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/SB 956

SPONSOR: Committee on Natural Resources and Sen. Jones

SUBJECT: Drycleaning solvent cleanup program

DATE: March 11, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kiger	Kiger	NR	Favorable / CS
2.			CP	
3.			AGG	
4.			AP	
5.				
6.				

I. Summary:

Currently, the Drycleaning Solvent Cleanup Program (DSCP) found in ss. 376.3078 – 376.319, F.S., 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.

The bill expands the civil liability immunity provisions within the DSCP to grant limited protection to real property owners for property damage claims. Specifically, immunity from these types of claims is granted unless an affected property owner sells, transfers, or changes the land use of the contaminated property and demonstrates than an economic damage has occurred as a result of the contamination.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 376.301, 376.3078, and 376.313.

II. Present Situation:

Drycleaning Solvent Cleanup Program

The Legislature created the Drycleaning Solvent Cleanup Program (DSCP)[ss. 376.3078-376.319, F.S.] in 1994 to provide a source of funding for rehabilitating sites and drinking water supplies contaminated by drycleaning solvents. The DSCP provides eligible drycleaning and wholesale supply facilities freedom from liability for state and local government-mandated site cleanup costs. Such costs are paid by the state from funds generated by the drycleaning industry in the form of a two percent gross receipts tax on all drycleaners and a $5 per gallon surcharge on perchloroethylene, the halogenated solvent commonly used in the drycleaning industry. Additional revenues are generated by a $100 annual registration fee, applicable to all

drycleaners, and cleanup cost deductible fees of $1,000, $5,000, or $10,000 depending upon when the drycleaner applied for program eligibility.

Owners and operators of drycleaning facilities and the owners of real property on which such facilities are located were able during the registration period for the program, to seek program eligibility by formally applying to the program and submitting to the Florida Department of Environmental Protection (DEP) a "site screening report" which indicated the presence of contaminants on or below the site. Even trace amounts—as low as one part per billion—of perchloroethylene would make the facility eligible for the program, presuming that certain other statutory criteria were met. These other criteria consist of operational protocols, such as the requirement for secondary containment devices beneath and around drycleaning machines and chemical storage areas, quick reporting of spills, etc.

The registration period for the program extended from October 1, 1994, through December 31, 1998. Of the 1,737 "wet plant" drycleaning facilities (i.e. a facility where actual drycleaning was or is done upon the premises, as opposed to those facilities where clothes are just dropped off and the drycleaning takes place elsewhere) in the state, 1,565 facilities timely applied for eligibility. Of these, 1,422 facilities have been deemed eligible by the DEP.

Eligibility for the DSCP is provided to "contaminated sites," which is defined by s. 376.301(10), F.S., as any contiguous land, sediment, surface water, or groundwater areas that contain contaminants that may be harmful to human health or the environment. Accordingly, a "contaminated site" may cover numerous adjacent and contiguous properties. Also, there may be more than one contaminated site (also called a contaminant plume) on any given property. Each site (i.e., plume) is reviewed separately for eligibility. The DEP performs cleanup of eligible facilities and the sites are addressed on a priority basis using risk-based corrective action.

As of the end of December 2002, the DEP had initiated work on 250 (18%) of the 1,422 eligible sites. Of these, 18 sites are undergoing assessment, 40 are undergoing remedial design work, 15 are under construction, 41 are under active cleanup, 60 are in a monitored natural attenuation status, and cleanup has been completed at 58 sites. The remaining 18 sites are in voluntary cleanup or have been rescored.

The average program cost in Florida for *site assessment* is $91,000, which represents a low of approximately $36,000 for sites determined to need no further action or monitoring only and a high of $200,000 for a very complicated and egregiously contaminated site. The *design costs* for engineered remedial systems where active cleanup is required averages $50,000 and the average *cost of construction* for active cleanup sites is $187,000. The average annual *cost of operation and maintenance* for active cleanup sites is $55,000 per year. The average annual cost for *natural attenuation monitoring* is $24,000. The term for active cleanup sites will range from two to nine or ten years, while the average term for monitoring sites is 2.5 years with a maximum of five years. Florida's program is not a reimbursement program as site work is performed by state-approved contractors under strict monitoring and cost control oversight by the DEP.

Note: Drycleaning statistics from the Department of Environmental Protection.

Immunity provisions under the DSCP

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, other than those related to the costs of rehabilitation. 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., referenced above, 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:
>
> - 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;
> - Did not participate in the operation or management of the drycleaning facility at the source location; and
> - 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.

Recent legal developments

In *Metropolitan Dade County v. Chase Federal Housing Corp,* 737 So.2d 494 (Fla. 1999), the Florida Supreme Court addressed the issue of whether the immunity provisions of the DSCP could be retroactively applied to bar Dade County from seeking the recovery of money it expended to clean a site contaminated by the defendant's lessees. The court noted that the language in s. 376.3078(3), F.S., clearly and unequivocally provides that, upon being determined eligible to participate in the program, an entity shall not be subject to administrative or judicial action brought by or on behalf of any state or local government or agency thereof, or by or on behalf of any person, to compel rehabilitation or pay for the costs of rehabilitation----regardless of when the drycleaning contamination was discovered. Also, the court noted that the immunity provision pertaining to property owners who voluntarily clean their property (s. 376.3078(9), F.S.) expressly immunizes these property owners from liability for costs incurred to clean the property before the effective date of the DSCP. The court then ruled that the immunity provisions did not violate the due process clause of the constitution and that they could be retroactively applied to bar Dade County's suit for costs incurred prior to the effective date of the act.

In *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.,* 788 So.2d 1045, (Fla. 2d DCA 2001), the owner of a parcel of land adjacent to property owned by Publix brought an action against Publix alleging common law causes of action of negligence, trespass, nuisance, and strict liability for drycleaning solvent contamination of their property. The property owner was seeking damages for the lost value of the property resulting from the contamination. The court in *Courtney* confirmed that the measure of damages in this type of lawsuit under the common law is the lower of the lost value of the property or the cost of cleanup, but not both.

The court in *Courtney* ruled that the plain language of the immunity provisions of the DSCP did not expressly state that the DSCP eliminated liability for common law causes of action for damages. Since the immunity provisions only expressly provide immunity from damages for the costs of cleanup, the court ruled that the property owner could seek damages for the loss in value to the property even though the property would eventually be cleaned up by the state. The court noted that its interpretation of the DSCP rendered the immunity provisions "toothless" and stated the following:

> We find it troublesome that our decision permitting Courtney to present its case to a jury may result in a benefit to Courtney for which Publix may not be able to seek recovery in the event that the state eventually provides the necessary funds to cause Courtney's property to be cleaned up. However, we conclude that this issue can only be addressed by the Legislature.

Courtney, at 1050.

III. Effect of Proposed Changes:

Section 1. Amends s. 376.301, F.S., by creating a new definition of "nearby real property owner." The term "nearby real property owner" is defined 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 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.

Section 2. Creates subsection (14) in s. 376.3078, F.S., to establish provisions for the filing of a property damage claim by affected property owners. Specific criteria for the filing of a damage claim include:

- A demonstration that the sale, transfer, or change in use of the contaminated property resulted in an economic damage.
- A requirement that any claim, at a minimum, be based on a valid appraisal that demonstrates the loss in fair market value to the contaminated property.
- Criteria for determining the amount of the damages, if any. The claim cannot exceed the difference between the present value of the land and the value of the land if the pollution did not exist. In addition, no site rehabilitation costs may be awarded.
- A prohibition against being compensated more than once for the same loss.

Finally, a new provision is created that allows for the retroactive application of the immunity provisions.

Section 3. Amends subsections (3) and (5) of s. 376.313, F.S., which pertains to the nonexclusiveness of remedies and individual causes of action for damages in pollution cases. Currently, s. 376.313(3), F.S., provides that nothing contained in ss. 376.30 – 376.319, F.S., prohibits any person from bringing a cause of action for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30 – 376.319, F.S. This subsection is amended to conform it with the immunity provisions created in s. 376.3078(14), F.S., to expressly provide that subsection (3) of s. 376.313, F.S., does not permit causes of action for property damage against the owner or operator of a drycleaning facility or a wholesale supply facility, or the owner of the real property on which such facility is located, if such entity is eligible under the DSCP provisions.

Currently, subsection (5) of s. 376.313, F.S., provides that civil actions against owners or operators of drycleaning facilities or wholesale supply facilities, or the owner of the real properties on which such facilities are located, that are eligible for the DSCP, must prove such entities acted negligently if, at the time of discharge, the damages resulted solely from a discharge from a drycleaning facility or wholesale supply facility that was in compliance with department rules regulating drycleaning facilities or wholesale supply facilities. The bill adds facilities involved in voluntary cleanups under s. 376.3078(11), F.S., to this list of entities.

Section 4. Provides that the 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:

None.

B. Private Sector Impact:

The impact to the private sector, although indeterminate, includes:

Provisions which will prevent affected property owners from receiving a double recovery – damages for the lost value of the contaminated property and rehabilitation of the property to its pre-contamination status.

The retroactive application of the immunity provisions will prevent affected property owners from recovering damages for the lost value of their contaminated properties. Nevertheless, their properties will be rehabilitated at no cost to them.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.