

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: CS/CS/SB 1376

SPONSOR: Finance and Taxation Committee and Natural Resources Committee and Senator Laurent

SUBJECT: Phosphogypsum Stack Management

DATE: April 10, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Gee</u>	<u>Voigt</u>	<u>NR</u>	<u>Favorable/CS</u>
2.	<u>Keating</u>	<u>Johansen</u>	<u>FT</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>AGG</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill authorizes the Department of Environmental Protection (DEP) to abate imminent hazards from phosphogypsum stack systems through the use of funds from the Nonmandatory Land Reclamation Trust Fund (NLRTF). The bill provides registration fees and financial responsibility requirements. It also provides for a right of action and lien to seek reimbursement of expended funds and provides for the closure of abandoned stack systems. It also repeals provisions exempting certain small mines from review as developments of regional impact.

This bill amends ss. 378.035, 378.601, 403.4154, and 403.4155 of the Florida Statutes.

II. Present Situation:

The production of fertilizer from phosphoric rock is a major industry in Florida. Unfortunately, the process results in wastewater and byproducts that are difficult to manage. The process produces phosphoric acid, wastewater, and gypsum to produce a slurry that is pumped to the top of a stack of gypsum. There, it is held until it seeps below and is redistributed to cooling ponds. It is critical that this acidic water not overflow the reservoir on the top of the stack or the cooling ponds. A phosphate plant relies heavily on its system of pipes and pumps to distribute the acidic water so as to prevent overflows, particularly during heavy rains. The stacks themselves contain slightly radioactive gypsum. Phosphate plants are regulated by the DEP.

In December 1997, a Mulberry Corporation phosphate plant spilled an estimated 50 million gallons of acidic wastewater into the Alafia River, killing an estimated one million fish. The spill was blamed on heavy rains combined with poor maintenance of an overflow pipe.

Recently, the Mulberry Corporation announced that it could no longer afford to operate or properly close two phosphate plants. One plant has two stacks 120 feet high with four ponds and two ground level cooling ponds; its system confines one billion gallons of acidic water. The other plant has one stack 65 feet high with four ponds and three ground level cooling ponds, confining one-half billion gallons of acidic water. The company filed for bankruptcy on February 8, 2001. Shortly thereafter, the company was told its electricity would be shut off for nonpayment of its electric bills.

Because of the danger of spills if the pumps are idle, the U.S. Environmental Protection Agency initially took control. On February 21, 2001, the plants were turned over to the DEP, which is currently maintaining the plants. The situation was unprecedented. Current expenses to operate the plants and run the pumps total \$400,000 a month; up to \$4 million from the NLRTF has been authorized for the effort. There appears to be little likelihood that the Mulberry Corporation or a buyer will relieve the situation in the near future.

There are currently 25 phosphogypsum stacks in Florida, including the two now operated by the DEP. There is an annual registration fee per stack. The total for all fees is \$500,000. Each stack is assessed pro rata, for an average fee of approximately \$20,000.

Pursuant to s. 378.035, F.S., the Nonmandatory Land Reclamation Trust Fund (NLRTF) funds the reclamation of lands disturbed by phosphate mining prior to July 1, 1975. The NLRTF is primarily funded by a severance tax on phosphate. As of June 30, 2000, the trust fund had an unreserved balance of \$96.8 million. The DEP estimates that the resolution of the Mulberry Corporation hazard situation will cost at least \$20-30 million. Currently by rule, owners of stack systems must meet financial tests for operating and closure expenses.

Currently, s. 378.601, F.S., provides conditions for an exemption from review as a development of regional impact for small heavy mineral mining operations under specified circumstances. Over the years, most such mining operations have become exempt. It appears that the statute has limited applicability.

III. Effect of Proposed Changes:

Section 1. Section 378.035, F.S., is amended to increase, effective July 1, 2001, the amount reserved in the NLRTF from \$30 million to \$50 million for reclamation of lands disturbed by phosphate mining which has been discontinued due to a company ceasing mining activities prior to full reclamation.

The DEP is authorized to spend funds from the \$50-million reserve fund established by s. 378.035 (5), F.S., for the abatement of an imminent hazard as provided by s. 403.4154(3), F.S., and for the purpose of closing an abandoned phosphogypsum stack system and carrying out post-closure care as provided by s. 403.4154 (5), F.S. Registration fees deposited in the NLRTF pursuant to s. 403.4154(4), F.S., may be used for such purposes. However, such fees may only be used at a stack system if closure or imminent-hazard-abatement activities initially commence on or after July 1, 2002.

The DEP is prohibited from accepting any applications for nonmandatory land reclamation programs after November 1, 2008.

The Bureau of Mine Reclamation is directed to review the sufficiency of the NLRTF to support the stated objectives and report to the DEP Secretary annually with recommendations as appropriate. The report submitted for calendar year 2008 must specifically address the effect of providing a future refund of fees paid pursuant to s. 403.4154(4), F.S., following certification of stack closure pursuant to DEP rules, and the report must be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives on or before March 1, 2009.

Section 2. Section 378.601, F.S., is amended to delete provisions providing conditions for exempting certain small mining operations from review as developments of regional impact.

Section 3. Section 403.4154, F.S., is amended to provide the following two new definitions:

- “Phosphogypsum stack system” means the phosphogypsum stack (or pile, or landfill), together with all pumps, piping, ditches, drainage conveyances, water control structures, collection pools, cooling ponds, surge ponds, and any other collection or conveyance system associated with the transport of phosphogypsum from the plant to the phosphogypsum stack, its management at the stack, and the process wastewater return to the phosphoric acid production or other process. The term specifically includes toe drain systems and ditches and other leachate collection systems, but does not include conveyances within the confines of the fertilizer production plant or existing areas used in an emergency caused by rainfall events of high volume or duration for the temporary storage of process wastewater to avoid discharges to surface waters of the state; the process wastewater must be removed from the temporary storage area as expeditiously as possible within 120 days after the emergency.
- “Process wastewater” means any water that, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product, along with any leachate or runoff from the phosphogypsum stack system. The term does not include contaminated nonprocess wastewater as that term is defined in 40 C.F.R. 418.11(C).

The section also deletes provisions providing legislative intent that an annual registration fee be imposed on stacks that have not been closed and that such fees be used for the purpose of paying the costs of the DEP’s review of applications to permit the closure of stack systems or the construction of new or expanded stack systems and of the DEPs review of requests for deferral of mandatory closure requirements.

The bill authorizes the DEP to take action to abate or substantially reduce any imminent hazard caused by the physical condition, maintenance, operation, or closure of a phosphogypsum stack system. An imminent hazard exists if the physical condition, maintenance, operation or closure of a phosphogypsum stack system creates an immediate and substantial danger to human health, safety, or welfare, or to the environment. A phosphogypsum stack system is presumed not to cause an imminent hazard if the physical condition and operation of the system are in substantial compliance with all applicable DEP rules.

If the DEP determines that the physical condition, maintenance, operation, or closure of a phosphogypsum stack system poses an imminent hazard, the DEP must request access to the property on which the stack system is located from the owner or operator of the stack system for the purposes of taking action to abate or substantially reduce the imminent hazard. If the DEP, after making a reasonable effort, is unable to timely obtain the necessary access to abate or substantially reduce the imminent hazard, the DEP may institute action in its own name, using the procedures and remedies of s. 403.121, F.S., or s. 403.131, F.S., to abate or substantially reduce an imminent hazard. Whenever serious harm to human health, safety, or welfare, to the environment, or to private or public property may occur prior to completion of an administrative hearing or other formal proceeding that might be initiated to abate the risk of serious harm, the DEP may obtain from the court, ex parte, an injunction without paying filing and service fees prior to the filing and service of process.

To abate or substantially reduce an imminent hazard, the bill authorizes the DEP to take any appropriate action, including, but not limited to, using employees of the DEP or contracting with other state or federal agencies, with private third-party contractors, or with the owner or operator of the stack system, or financing, compensating, or funding a receiver, trustee or owner of the stack system, to perform all or part of the work.

The DEP must recover from the owner or operator of the phosphogypsum stack system all moneys expended from the NLRTF, including funds expended prior the effective date of this section, to abate an imminent hazard posed by the phosphogypsum stack system plus a penalty equal to an amount calculated at 30 percent of such funds expended. This penalty shall be imposed annually, and pro-rated from the date of payment from the fund until the expended funds and the penalty are repaid. If the DEP prevails in any action to recover funds pursuant to s. 403.4154(3), F.S., it may recover reasonable attorney's fees and costs incurred. Phosphogypsum may not be deposited on a stack until all moneys expended from the fund in connection with the stack have been repaid, unless the DEP determines that such placement is necessary to abate or avoid an imminent hazard or unless otherwise authorized by the DEP.

The DEP is authorized to impose a lien on the real property on which the phosphogypsum stack system that poses an imminent hazard is located and on the real property underlying and other assets located at associated phosphate fertilizer production facilities equal in amount to the moneys expended from the NLRTF pursuant to s. 403.4154(3)(d), F.S., including attorney's fees and court costs. The owner of any property on which such a lien is imposed is entitled to a release of the lien upon payment to the DEP of the lien amount. The lien does not take priority over any other prior perfected lien on the real property, personal property, or other assets referenced herein, including, but not limited to, the associated phosphate rock mine and reserves.

A registration fee is required of the owner or operator of each existing phosphogypsum stack who has not provided a performance bond, letter of credit, trust fund agreement, or closure insurance to demonstrate financial responsibility for closure and long-term care. All fees must be deposited into the NLRTF. The fee for each existing stack is \$75,000 for each of the five 12-month periods following July 1, 2001. The fee for any new stack for which the owner or operator has not provided a performance bond, letter of credit, trust fund agreement, or closure insurance

to demonstrate financial responsibility for closure and long-term care is \$75,000 for each of the five 12-month periods following the issuing by the DEP of a construction permit for that stack.

Within 30 days after a phosphogypsum stack has been certified as closed, the DEP will refund to the owner of the closed phosphogypsum stack an amount from the NLRTF equal to the total amount of fee payments made by the owner or operator to the fund in connection with the closed phosphogypsum stack; however, any refund becoming payable prior to July 1, 2009, will be paid to the owner on or after that date.

This section deletes existing provisions establishing the total annual registration fees for existing stacks, and requires the DEP to advise existing stack owners of the fee for the 12-month period commencing on the immediately preceding July 1. The payment must be remitted on or before August 31.

The bill authorizes the DEP to use funds from the NLRTF to take all steps necessary to close an abandoned phosphogypsum stack system and to carry out post-closure care in accordance with DEP rules in effect on the date of commencement of closure activities. To accomplish such closure and post-closure care, the DEP may take any appropriate action, including by the use of DEP personnel, by contracting with other state or federal agencies or by the use of a private contractor.

The DEP may close a phosphogypsum stack system through agreement with the owner or by court order. In determining whether closure is appropriate, the court will consider whether closing the stack will protect human health, safety, or welfare or the environment; the useful life of the stack; the effect of delaying closure on the stability of the fund; the likelihood that the stack will be operated again; and other relevant factors. If the court finds that closure is appropriate, the court may appoint a receiver to oversee the closure or shall authorize DEP employees, agents, and contractors to enter all land owned by the owner of the phosphogypsum stack system for the performance of closure and postclosure activities.

The DEP may impose a lien on the real property on which a closed phosphogypsum stack system is located and on the real property underlying and other assets located at its formerly associated phosphate fertilizer production facilities equal in amount to the moneys expended from the NLRTF for closure and postclosure care. The owner of any property on which such a lien is imposed is entitled to a release of the lien upon payment to the DEP of the lien amount and execution of an agreement to carry out postclosure care in accordance with applicable DEP rules. The lien imposed does not take priority over any other prior perfected lien on the real property, personal property, or other assets referenced in this paragraph, including, but not limited to, the associated phosphate rock mine and reserves.

Section 4. Section 403.4155, F.S., is amended to delete an obsolete provision and require the DEP, by January 31, 2002, to review chapter 62-673, F.A.C., to determine the adequacy of the financial-responsibility provisions contained in its rules and shall take any measures necessary to ensure that the rules provide sound and effective provisions to minimize risk to the environment and to public health and safety from the business failure of a phosphogypsum stack system.

Section 5. The act will take effect July 1, 2001.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

Owners or operators of each existing or new stack who do not provide assurances of financial responsibility pursuant to s. 403.4154(4), F.S., must pay an annual fee of \$75,000 per stack for five years following July 1, 2001, for existing stacks, and for the first five years after issuance of a construction permit for new stacks.

B. Private Sector Impact:

Owners or operators of each existing or new stack who do not provide assurances of financial responsibility pursuant to s. 403.4154(4), F.S., must pay an annual fee of \$75,000 per stack for five years following July 1, 2001, for existing stacks, and for the first five years after issuance of a construction permit for new stacks.

Owners or operators of stacks for which the DEP spent funds to abate an imminent hazard or for closure and postclosure activities are subject to liens until the amount spent by the DEP is repaid. Such owners or operators may also be liable for court costs and attorney fees.

Within 30 days after a stack has been certified as closed by the DEP, the DEP will refund the total amount of registration fees paid to the stack's owner. Any refund due prior to July 1, 2009 will not be made until on or after that date. After November 1, 2008, no new funds for nonmandatory reclamation would be available.

C. Government Sector Impact:

There are currently 23 phosphogypsum stacks in Florida, including the two being operated by the DEP. If 23 stacks are assessed the \$75,000 registration fee, as the DEP expects, revenues will be \$1,725,000 annually for five years following July 1, 2001. Total revenues could be reduced by refunds due for closed stacks, although no refunds may be paid until July, 2009.

Effective July 1, 2001, the bill increases the amount of reserved funds in the NLRTF from \$30 million to \$50 million for use by the Department of Environmental Protection. The bill authorizes the DEP to use the \$50 million reserved in the NLRTF for reclamation activities for abatement of imminent hazards and for closure and postclosure care of abandoned stacks. The bill also prohibits the DEP from accepting applications for nonmandatory land reclamation programs after November 1, 2008, which would effectively end the program.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

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