damages" together with the Legislature's directive that the WQAA be liberally construed.⁷² In this case, the appellee suggested the WQAA was overly broad but the Court rejected this interpretation and said it would be "[a]n issue for the Legislature to address."⁷³

The Brownfields Redevelopment Act

Commercial and industrial property that has been abandoned or is underutilized due to contamination or pollution may qualify for rehabilitation as a brownfields site.⁷⁴ Brownfields rehabilitation is an important tool to encourage redevelopment and improve economic and housing opportunities for people who work and live around the brownfield area.⁷⁵ Federal and state governments recognize the importance of rehabilitating brownfields and incentivize private rehabilitation through funding opportunities.

Initiated by the EPA in 1995 and codified in federal law in 2002, the federal brownfields program assesses brownfields sites and provides standards and guidance for the safe clean up and reuse of brownfields.⁷⁶ It provides incentives for redevelopment of designated sites and provides grants for

⁶² S. 376.313(5)(a), F.S.

⁶³ S. 376.3078, F.S. See also DEP, *Drycleaning Solvent Cleanup Program* (last updated Jan. 29, 2024), [Drycleaning Solvent Cleanup Program | Florida Department of Environmental Protection](#) (last visited Feb. 12, 2024).

⁶⁴ S. 376.3078(3), F.S.

⁶⁵ S. 376.3078(11), F.S.

⁶⁶ S. 376.3078(3)(d), F.S.

⁶⁷ S. 376.3078(3)(q), F.S.

⁶⁸ *Id.*

⁶⁹ Lauren D. Brooks, *The New Scope of Florida's Water Quality Assurance Act*, Florida Bar Journal, Nov./Dec. 2021, p. 48.

⁷⁰ *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1221 (Fla. 2010); s. 376.031(5), F.S.

⁷¹ *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 147 (Fla. 2019).

⁷² *Id.* See also s. 376.315, F.S.

⁷³ *Id.*

⁷⁴ Environmental Law Institute, *Brownfields FAQ*, [Brownfields FAQ | Environmental Law Institute \(eli.org\)](#) (last visited Feb. 11, 2024).

⁷⁵ EPA, *Brownfields and Land Revitalization Program Impacts* (updated Jan. 2023), [Jan2023-brownfields-and-land-revitalization-program-impacts_final.pdf \(epa.gov\)](#) (last visited Feb. 12, 2024).

⁷⁶ EPA, *About Brownfields* (last updated Feb. 6, 2024), [About | US EPA](#) (last visited Feb. 12, 2024).

assessment and clean up.⁷⁷ Federal law provides liability exemptions for prospective purchasers and for owners of contiguous properties who were not at fault in contaminating the site.⁷⁸

The Florida Brownfields Redevelopment Act (Act) includes a process for designating brownfield areas, environmental contamination cleanup criteria, eligibility criteria, brownfields site rehabilitation agreement (BSRA) requirements and liability protection.⁷⁹ Brownfield sites may include community redevelopment areas, enterprise zones, empowerment zones, other such designated economically deprived communities and areas, and EPA-designated brownfield pilot projects.⁸⁰ There are 573 designated Brownfield Areas statewide and, as of June 30, 2023, there were 473 executed BSRA's.⁸¹

The designation of a brownfield area may be initiated in one of two ways: by a local government to encourage redevelopment of an area of specific interest to the community; or, by a "person" with a plan to rehabilitate and redevelop a brownfield site.⁸² For the purposes of the Act, a person is defined as "[a]ny individual, partner, joint venture, or corporation; any group of the foregoing, organized or united for a business purpose; or any governmental entity."⁸³ To create a brownfields designation, a local government must pass a local resolution and provide public notice and certain public hearings. For any brownfields designation, the local government must notify DEP and attach a map that clearly identifies the parcels proposed within the site or a less-detailed map accompanied by a detailed legal description of the brownfield area.⁸⁴ 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.⁸⁵

Liability protection under the Act is conditioned on program eligibility. A person who has not caused or contributed to the contamination of a brownfield site on or after July 1, 1997, and under certain conditions, is eligible to participate in the brownfield program.⁸⁶ Also eligible are potential brownfield sites owned by the state or a local government which have already been designated by EPA.⁸⁷ However, a brownfields site is ineligible for program participation if the area is subject to an ongoing formal judicial or administrative enforcement or corrective action pursuant to federal authority or is required to obtain a hazardous waste operation, storage or disposal facility permit.⁸⁸

Liability protection under the Act begins when a person executes and complies with a BSRA. Upon execution of a BSRA, the person is relieved of:

1. Further liability for remediation of the contaminated site or sites to the state and to third parties.
2. Liability in contribution to any other party who has or may incur cleanup liability for the contaminated site or sites.
3. 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

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See ss. 376.77 – 376.85, F.S. Cleanup criteria is provided in s. 376.81, F.S., and eligibility criteria and liability protection are provided in s. 376.82, F.S.

⁸⁰ S. 376.79(5), F.S.

⁸¹ DEP, Division of Waste Management, Waste Cleanup Program, *Florida Brownfields Redevelopment Program Annual Report*, August 2023 p. 2, [2022-2023 Florida Brownfields Annual Report \(floridadep.gov\)](https://www.floridadep.gov/2022-2023-Florida-Brownfields-Annual-Report) (last visited Feb. 11, 2024).

⁸² See s. 376.80, F.S.

⁸³ S. 376.79(16), F.S. Section 376.79(15), F.S., defines a person responsible for brownfield site rehabilitation as "[t]he 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."

⁸⁴ S. 376.80(1), F.S.

⁸⁵ S. 376.80(1)(c)3., F.S.

⁸⁶ S. 376.82(1)(b), F.S.

⁸⁷ S. 376.82(1)(c), F.S.

⁸⁸ S. 376.82(1)(a), F.S.

improvements; or stigma to real property or improvements caused by contamination addressed by a BSRA.⁸⁹

The Act also provides liability protection once the site rehabilitation is completed unless certain conditions exist including but not limited to: fraud committed during the rehabilitation process; a new contamination release that occurs after an eligibility determination; or, the existence of a previously unknown contamination is confirmed that exceeds rehabilitation levels established in the BSRA.⁹⁰ Nor does it apply to a person who causes property damage by exacerbating the contamination of a property in violation of applicable laws.⁹¹

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.⁹² However, such an action may not compel site rehabilitation beyond what is required in the BSRA, required by DEP, or required by an approved local pollution control program.⁹³ National, not-for-profit land conservation organizations, acting for the public interest, which purchased contaminated sites and did not contribute to the release of contamination on the site also enjoy liability protection.⁹⁴

Lenders are afforded certain liability protections to encourage financing of real property in brownfield areas. Essentially, the same liability protections apply to lenders if they have not caused or contributed to a release of a contaminant at the brownfield site.⁹⁵

In an effort to secure federal liability protection for those persons willing to undertake remediation at a brownfield site, DEP must attempt to negotiate an agreement with the EPA to forego federal enforcement of corrective action authority.⁹⁶

Effect of the Bill

The bill requires, for purposes of water quality, side slope design for a nonindustrial stormwater management system that is accessible to the general public and is in or adjacent to residential or urban areas have a horizontal-to-vertical ratio no steeper than 4:1 to a depth of at least two feet below the control elevation. The side slope must be stabilized with vegetation to prevent erosion and provide for pollutant removal.

The bill provides that a side slope may be designed with a steeper ratio than a 4:1 horizontal-to-vertical ratio if the slope incorporates adequate temporary and permanent erosion and sediment control best management practices.

The bill provides that all side slope rules adopted by DEP, WMDs or delegated local programs as of July 1, 2024, are superseded by the bill's requirements and may be repealed without further rulemaking by publication of a notice of repeal in the Florida Administrative Register and subsequent filing of a list of the rules repealed with the Department of State.

The bill narrows the cause of action for damages under the WQAA to permit damages only to real or personal property directly resulting from a discharge or other condition of pollution covered under the WQAA. Damages under the WQAA derive from the absence of governmental approval or permitting authority to engage in certain activities. The bill expands the aforementioned government activities to include Ch. 373, F.S., relating to water resources, as well as ch. 376, F.S., relating to pollutant discharge prevention and removal in addition to ch. 403, F.S., relating to environmental control.

⁸⁹ S. 376.82(2)(a), F.S. Property damages liability protection applies only to causes of action accruing on or after July 1, 2014. S. 376.82(2)(a)3., F.S.

⁹⁰ S. 376.82(2)(a)3., F.S.

⁹¹ *Id.*

⁹² S. 376.82(2)(b), F.S.

⁹³ *Id.*

⁹⁴ S. 376.82(2)(j), F.S.

⁹⁵ S. 376.82(4), F.S.

⁹⁶ S. 376.82(2)(g), F.S.

The bill removes “defenses” to a WQAA cause of action and authorizes only those strict-liability exceptions set forth in s. 376.308, F.S., relating to an act of war; an act of government; an act of God; an act or omission of a third party; and adds s. 376.82, F.S., relating to eligibility criteria and liability protection for the successful completion of a BSRA.

B. SECTION DIRECTORY:

Section 1: Amends s. 373.4131, F.S., relating to statewide environmental resource permitting rules.

Section 2: Amends s. 376.313, F.S., relating to nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.317, F.S.

Section 3: Provides an effective date of July 1, 2024.

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

On January 24, 2024, the Water Quality, Supply & Treatment Subcommittee adopted a Proposed Committee Substitute (PCS) and reported the bill favorably as a committee substitute. The PCS:

- Removes revisions to s. 120.595, F.S., relating to attorneys' fees that would entitle a prevailing party to recover reasonable costs and fees when challenging or defending a DEP or WMD authorization issued pursuant to chs. 403 or 373, F.S., respectively.
- Removes a mandated review and specific reporting requirements for DEP and each WMD relating to their respective coastal permitting processes and programs.

On February 15, 2024, the Infrastructure Strategies Committee adopted one amendment and reported the bill favorably as a committee substitute: The committee substitute:

- Clarifies that the maximum side slope requirement for a nonindustrial stormwater management system accessible to the general public applies for the purposes of water quality.
- Removes the requirement that an incursion barrier be installed around stormwater management systems with horizontal-to-vertical ratio steeper than 4:1.

This analysis is drafted to the committee substitute as approved by the Infrastructure Strategies Committee.