

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1130

SPONSOR: Judiciary and Banking and Insurance Committees and Senator Casas

SUBJECT: Explosives

DATE: April 13, 2000 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Deffenbaugh</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Favorable</u>
2.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The committee substitute amends chapter 552, F.S., relating to the manufacture, distribution, and use of explosives, as follows:

- Requires proof of financial responsibility for the issuance of a license in lieu of proof of financial responsibility for each blasting activity;
- Requires the division to prescribe rules relating to set-back distances between a residential area and blasting activities and relating to the appropriate amount of financial responsibility;
- Allows a person who is injured or whose property is damaged by blasting activities to proceed against a guarantor under specified circumstances;
- Authorizes the division to bring a civil cause of action to recover civil penalties for the specific violation of the prescribed rule relating to set-back distances between residential areas and blasting activities; and
- Provides a statutory civil cause of action for injunctive relief by any substantially affected person to enforce compliance with chapter 552, F.S., or rules adopted thereunder.

This bill substantially amends the following sections of the Florida Statutes: 552.13 and 552.161. This bill creates section 552.095 of the Florida Statutes.

## II. Present Situation:

### General

Chapter 552, F.S., governs the requirements and the enforcement for the manufacture, distribution, and use of explosives. The Division of State Fire Marshal (“division”) within the Department of Insurance is responsible for enforcing this chapter. The division issues licenses for

companies and individuals who are manufacturers-distributors, dealers, and users. The division solely issues permits for blasters of explosives.

A manufacturer-distributor means a person engaged in the manufacture, compounding, combining, production, or distribution of explosives. A dealer is a person engaged in the wholesale or retail business of buying and selling explosives. A user is a dealer or manufacturer-distributor who uses an explosive as an ultimate consumer or a person who, as an ultimate consumer purchases such explosive from a dealer or manufacturer-distributor. A blaster is a person employed by a user who detonates or otherwise effects the explosion of an explosive.

### **Licenses and permits**

Licenses and permits issued by the division must include minimum statutory information including the purpose for which the license or permit is to be used in relation to explosives and any restrictions placed upon the licensee or permittee by the division. *See* s. 552.094, F.S. A blaster's permit is valid only for use by the permit holder in the course of his or her employment with a licensed user. There are currently 202 licensed users of explosives.

Once the division issues a license to a user of explosives, the division does not issue permits to the licensee to prepare explosives or to conduct particular blasting operations. Under state regulations, however, a user or blaster is required to keep an accurate blasting log for each blasting operation if there is even a remote possibility of damage to private or public property. *See* Fla. Admin. Code R. 4A-2.019. Local governments have adopted ordinances relating to explosives and blasting activities for which permits must be secured from the local county or city in which the specific blasting operation takes place. The division does conduct investigations of blasting scenes and storage facilities for explosives to determine compliance with statutes.

### **Administrative Rules**

The division is statutorily required to adopt and enforce rules relating to minimum general standards covering the manufacture, transportation, use, sale, handling, and storage of explosives. *See* Fla. Admin. Code R. chapter 4A. These regulations must be based on those reasonably necessary for the protection of the health, welfare, and safety of the public and of persons possessing, handling and using explosive materials. In addition, these rules must "be in substantial conformity with generally accepted standards of safety concerning such subject matters." *See* s. 552.13, F.S. The division is also authorized to restrict the "quantity and use of explosives at any location within the state when the division deems the use of such explosives is likely to cause injury to life or property." *See* s. 552.211(3), F.S.

The division, however, has not adopted any rules relating to financial responsibility requirements for users of explosives. There are no specific rules relating to prescribed minimum set-back distances between residential structures or buildings and the use of explosives. However, the division has adopted in rules a distance schedule relating to the storage of explosives. *See* Fla. Admin. Code R. 4A-2.006. There are no specific rules relating to limits on the ground vibration, air blast or flyrock from use of explosives. Such rules were reportedly proposed about ten years ago but were never filed due to surrounding controversy. Essentially, the division responds on a complaint-by-complaint basis, especially, specific complaints regarding the use of explosives near residential structures. Typically, the division enters into stipulation agreements (stipulated orders) with the users of the explosives to establish conditions for their use such as placing limitations on

the maximum ground vibrations relative to distance, restrictions on the time of day for the explosions, and other related conditions. The division states that the proposed Florida Fire Prevention Code and the Life Safety Code will include restrictions and standards for use of explosives relating to ground vibration, air blast, and flyrock relative to distance set-backs for all blasting operations.

The Department of Insurance is required to adopt the Florida Fire Prevention Code and the Life Safety Code as rules by January 1, 2001,<sup>1</sup> and update these codes<sup>2</sup> every three years thereafter. *See* ch. 98-287, *L.O.F.* The Florida Fire Prevention Code and the Life Safety Code are referenced in chapter 633, F.S., relating to fire prevention and control. In actuality these codes are composites of other national standard codes incorporated by reference in statute. Therefore, the Florida Fire Prevention Code is based in part on the National Fire Protection Association's (NFPA) Standard 1, Fire Prevention Code. *See* s. 633.0215, F.S. There is no separate statutory section entitled the "Life Safety Code."<sup>3</sup> The term "Life Safety Code" appeared for the first time in statute in 1998 in connection with the statutory development of a uniform building code. *See* ch. 98-287, *L.O.F.*; s. 633.0215(2), F.S. The Life Safety Code actually refers to and is to be based on the current edition of the NFPA's Life Safety Code. *See* NFPA 101, Life Safety Code, 2000 ed.

The 2000 edition of the NFPA Fire Prevention Code does include by reference the NFPA's Explosives Materials Code (NFPA 495). Article 8 of NFPA 495 deals with blasting operations at any dwelling, public building, school, church or commercial or institutional building adjacent to a blasting site. The Department of Insurance is currently evaluating whether to adopt partially or in its entirety the NFPA 495 as rules.

### **Penalties**

There are civil penalties for violations of the chapter or any rules thereunder. The division may issue a cease and desist order, assess an administrative fine not to exceed \$1,000 per violation, suspend or revoke a license or permit for explosives, or secure temporary or permanent injunctive relief. *See* ss. 552.151, 552.161, 552.171, and 552.23, F.S., respectively. Criminal penalties are also available for specified offenses ranging from second degree felony for violation by a person who manufactures, stores, or possesses explosives with the intent to harm life, limb or property to a first degree misdemeanor for violation by a license or permit holder for abandonment of explosive material. *See* s. 552.22, F.S.

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<sup>1</sup>CS/CS for SBs 4 and 380 clarify that it is the State Fire Marshal who is to adopt these codes.

<sup>2</sup>These codes are also encompassed as part of the uniform Florida Building Code which is the subject of legislation this year. *See* CS/CS for SBs 4 and 380. The effort to establish a statewide unified building code was based on legislation enacted in 1998, which incorporated the findings and recommendations of a 1996 Florida Building Code Study Commission. *See* ch. 98-287, *L.O.F.* In February, 2000, the Florida Building Commission adopted the Florida Building Code as an administrative rule which is the basis for CS/CS for SBs 4 and 380. Any conflicts arising between the Florida Fire Prevention and Life Safety Codes and the Florida Building code are to be resolved by a joint committee by the State Fire Marshal and the Florida Building Commission.

<sup>3</sup>An old administrative rule entitled the "Life Safety Code" was repealed in 1997. *See*, Fla. Admin. Code R. 60D-7.004.

### **Civil Action and Liability**

In Florida, liability in connection with the manufacture, storage, use, or transportation of explosives may be predicated on negligence, nuisance, violation of state or local law, and strict liability based on the ultrahazardous or abnormally dangerous aspect of explosives. *See Poole v. Lowell Dunn Co.*, 573 So.2d 51 (Fla. 3rd DCA 1990); *Morse v. Henry Corp.*, 200 So.2d 816 (Fla. 2nd DCA 1967). There is no express statutory provision for temporary or permanent injunctive relief in chapter 552, F.S., for persons who are threatened or who continue to suffer irreparable personal injury or property damage for which no other adequate remedy at law is available.

However, a person could also seek temporary and permanent injunctive relief by filing an affidavit or verified pleading with the court stating specific facts showing that immediate and irreparable injury, loss, or damages will result before the adverse party can be heard in opposition. See Fla.R.Civ.P. 1.610. The affidavit and verified pleading must also show that the person's attorney made efforts to give notice and show the reasons why notice should not be required beforehand. A bond is required by the court although a bond is not required for a temporary injunction issued solely to prevent physical injury or abuse of a person.

### **III. Effect of Proposed Changes:**

**Section 1** creates s. 552.095, F.S., to require an applicant for an explosives user license to provide the division with proof of financial responsibility. The amount of the financial proof shall be determined by rule, but shall not exceed \$1 million. Such financial responsibility may be established in the form of cash, trust fund, surety bond, letter of credit, casualty insurance, a financial test, corporate guaranty, or a combination thereof. The financial responsibility must be maintained for the duration of the license.

If the user secures a guarantor to guarantee his or her financial responsibility and any person is subsequently injured or the person's property is damaged by the use of explosives, such person may initiate a civil action for recovery of damages against a user's guarantor of financial responsibility. If the user is in bankruptcy, or if any state or federal court can not obtain jurisdiction over a user likely to be insolvent at the time of judgment, such claim may be made directly against the guarantor providing the financial responsibility but limited by the amount of the financial responsibility. The guarantor may invoke all rights and defenses that would have been available to the user. The term "guarantor" is defined to include all those persons or entities providing the proof of financial responsibility.

**Section 2** amends s. 552.13, F.S., relating to rulemaking authority by the Division of State Fire Marshall. It directs the division to adopt rules specifically prescribing a distance from a residential area within which no explosives may be used. This section does not address a set-back distance for other activities associated with the explosives (i.e., manufacture, sale, storage or handling of explosives). It also directs the division to adopt rules relating to the procedure for determining the appropriate amount for proof of financial responsibility.

**Section 3** amends s. 552.161, F.S., relating to administrative fines to extend remedies to include a civil penalty for a specified violation. The division may seek to recover civil penalties up to

\$15,000 per day for violation of the rule restricting use of explosives within a specified distance of a residential area.

**Section 4** amends s. 552.23, F.S., relating to injunctions. Any substantially affected person may bring a civil action for injunctive relief to enforce compliance with chapter 552, F.S., or rules adopted thereunder.

**Section 5** provides that this act shall take effect July 1, 2000.

#### IV. Constitutional Issues:

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

None.

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

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

It is uncertain whether any statutory restriction on blasting activities in close proximity to residential areas would impact the interest or impair the vested rights of explosives companies in their property or otherwise implicate the unlawful taking of property. A citizen's private property may not be taken for public use without just compensation. *See* Amend. 5, *U.S. Const.* The *Florida Constitution* also guarantees that "[no] private property shall be taken except for a public purpose and with full compensation therefor paid to each owner." *See* art. X, s.6(a), *Fla. Const.* No person may be deprived of property without due process of law. *See* art. I, s. 2, *Fla. Const.* However, the use of explosives is recognized as an ultrahazardous activity whose regulation would fall within police powers.

Nonetheless, common law remedies are available based on actions for equitable estoppel or inverse condemnation. A property owner whose property value or usefulness is destroyed or severely diminished by government regulation could also proceed under the 1995 Bert J. Harris Private Property Rights Protection Act (Harris Act). This Act provides an alternative means of relief to private property owners whose property has been "inordinately burdened" by state and local government action. *See* s. 70.001(1), F.S. The inordinate burden applies either to an existing use of real property or a vested right to a specific use, as determined by application of the rules of equitable estoppel. *See* s. 70.001(2),(3)(a), F.S.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill imposes financial responsibility requirements of up to \$1 million for licensed users of explosives and civil liability against such licensees which would provide greater protection for persons who suffer personal injury or property damage arising from the use of explosives. Such liability also extends to the guarantor of the financial responsibility.

This bill will impact owners of mining operations and other businesses that use explosives whose blasting activities could be limited by the residential area restriction against use of explosives. It is unknown at this time what the cost of securing the proof of financial responsibility will be for user licensees

This bill will benefit persons who are injured or whose property is damaged by explosives by providing a statutory cause of action for injunctive relief and for recovery of damages based on the new financial responsibility requirements.

C. Government Sector Impact:

The bill will impact the Division of State Fire Marshal as the bill expands its current workload to include the maintenance of records, and identification and monitoring of blasting activities from start to finish, for purposes of enforcing the financial responsibility requirements of the bill. The division estimates the following fiscal impact to the Insurance Commissioner’s Regulatory Trust Fund:

<b>Fiscal Impact to Insurance Com. Reg. Trust Fund</b>	<b>Amount Year 1 (FY 00-01)</b>	<b>Amount Year 2 (FY 01-02)</b>	<b>Amount Year 3 (FY 02-03)</b>
FTE	5.0	5.0	5.0
Salaries and Benefits	170,579	170,579	170,579
Expense	58,056	36,565	36,565
OCO	10,000	0	0
Vehicles	48,000	0	0
<b>Total Impact to Fund</b>	<b>\$286,635</b>	<b>\$207,144</b>	<b>\$207,144</b>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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