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DATE: February 21, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1541
RELATING TO: Drycleaning Solvent Cleanup Program
SPONSOR(S): Representative Ross
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT YEAS 9 NAYS 0
 - (2) COUNCIL FOR SMARTER GOVERNMENT
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

Currently, the Drycleaning Solvent Cleanup Program (DSCP) provides to eligible drycleaning facilities and wholesale supply facilities an exemption from liability for cleanup costs, provided that the facilities meet the requirements of the law and regulations.

This bill expands civil liability immunity provisions within the Drycleaning Solvent Cleanup Program to grant civil immunity to real property owners and nearby property owners, for property damage claims of any kind, brought by any person, state, or local government against the real property owner, the nearby property owner or the owner, or operator of a drycleaning facility or a wholesale supply facility, if certain minimal conditions are met. The provision of immunity is based on the site being deemed eligible for cleanup under the DSCP.

This bill further expands the statutory immunity for real property owners and nearby real property owners who voluntarily engage in site cleanup, regardless of the site eligibility under the DSCP.

This bill has an indeterminate fiscal impact on state and local governments.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

Immunity from suit does not promote personal responsibility for ones actions.

B. PRESENT SITUATION:

The Legislature created the Drycleaning Solvent Cleanup Program (DSCP) in 1994 to provide a source of funding for rehabilitating sites and drinking water supplies contaminated by drycleaning solvents. Section 376.3078, F.S., provides eligible drycleaning facilities and wholesale supply facilities an exemption from liability for cleanup costs, provided that the facilities meet the requirements of the law and regulations promulgated thereunder. It further provides that the owner, operator, or any person who otherwise could be liable as a result of the operation of an eligible drycleaning facility or wholesale supply facility, is not subject to administrative or judicial action brought by or on behalf of any state or local government or any person to compel cleanup or pay cleanup costs. Eligibility for DSCP is provided to "contaminated sites," not to "properties"; and there may be more than one contaminated site (i.e., contaminant plume) on any given property. Each site (i.e., plume) is reviewed separately for eligibility.

The Department of Environmental Protection (DEP) performs cleanup of eligible facilities. Sites are addressed on a priority basis using risk-based corrective action. The department has established a registration program for drycleaning facilities and collects registration fees pursuant to the law. The Department of Revenue collects other fees and taxes.

Section 376.3078(11), F.S., provides a voluntary cleanup provision authorizing property owners to conduct site rehabilitation activities at contaminated sites. Regardless of whether the contaminated site is eligible for the DSCP, a real property owner conducting voluntary cleanup of drycleaning solvents is immune from liability to compel or enjoin site rehabilitation, or to pay the costs of site rehabilitation. The real property owner is also not compelled to pay fines or penalties, provided the owner conducts site rehabilitation in a timely manner consistent with state and federal laws and provides the DEP with site access.

Under current law, the immunity provisions, for both DSCP sites and sites at which voluntary cleanup is being conducted, are limited to immunity from being compelled to clean up a site or to pay for the cost of cleanup. There is no immunity from third-party suits for damages. Section 376.313(3), F.S., provides:

Notwithstanding any other provision of law, nothing contained in ss.
376.30-376.319 prohibits any person from bringing a cause of action in

a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.319. Nothing in this chapter shall prohibit or diminish a party's right to contribution from other parties jointly or severally liable for a prohibited discharge of pollutants or hazardous substances or other pollution conditions. Except as otherwise provided in subsection (4) or subsection (5), in any such suit, it is not necessary for such person to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred. The only defenses to such cause of action shall be those specified in s. 376.308.

Section 376.313(5), F.S., does provide an additional limited defense to such a third-party cause of action if the facility is in compliance; in which case, the plaintiff would be required to prove negligence. However, the defense is only available to drycleaning facilities that are ineligible for the DSCP.

Current law also provides protection for innocent adjacent property owners whose property becomes contaminated by drycleaning solvents that have migrated from a nearby drycleaning facility. Section 376.3078(3)(p), F.S., provides:

A person whose property becomes contaminated due to geophysical or hydrologic reasons from the operation of a nearby drycleaning or wholesale supply facility and whose property has never been occupied by a business that utilized or stored drycleaning solvents or similar constituents is not subject to administrative or judicial action brought by or on behalf of another to compel the rehabilitation of or the payment of the costs for the rehabilitation of sites contaminated by drycleaning solvents, provided that the person:

1. Does not own and has never held an ownership interest in, or shared in the profits of, the drycleaning facility operated at the source location;
2. Did not participate in the operation or management of the drycleaning facility at the source location; and
3. Did not cause, contribute to, or exacerbate the release or threat of release of any hazardous substance through any act or omission.

The defense provided by this paragraph does not apply to any liability under a federally delegated program.

Section 376.301, F.S., defines terms used throughout Florida's statutes as well as rules governing the Petroleum, Drycleaning Solvent, and Brownfields Cleanup Programs.

C. EFFECT OF PROPOSED CHANGES:

Definitions

This bill refines the definition of "contaminated site" as any contiguous land, sediment, surface water, or groundwater areas that contain contaminants which that may be harmful to human health or the environment, and expressly includes drycleaning solvents as a form of contaminant to be included in this definition. This inclusion may not be necessary as the definition of contaminant contained in s. 376.301(9), F.S., defines contaminants as any physical, chemical, biological, or

radiological substance present in any medium which may result in adverse effects to human health or the environment or which creates an adverse nuisance, organoleptic, or aesthetic condition in groundwater.

This bill also redefines "site rehabilitation" to mean the assessment of a contaminated site and the remediation activities that reduce the levels of contaminants at a contaminated site. This change in definition excludes the initial assessment of the site as a part of the rehabilitation. A site may or may not be contaminated, and only through site assessment activities can it be conclusively determined to be a "contaminated site".

This bill further defines "nearby real property owner" to mean the individual or entity that is vested with ownership, dominion, or legal or rightful title to real property, or that has a ground lease or commercial lease in real property, onto which drycleaning solvent has migrated through soil or groundwater from a drycleaning or wholesale-supply facility eligible for site rehabilitation under s. 376.3078(3), F.S., or from a drycleaning or wholesale-supply facility that is approved by the department for voluntary cleanup under s. 376.3078(11), F.S. The inclusion of commercial lease holder within this definition may preclude a business tenant from bringing a damage suit for actual impaired use of the improvements on the contaminated real property or for damages such as lost profits associated with stigma to the real property or improvements caused by the drycleaning contamination. This definition also only refers to drycleaning solvent migrating through soil or groundwater from a facility eligible for the DSCP or at which voluntary cleanup is being conducted and does not indicate that the contamination has migrated across a property boundary onto a nearby real property. Accordingly, a "nearby real property owner" may actually be co-located with the individual or entity receiving the immunity.

Immunity

This bill broadens civil liability immunity provisions within the DSCP to eliminate property damage claims of any kind brought by any person, state, or local government against the real property owner, the nearby property owner or the owner or operator of a drycleaning facility or a wholesale supply facility. Property damages claims include, but are not limited to, diminished value of real property or improvements, lost or delayed rent, sale or use of real property or improvements, or stigma to real property or improvements caused by drycleaning-solvent contamination. This bill further broadens this immunity to provide that any real property owner or nearby real property owner who voluntarily conducts site rehabilitation will also be immune from suit.

This bill provides that the real property owner must provide upon request from any nearby real property owner all reasonably available documentation in the public records in reference to the drycleaning-solvent contamination, including, but not limited to, copies of any soil or groundwater tests and site-assessment reports, and a copy of the department's order of eligibility. The bill also provides that the DEP must assist the real property owner to provide such documentation. The bill further provides that the real property owner must, within 90 days after the request, furnish the nearby real property owner with a sworn affidavit in recordable form, certifying:

- (1) That a drycleaning solvent has migrated through soil or groundwater;
- (2) That the contaminated site is eligible for site rehabilitation; and
- (3) That the nearby property is eligible for site rehabilitation.

This bill further provides that the furnishing of these documents is the predicate to the immunities from suits for damages provided in the DSCP. As the real property owner may not be able to

provide this affidavit, the real property owner may be dependent on the DEP or an independent title company to produce the requested transcript of documents.

This bill also provides that upon request from the nearby real property owner, any real property owner who voluntarily conducts site rehabilitation will provide the nearby real property owner with all reasonably available public records documentation referencing the approved voluntary cleanup agreement.

This bill also amends subsection 376.308(6), F.S., to establish that the immunity of real property owner and nearby real property owner is not affected by anything in ch. 376, F.S., unless expressly provided in the chapter.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 376.301, F.S.; amending definitions of “contaminated site” and “site rehabilitation” and creating a new definition of “nearby real property owner”.

Section 2. Amends ss. 376.3078(3) and (11), F.S.; expands immunity provisions of DSCP to include immunity from claims of any person, state, or local government for property damages of any kind caused by drycleaning solvent contamination; establishes that the real property owner, if requested, shall provide the nearby real property owner with certain public records regarding the contamination and a sworn affidavit certifying certain site information; clarifies that DSCP eligibility for site rehabilitation applies to the facility and any place where the contamination that is eligible for cleanup has migrated; expands the immunity provisions for real property owners conducting voluntary cleanup to include immunity from claims of any person, state, or local government for property damages of any kind caused by drycleaning solvent contamination; establishes that the statutory immunity provisions in the voluntary cleanup subsection also apply to any nearby real property owner; and establishes that the real property owner, if requested, shall provide the nearby real property owner with certain public records regarding the contamination including a copy of the executed voluntary cleanup agreement.

Section 3. Amends subsection 376.308(6), F.S.; establishes that immunity of real property owner and nearby real property owner is not affected by anything in ch. 376, F.S., unless expressly provided in the chapter.

Section 4. Provides that the act shall take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The Department of Environmental Protection may have to forego pursuit of natural resources damage claims against responsible parties conducting voluntary cleanup pursuant to s. 376.3078(11), F.S. The fiscal impact is indeterminate.

2. Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Indeterminate.

2. Expenditures:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private individuals may suffer property damage related losses such as diminution in value of property or improvements, lost or delayed rent, sale or use of real property or improvements, or stigma to real property or improvements caused by drycleaning contamination, and they will be unable to pursue a common law cause of action for such damages if this bill becomes law. Real property owners who gain the additional immunity provided by this bill will benefit from the avoidance of litigation and damage judgments.

D. FISCAL COMMENTS:

None.

III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to expend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill appears to be applying current legislation retroactively to past events. The Supreme Court of Florida in *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999), dealing with 376.3078(3) and (9), F.S., noted that: "(t)wo interrelated inquiries arise when determining whether statutes should be retroactively applied. The first inquiry is one of statutory construction: whether there is clear evidence of legislative intent to apply the statute retrospectively. If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is

whether retroactive application is constitutionally permissible.”¹ The Court held that based upon the express terms of the DSCP as well as the structure and purpose of the DSCP, the immunity provision contained in the DSCP could be applied retroactively.

According to the Florida Supreme Court in *Metropolitan Dade County v. Chase Federal Housing Corp.*, “retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations,”² but in *State of Florida Department of Transportation v. Knowles*, the Court further found that this rule is not absolute.³ The Court stated “it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.”⁴ It is unclear whether the retroactive effects of this bill would survive this scrutiny.

When the legislature abrogates a cause of action, as this bill does, such action may be challenged under Florida’s access to courts provision at art. I, s.21, Fla. Const., which provides that “the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” For the legislature to abrogate a cause of action, it must provide a reasonable alternative remedy or equivalent benefit, or the legislature must show an overpowering public necessity justifying such restriction while finding that there is no alternative method of meeting such public necessity.⁵ It is unclear whether the alternative remedy provided by this bill, (participation in the DSCP cleanup program) is an “adequate alternative” or whether there is an overpowering public necessity for this abrogation.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The proposed definition changes within this bill could create confusion among the other cleanup programs. The definitions of “contaminated site” and “site rehabilitation” are used throughout the statutes and rules governing the Petroleum, Drycleaning Solvent and Brownfields Programs. The proposed changes could eliminate eligibility for a Voluntary Cleanup Tax Credit for costs associated with site assessment under these cleanup programs.

This bill proposes changes that create conflicts between federal and state law as well as within current state statutes:

- This bill may create a conflict between federal and state law. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC § 9607(f)(2)(B), there are requirements for the appointment of a federal natural resources trustee and the appointment of a state natural resources trustee. The proposed bill language eliminating the state’s right to pursue natural resources damage may, therefore, conflict with federal law under CERCLA.

¹ *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 at 499, 24 Fla. Weekly S267 (Fla. 1999), reh’g denied, (Aug 4, 1999).

² *Id* at 503, quoting *State of Florida Department of Transportation v. Knowles*, 402 So.2d 1155 at 1158 (Fla. 1981) reh’g denied (Sept 24, 1981).

³ *State of Florida Department of Transportation v. Knowles*, 402 So.2d 1155 at 1158, reh’g denied (Sept 24, 1981).

⁴ *Id.*

⁵ *Kluger v. White*, 281 so.2d 1 at 4 (Fla. 1973).

- This bill seems to conflict with the existing law in s. 376.313, F.S., the section which creates an individual cause of action for damages (see Present Situation Section above). This bill abrogates a third party's common law cause of action to bring such damage claims.

According to the DEP, voluntary cleanup is generally conducted for business reasons, and often is due to concerns associated with real estate transactions and third-party liability (e.g., property damage or personal injury lawsuits filed by adjacent property owners.) A property owner whose site is eligible for a state-funded cleanup in the DSCP may opt to conduct voluntary cleanup and forego the state funding for similar business reasons. This bill promotes this incentive because by conducting a voluntary cleanup, the real property owner obtains immunity from a suit for damages.

According to the DEP, there are 1,373 eligible DSCP sites remaining to be cleaned up and annual funding is limited (approximately \$8,000,000 per year with average per-site costs ranging from \$200,000 to \$500,000), it will take decades to clean up all currently known contaminated sites.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 21, 2002, the Committee on Judicial Oversight adopted one amendment. This amendment provides that if the real property owner and the nearby property owner are eligible under the DSCP, the real property owner and the nearby real property owner will be immune from liability from all persons except any governmental entity. This amendment also provides that any real property owner or nearby property owner who voluntarily engages in site cleanup is also immune from liability for damages from all persons except any governmental entity. This amendment clarifies the documentation that the real property owner is required to provide to the nearby property owner. This amendment also provides that this immunity will be retroactive to all cases, regardless of when the contamination occurred provided a lawsuit has not yet been filed.

The bill was then reported favorably as amended.

VI. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

Noelle M. Melanson

Nathan L. Bond J.D.