

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 2726

SPONSOR: Senator Argenziano

SUBJECT: Site Rehabilitation of Contaminated Sites

DATE: April 18, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Branning</u>	<u>Kiger</u>	<u>NR</u>	<u>Fav/1 amendment</u>
2.	<u>Keating</u>	<u>Johansen</u>	<u>FT</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides that risk-based corrective-action (RBCA) principles apply to all contaminated sites resulting from a discharge of pollutants or hazardous substances, to the extent the sites are not subject to RBCA cleanup criteria established for the petroleum, brownfields, and the drycleaning rehabilitation programs. This concept is often referred to as “Global RBCA.” The bill provides for rulemaking authority for the DEP and cleanup criteria consistent with that found in the petroleum, brownfields and drycleaning site rehabilitation programs.

Clarifies and revises provisions relating to the intangible tax credit for contaminated site rehabilitation, corporate income tax credit for contaminated site rehabilitation, and the partial tax credit for rehabilitation of drycleaning solvent contaminated sites and brownfield sites in designated brownfield areas. Clarifies who may transfer a tax credit and allows a 5-year expiration period to begin anew following the transfer. Converts the voluntary cleanup tax credit application period from a tax year to a calendar year. The tax credit application deadline is changed from December 31 to January 15 of the year following the calendar year for which site rehabilitation costs are being claimed. An applicant must submit a complete application. The filing of placeholder applications is prohibited. Tax credit applications are processed on a first-come, first-served basis. The application must be filed with the DEP’s Division of Waste Management.

This bill substantially amends ss. 199.1055, 220.1845, and 376.30781, F.S.; and creates s. 376.30701, F.S.

II. Present Situation:

Global RBCA — In the past several years, the Florida Legislature has adopted risk-based corrective-action principles (RBCA) to apply to cleanups conducted at petroleum contaminated sites, drycleaning solvent contaminated sites, and brownfield sites in designated brownfield areas. RBCA is a decision-making process used to evaluate the cleanup of contaminated sites based on the protection of human health and environmental resources. It is intended to add flexibility to the cleanup effort so that a cleanup can be done in a more cost-effective manner than by using traditional approaches under which all sites must conform to uniform standards and procedures.

Currently, sites that fall outside the three program areas in which RBCA has been adopted are subject to one of two cleanup processes. The most common of these is often referred to as the CAP/RAP (Contamination Assessment Plan/Remedial Action Plan) process, wherein site cleanups are generally completed by licensed environmental professionals in accordance with the Department of Environmental Protection's Model Corrective Actions for Contaminated Sites guidance document. This document provides recommended procedures for the development and approval of work plans and reports. The department has generally incorporated risk-based cleanup decisions but does not have the clear and express authority to do so for sites outside of the three designated RBCA programs.

The other cleanup process is included in the federal Resource Conservation and Recovery Act (RCRA) program, which the department has been authorized by the U.S. Environmental Protection Agency (EPA) to administer in Florida. RCRA cleanups in Florida are governed by federal regulations adopted as Florida rules, where they are equivalent or more stringent, and federal program guidance.

In April 1998, when the Environmental Regulation Commission adopted the Brownfields Cleanup Criteria Rule, there was a request from the regulated community and environmental and health advocacy groups to have the department provide an ongoing forum for interested parties to discuss evolving technical and scientific issues associated with contaminated site cleanup and the use of risk based management principles. In response, the department hosted the first Contaminated Soils Forum in July 1998. During 1999 and 2000, the concept of applying RBCA to all sites contaminated with pollutants or hazardous substances regardless of program status was the subject of some discussion at the Contaminated Soils Forum meetings. This concept was termed "Global RBCA" since it would apply RBCA principles to all cleanups. In general, application of RBCA principles has been seen as a streamlined approach that offers a more cost-efficient process.

The adoption of formal RBCA language by the Legislature for the three program areas gave the department the clear authority to adopt default cleanup target levels and allowed alternative cleanup target levels, where appropriate, as determined by a site-specific risk assessment. It also authorized the department to allow the use of institutional and engineering controls to eliminate or control exposure at sites with remaining contamination. It has been argued that these benefits should apply equally to program and non-program sites in Florida.

There is an ongoing debate with the EPA regarding the application of state Applicable or Relevant and Appropriate Requirements, or ARARS, at Superfund sites in Florida. Currently, the EPA has opted to apply a cancer risk range from 10^{-4} (1 in 10,000) to 10^{-6} (1 in a million) in establishing cleanup requirements at Superfund sites. If a state has adopted cleanup requirements that are different from EPA's, the EPA must accept them as ARARs and apply them at sites being cleaned up under the federal Superfund program within that state. The EPA has taken the position that Florida has not promulgated statewide ARARs since RBCA in Florida applies only to the three program areas. The result has been the application of cleanup requirements at some Superfund sites that are less stringent than Florida's statutorily adopted standard of 10^{-6} cancer risk for contaminated sites.

Voluntary Cleanup Tax Credits — In 1998, the Legislature provided for a Voluntary Cleanup Tax Credits Program for rehabilitation of sites contaminated by drycleaning solvents or brownfield sites in designated brownfield areas. The purpose of the tax credits is to encourage the voluntary site rehabilitation at brownfield sites or drycleaning solvent contaminated sites by the real property owner if the owner is not also the owner or operator of the drycleaning facility or other business where the contamination exists. Credits can be taken against the intangible personal property tax or corporate income tax. Credits are capped at \$250,000 per site per year, and total credits authorized in a single year are capped at \$2 million. These tax credits may be transferred after a merger or acquisition to the surviving or acquiring entity and used in the same manner with the same limitations.

In order to encourage completion of site rehabilitation at contaminated sites being voluntarily cleaned up and eligible for a tax credit, the taxpayer may claim an additional 10 percent of the total cleanup costs, not to exceed \$50,000, in the final year of cleanup as evidenced by the Department of Environmental Protection issuing a "No Further Action" order for that site.

III. Effect of Proposed Changes:

Section 1. Section 376.30701, F.S., is created to apply risk-based corrective action (RBCA) principles to all contaminated sites resulting from a discharge of pollutants or hazardous substances, to the extent the sites are not subject to RBCA cleanup criteria established for the petroleum, brownfields, and dry-cleaning programs. The concept of this section is often referred to as "Global RBCA." This section would apply to a variety of site rehabilitation scenarios including, but not limited to, site rehabilitation conducted voluntarily, conducted pursuant to the Department of Environmental Protection's (DEP) enforcement authority, or conducted as a state-managed cleanup by the department.

The Global RBCA provisions would apply retroactively to all existing contaminated sites where legal responsibility for site rehabilitation exists pursuant to other provisions of ch. 376 or 403, F.S., except for certain specified sites. In instances where the cleanup target levels have been accepted by the department in an approved technical document, current permit, or other written agreement and to those sites that have received a No Further Action Order or a Site Rehabilitation Completion Order from the department, the person responsible for site rehabilitation may elect to have the provisions of this section apply in lieu of those in an approved technical document, current permit, or other written agreement.

This section may not be construed to prohibit or delay actions to respond to a discharge of pollutants or hazardous substances before any contact with the department. The RBCA process contemplates appropriate emergency-response action or initial remedial action before any formal application of the RBCA process involving site assessment, and if required, subsequent remedial action. Any emergency response actions or initial remedial actions must be conducted in accordance with all applicable federal, state, and local laws and regulations.

The provisions in this bill for Global RBCA are consistent with the statutory provisions which apply RBCA principles to contaminated sites in brownfields, drycleaning contaminated sites, and petroleum contaminated sites. The bill provides for rulemaking authority for the DEP and cleanup criteria. In establishing the rules for a site rehabilitation program, the department shall apply, to the maximum extent feasible, a risk-based corrective-action process to achieve protection of human health and safety and the environment in a cost-effective manner based on the principles established in this bill. The rules must prescribe a phased risk-based corrective-action process that is iterative and that tailors site rehabilitation tasks to site-specific conditions and risk. The rules must also include protocols for the use of natural attenuation, the use of institutional and engineering controls, and the issuance of “no further action” letters. The criteria for determining what constitutes a rehabilitation program task or completion of a site rehabilitation program task or site rehabilitation program, including a voluntary site rehabilitation program, must:

- Consider the current exposure and potential risk of exposure to humans and the environment, including multiple pathways of exposure. The physical, chemical, and biological characteristics of each contaminant must be considered in order to determine the feasibility of risk-based corrective-action assessment.
- Establish the point of compliance at the source of the contamination. However, the department may temporarily move the point of compliance to the boundary of the property, or to the edge of the plume when the plume is within the property boundary, while cleanup, including cleanup through natural attenuation processes in conjunction with appropriate monitoring, is proceeding. Also, the department may temporarily extend the point of compliance beyond the property boundary under certain circumstances.
- Ensure that the site-specific cleanup goal is that all contaminated sites being cleaned up under s. 376.30701, F.S., ultimately achieve the applicable cleanup target levels. The department may allow concentrations of contaminants to temporarily exceed the applicable cleanup target levels while cleanup, including cleanup through natural attenuation processes in conjunction with appropriate monitoring, is proceeding under certain circumstances, if human health, public safety, and the environment are protected.
- Allow the use of institutional and engineering controls at contaminated sites being cleaned up, where appropriate, to eliminate or control the potential exposure to contaminants of humans or the environment. The use of controls must be preapproved by the department and only after constructive notice and opportunity to comment within 30 days after receipt of notice is provided to local governments, to owners of any property into which the point of compliance is allowed to extend, and to residents on any property into which the point of compliance is allowed to extend. When institutional or

engineering controls are implemented to control exposure, the removal of the controls must have prior DEP approval and must be accompanied by the resumption of active cleanup, or other approved controls, unless cleanup target levels have been achieved.

- Consider the additive effects of contaminants. The synergistic and antagonistic effects must also be considered when the scientific data become available.
- Take into consideration individual site characteristics such as the current and projected use of the affected groundwater and surface water in the vicinity of the site, current and projected land uses of the area affected by the contamination, the exposed population, the degree and extent of contamination, the rate of contaminant migration, the apparent or potential rate of contaminant degradation through natural attenuation processes, the location of the plume, and the potential for further migration in relation to site property boundaries.
- Apply state water quality standards as follows:
 1. Cleanup target levels for each contaminant found in groundwater must be the applicable state water quality standards. Where such standards do not exist, the cleanup target levels for groundwater must be based on the minimum criteria specified in department rule. The DEP must apply the following, as appropriate, in establishing the applicable cleanup target levels: calculations using a lifetime cancer risk of 10^{-6} ; a hazard index of 1 or less; the best achievable detection limit; and nuisance, organoleptic, and aesthetic considerations. However, the department shall not require site rehabilitation to achieve a cleanup target level for any individual contaminant that is more stringent than the site-specific, naturally occurring background concentration for that contaminant.
 2. Where surface waters are exposed to contaminated groundwater, the cleanup target levels for the contaminants must be based on the more protective of the groundwater or surface water standards as provided by department rule. The point of measuring compliance with the surface water standards shall be in the groundwater immediately adjacent to the surface water body.
 3. Using RBCA principles, the DEP shall approve alternative cleanup target levels in conjunction with institutional and engineering controls, if needed, based upon an applicant's demonstration, that the human health, public safety, and the environment are protected. When a state water-quality standard is applicable, a deviation may not result in the application of cleanup target levels more stringent than the standard. In determining whether it is appropriate to establish alternative cleanup target levels at a site, the department must take certain specified considerations into account.
- Provide for the department to issue a "no further action order, with conditions."
- Establish appropriate cleanup target levels for soils.

1. In establishing soil cleanup target levels for human exposure to each contaminant found in soils from the land surface to 2 feet below land surface, the department shall apply the following, as appropriate: calculations using a lifetime cancer risk level of 10^{-6} ; a hazard index of 1 or less; and the best achievable detection limit. However, the DEP may not require site rehabilitation to achieve a cleanup target level for an individual contaminant which is more stringent than the site-specific, naturally occurring background concentration for that contaminant. Institutional controls or other methods must be used to prevent human exposure to contaminated soils more than 2 feet below the land surface. Removal of institutional controls requires that the contaminated soils be remediated.
2. Leachability-based soil target levels must be based on protection of the groundwater cleanup target levels or the alternative cleanup target levels for groundwater, as appropriate. Source removal and other cost-effective alternatives that are technologically feasible must be considered in achieving the established leachability soil target level. The leachability goals do not apply under certain circumstances.
3. Using RBCA principles, the department shall approve alternative cleanup target levels in conjunction with institutional and engineering controls, if needed, based on an applicant's demonstration under certain circumstances.

The department shall require source removal as a risk-reduction measure, if warranted and cost-effective.

This section also provides that the cleanup criteria govern only site rehabilitation activities occurring at the contaminated site. Removal of contaminated media from a site for offsite relocation or treatment must be in accordance with all applicable federal, state, and local laws and regulations.

Upon completion of site rehabilitation, additional site rehabilitation is not required except under certain specified circumstances.

Section 2. Section 199.1055, F.S., relating to the intangible tax credit for contaminated site rehabilitation, is amended to clarify the existing requirements and to specify that the tax credit is granted to the tax credit applicant, not the "taxpayer," to make it consistent with other governing provisions of law. This bill clarifies who may transfer a tax credit and allows a 5-year expiration period to begin anew following the transfer.

Section 3. Section 220.1845, F.S., relating to corporate income tax credit for contaminated site rehabilitation, is amended to clarify the existing requirements and to specify that the tax credit is granted to the tax credit applicant, not the "taxpayer," to make it consistent with other governing provisions of law. This bill clarifies who may transfer a tax credit and allows a 5-year expiration period to begin anew following the transfer.

Section 4. Section 376.30781, F.S., relating to the partial tax credit for rehabilitation of drycleaning solvent contaminated sites and brownfield sites in designated brownfield areas, to

clarify the existing requirements and to specify that the tax credit is granted to the tax credit applicant, not the “taxpayer” to make it consistent with other governing provisions of law. The bill converts the voluntary cleanup tax credit application period from a tax year to a calendar year. The tax credit application deadline is changed from December 31 to January 15 of the year following the calendar year for which site rehabilitation costs are being claimed. An applicant must submit a complete application. The filing of placeholder applications is prohibited. Tax credit applications are processed on a first-come, first-served basis. The application must be filed with the DEP’s Division of Waste Management.

Section 5. This act shall take effect upon becoming a law.

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:

The provision in the bill allowing the transferee 5 years after the date of the transfer to use the tax credits would extend the life of the tax credit beyond the current limit of 5 years.

B. Private Sector Impact:

Since use of RBCA principles generally adds flexibility to the cleanup effort so that a cleanup can be done in a more cost-effective manner than by using traditional approaches, a positive impact is anticipated on the private sector. The use of Global RBCA will allow the use of institutional and engineering controls, and the application of alternative cleanup target levels to manage the risk associated with contaminated sites if certain conditions exist. This will also allow the use of natural attenuation as a passive means of cleanup where conditions are favorable for such an approach.

As the stigma of contamination is removed from a site, its property value would increase. This could facilitate the transfer and sale of real property.

C. Government Sector Impact:

The Department of Environmental Protection will experience some additional costs associated with rulemaking for the new Global RBCA cleanup criteria. In addition, rule changes will be necessary to implement the provisions relating to the voluntary cleanup tax credits.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Natural Resources:

This is a technical amendment to conform subsection (12) of s. 376.30781, F.S., to other changes in the bill.