SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1094

SPONSOR: Senator Campbell

SUBJECT: Insurance--Pollution Exclusion Clauses

DATE: March 19, 2001 REVISED: 03/21/01

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	Fav/1 amendment
2.				
3.				
4.				
5.				
6.				

I. Summary:

Senate Bill 1094 provides that pollution-exclusion clauses in property or liability insurance contracts may exclude *only* incidents and hazards that are traditionally associated with environmental pollution. It provides that that this provision will take effect and apply to policies entered into or renewed on or after August 1, 2001.

Amendment # 1 by the Banking and Insurance Committee deletes the terms "traditionally associated with environmental pollution" to specify that pollution exclusion provisions in property or liability insurance policies may exclude only incidents and hazards that involve long-term environmental degradation or an environment-wide exposure.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Insurance Clauses for Environmental Pollution

Prior to 1970, liability insurance policy contracts were generally silent as to the issue of pollution. However, the enactment of increasingly stringent environmental laws and regulations during the 1970's greatly expanded the potential liability of businesses, individuals, counties and municipalities for remediation of environmental pollution. These parties were often held strictly and retroactively liable under state and federal law, for contamination caused by practices that may have been perfectly acceptable at the time of the contamination. Therefore, parties facing environmental liabilities looked to enforce their general liability insurance policies to provide coverage.

During the early 1970's, insurance companies placed pollution clauses into their general liability policies. These so-called "pollution exclusions" purported to exclude coverage for polluting events unless the release of pollutants was "sudden and accidental." In denying coverage, insurers argued that the word "accidental" meant a sudden, unforeseen, or fortuitous event. Insurance companies argued that general liability policies provided no coverage unless the insured could prove exactly when the contamination occurred and only if the contaminating event both began and ended "abruptly." Thus, environmental contamination caused by leaking tanks or drums, or by industrial operations was not covered. Since that time the insurance industry has made numerous refinements to the pollution exclusion language. Nonetheless, the meaning of these provisions continues to be hotly litigated.

According to representatives with the Department of Insurance, under a Commercial General Liability Policy (CGL), pollution liability is currently defined as bodily injury or property damage arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants. The typical CGL policy excludes pollution liability coverage.

However, pollution coverage can be obtained by endorsement, e.g., purchase of an additional benefit. The most common endorsement is the Insurance Services Office's[1] limited pollution liability extension endorsement. The endorsement itself, however, continues to exclude pollution liability coverage for a commercial policyholder involved in:

- the handling, storage, disposal, processing, treatment or transportation of waste;
- operations that test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize pollutants;
- storage tanks or other containers, ducts, piping which are below or partially below the surface of the ground or water and then subsequently exposed to erosion, excavation or any other means.

As an alternative to the limited pollution liability extension endorsement noted above, some insurance companies may offer pollution liability coverage for "sudden and accidental" events only, or, the insurer may design a special risk policy for a particular insured, e.g., for a group of gas station owners who need pollution liability coverage for underground storage tanks.

Proponents of the bill suggest that legislation is necessary to clarify the limitations of the common "pollution liability exclusion." They assert that insurance companies broadly interpret the pollution exclusion clauses in contracts, and thus deny benefits to an insured if such insured is held liable even for an event that is not "traditionally associated" with environmental pollution. For example, an architectural engineering firm was sued for business disruption and for personal injuries when an entire office building had to be evacuated due to spillage of ammonia from bottles the firm kept for copying blueprints. The insurance company refused to cover the incident under their commercial liability policy because ammonia was considered an environmental hazard, and was therefore included under the pollution exclusion. The Florida Supreme Court ultimately sided with the insurer and found that the absolute pollution exclusion

[1] The Insurance Services Offices is a supplier of statistical, actuarial, and underwriting information for and about the property and casualty insurance industry.

provision was unambiguous and that the ammonia was a pollutant within the meaning of the exclusion clause. See, *Deni Assoc. of Fla. v. State Farm Ins. Co.*, 711 So.2d 1135 (Fla. 1998).

Further, proponents assert that by broadly interpreting pollution exclusion provisions, insurers primarily hurt small business owners who are often forced to litigate these contract disputes. In one instance, a roofer was sued by a person in an office building who alleged illness due to exposure to hazardous fumes discharged by roofing products used in repairing the building's roof. The insurance company denied coverage due to the existence of the pollution exclusion provision in the roofer's liability policy. The court found in favor of the roofer, stating that the pollution exclusion was ambiguous because an ordinarily intelligent insured could reasonably interpret the clause as applying only to environmental pollution. The court stated "that an ordinary person would not understand that the policy did not cover personal injury claims like those asserted" in the present case. See, *Nautilus v. Jabar,* No. 98-2158, U.S. Court of Appeals (1st District 1998).

Opponents of the proposed legislation state that this bill impermissibly intrudes into legitimate contractual negotiations between insurance companies and insureds and that such contracts can encompass special risk policies designed specifically for the insured's particular commercial activity. Furthermore, opponents argue that the language of the bill is too ambiguous and thus impossible for the insurer to know if a particular substance is one "traditionally associated" with environmental pollution.

III. Effect of Proposed Changes:

Section 1. The bill provides that a clause in a property or liability insurance contract that excludes coverage for damage caused by the actual or threatened discharge or release of pollutants, including smoke, vapor, soot, fumes, acid, alkalis, chemicals, waste, or any other solid, liquid, gaseous, or thermal irritant or contaminant may exclude from coverage only incidents and hazards that are traditionally associated with environmental pollution.

It is not clear, since terms in the bill are not defined, that the effect of limiting the pollution exclusion to only those hazards "traditionally associated with environmental pollution" would expand current coverage because it is not clear how this language would be interpreted.

Section 2. Provides that the act shall take effect and shall apply to policies entered into or renewed on or after August 1, 2001.

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:

The bill may be unconstitutionally vague, therefore, a violation of due process, by referring to incidents and hazards "traditionally associated with environmental pollution," which is not defined.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill could represent an expansion of benefits to a policyholder, if the policyholder is held liable for an event that is *not* "traditionally associated" with environmental pollution. Thus, the bill could result in increased premiums and insurance rates if it resulted in increased losses attributable to the stated risks. The actual impact for policyholders with limited endorsements, sudden accidental events, and special risk arrangements is unknown.

C. Government Sector Impact:

There is no fiscal or revenue impact to the Department of Insurance.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Banking and Insurance:
Deletes the terms "traditionally associated with environmental pollution" to specify that pollution exclusion provisions in property or liability insurance policies may exclude only incidents and hazards that involve long-term environmental degradation or an environment-wide exposure.