

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Commerce and Tourism Committee

BILL: CS/SB 1284

INTRODUCER: Committee on Agriculture and Senator Bennett

SUBJECT: Biodiesel

DATE: April 11, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Weidenbenner	Spalla	AG	Fav/CS
2.	Pugh	Cooper	CM	Pre-meeting
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

Biodiesel is an alternative fuel produced from agricultural products such as soy beans, canola, camelina grass, mustard seeds, used vegetable-based cooking oils, and other organic products. Most alternative diesel fuel commercially available is a blend of 20-percent biodiesel and 80-percent regular diesel, denoted as “B20.”

The State of Florida has promoted biodiesel in recent years by supporting grant programs and providing tax credits or exemptions to eligible businesses.

CS/SB 1284 attempts to further the biodiesel industry in Florida by eliminating a bond requirement and certain motor fuel taxes on biodiesel fuel. Specifically, the bill:

- Requires all diesel fuel sold in Florida to contain a minimum 2 percent of biodiesel effective December 31, 2011, and provides guidelines for that percentage to be increased to 5 percent;
- Exempts from taxation biodiesel fuel manufactured by a biodiesel manufacturer who produces at least 50 percent of its annual production of 100-percent biodiesel (or B100) from Florida renewable feedstocks;

- Eliminates the bond requirement for any biodiesel manufacturer who produces at least 50 percent of its annual production of 100-percent biodiesel (or B100) from Florida renewable feedstocks;
- Defines “renewable feedstocks”;
- Extends statutory provisions making it unlawful to sell or distribute gasoline that does not meet state standards to apply to the sale or distribution of diesel fuel;
- Provides reporting requirements to the Department of Agriculture and Consumer Services (DACS); and
- Expresses legislative findings about the importance of biodiesel.

CS/SB 1254 substantially amends ss. 206.01, 206.02, 206.874, 206.9925, 526.202, 526.203, and 526.205, F.S.

II. Present Situation:

Biodiesel background

In s. 206.86(14), F.S., “biodiesel” is defined as any product made from nonpetroleum-based oils or fats that is suitable for use in diesel-powered engines. Biodiesel also is included in the statutory definition of diesel fuel, in s. 206.86(1), F.S.

Some of the types of crops that might be used to make biodiesel or biofuels are switchgrass; sugarcane; miscanthus; sweet sorghum; soybeans; peanuts; canola; and elephantgrass, according to research conducted the by University of Florida Institute of Food and Agricultural Sciences.¹ Other studies indicate that used palm oil, canola oil, and other cooking oils are good sources.²

Various governmental entities and private companies have incorporated biodiesel in their transportation fleets, including:³

- Public bus fleets in Fort Lauderdale, Orlando, and Jacksonville;
- Florida Power & Light;
- Disney World and Universal Studios;
- TriRail in its trains;
- School buses in Manatee County; and
- Water taxis used in Port Everglades.

Fuel Taxation

The state imposes a tax on the sale, use, distribution, or consumption of motor fuel.⁴ Diesel fuel is addressed separately in law, taxed differently, and generally considered to be subject to a highway tax, imposed for the purpose of constructing and maintaining the highways of the state.⁵

¹ Reports available at: http://edis.ifas.ufl.edu/topic_series_production_of_biofuel. Site last visited April 6, 2011.

² “Sustainable Biodiesel Progress in Florida in the Next 10 Years,” by Dr. Randell Wedel. PowerPoint Presentation dated August 26-27, 2009. Available at: <http://stlucie.ifas.ufl.edu/pdfs/Biofuel%20Feedstocks/vonWedel%20USDA%20FtPrc%208-26-09.pdf>.

³ Ibid.

⁴ Chapter 206, F.S., provides for the taxation of motor and other fuels.

⁵ Part II of ch. 206, F.S.

Biodiesel manufacturers are subject to the same reporting and licensing requirements as wholesalers.⁶

The 2011 amount of state and local taxes per gallon of diesel fuel is 30 cents,⁷ and includes the following:

- A 4-cents-per-gallon excise tax;
- A 1-cent-per-gallon tax, known as the “ninth-cent fuel tax”;
- A 6-cents-per-gallon tax, known as a “local-option fuel tax”;
- A 6.8-cents-per-gallon State Comprehensive Enhanced Transportation System Tax;⁸ and
- A 12.2-cents-per-gallon state “fuel sales tax.”⁹

Section 206.874, F.S., provides for exemptions to these taxes on diesel fuel under certain conditions. Such conditions include:¹⁰

- The tax status of the person involved in the removal or entry of the diesel fuel;
- The delivery of diesel fuel out-of-state;
- Fuel limited to a specified “local use,” typically pertaining to off-road, non-highway activity, such as the use of diesel fuel for home heating, or for contained farming operations;
- Biodiesel fuel manufactured by a public or private secondary school that produces less than 1,000 gallons annually for the sole use at the school, by its employees, or its students;¹¹ and
- Dyed diesel fuel (fuel marked for nontaxable purposes) used in school buses to transport students and school employees. Pursuant to this provision, a school district is still required to register as a “local government user of diesel fuel,” and to remit a return, but is authorized to apply for credit.¹²

Each fuel supplier, importer, exporter, wholesaler, blender, and biodiesel manufacturer operating in Florida is required to post a bond with DOR in the approximate amount of three times the average monthly tax levied on its operation, not to exceed \$100,000, to assure compliance with tax reporting and payment requirements.¹³

Additionally, fuels are subject to Florida excise taxes, generally on a per-barrel basis, to help pay for environmental cleanup. The producers and importers of fuel products pay these excise taxes. The excise tax revenues are deposited in the Coastal Protection Trust Fund and Inland Protection Trust Fund, pursuant to Part IV of ch. 206, F.S. The minimum tax rate is different for different

⁶ Section 206.02(5), F.S.

⁷ DOR fuel tax tips sheet, available at <https://taxlaw.state.fl.us/wordfiles/MSF%20TIP%2010B05-02.pdf>. The federal tax on diesel fuel for 2011 is an additional 24.4 cents per gallon.

⁸ Section 206.4608, F.S., provides that this tax, based on the amount of local-option taxes assessed, is spent on approved road projects in the counties where the tax is collected, to the extent practicable.

⁹ Section 206.87(1), F.S.

¹⁰ Section 206.874, F.S.

¹¹ Section 206.874(7), F.S. This exemption currently applies at least to the Oak Hall School, a private school in Gainesville, which has an on-site operation to turn used cooking oil into biodiesel to supplement regular diesel fuel used in the school’s lawnmowers. See: <http://www.oakhall.org/default.aspx?RelID=609681&issearch=biodiesel>.

¹² Section 206.874(4)(a),(b), and (d), F.S.

¹³ Section 206.05, F.S.

types of pollutants, but will increase automatically if the balances in these trust funds drop below certain thresholds.

Pollutants, defined as any petroleum products and a host of other chemicals,¹⁴ are subject to an excise tax under Part IV, ch. 206, F.S., unless exempt under s. 206.9941, F.S. Biodiesel is not exempt, nor is it excluded in the definition of “pollutants.”

Promotion of Biodiesel by the federal government and other states

The federal government offers a number of incentives to promote the development of biodiesel:¹⁵

- The Alternative Fuel Infrastructure Tax Credit, equal to 30 percent of the cost of equipment to create B20 or other types of alternative fuels that was placed into service after 2005 but before 2011. For equipment placed into service in 2011, the tax credit is capped at \$30,000.
- Biodiesel Mixture Excise Tax Credit, equal to \$1 per gallon of pure biodiesel, agri-biodiesel, or renewable diesel blended with petroleum diesel to produce a mixture containing at least 0.1-percent diesel fuel for any biodiesel blender that is registered with the IRS. Only blenders that have produced and sold or used the qualified biodiesel mixture as a fuel in their trade or business are eligible for the tax credit, which expires December 31, 2011.
- Biodiesel Income Tax Credit, which may be claimed by any taxpayer that delivers pure, unblended biodiesel (B100) into the tank of a vehicle or uses B100 as an on-road fuel in his or her business. If the biodiesel was sold at retail, only the person that sold the fuel and placed it into the tank of the vehicle is eligible for the tax credit. The incentive is allowed as a credit against the taxpayer's federal income tax liability. This tax credit expires December 31, 2011.
- Small Agri-Biodiesel Producer Tax Credit of 10 cents per gallon is available to any agri-biodiesel producer that is registered with the IRS, which sells the fuel either wholesale or retail, has no more than 60 million gallons of productive capacity, and meets other criteria. This tax credit also expires December 31, 2011.
- A number of grants and loans for biodiesel producers.

The federal government has a regulatory component to promoting the use of biodiesel and other alternative fuels.¹⁶ The national RFS Renewable Fuel Standard (RFS) Program was developed to increase the volume of renewable fuel that is blended into traditional petroleum-based fuels, and was authorized by the Energy Policy Act of 2005. The Energy Independence and Security Act of 2007 increased and expanded these requirements. In 2010, 12.95 billion gallons of renewable fuel must be available for use, increasing to 36 billion gallons per year by 2022. Beginning in 2010, a certain percentage of the renewable fuel blended into transportation fuels must be cellulosic biofuel, biomass-based diesel, and advanced biofuel. The U.S. Environmental Protection Agency oversees the implementation and enforcement of these requirements.

¹⁴ Defined in s. 206.9925(5), F.S.

¹⁵ See <http://www.afdc.energy.gov/afdc/laws/laws/US/tech/3251>. Site last visited April 7, 2011.

¹⁶ See <http://www.afdc.energy.gov/afdc/laws/laws/US/reg/3838>. Site last visited April 7, 2011.

Every state offers one or more incentives to promote the development or use of biodiesel,¹⁷ from tax credits to grants. Two states – Minnesota and Oregon – currently require that all of the diesel fuel sold within their jurisdiction be blended with at least 5-percent biodiesel, while Washington and Pennsylvania require a 2-percent blending. Several other states are in the process of considering legislation requiring blended biodiesel or have recently passed the requirement.

Florida Incentives for Biodiesel and Alternative Fuels

In recent years, Florida has created or expanded a number of incentives to promote the development and use of alternative fuels.

The Florida Renewable Fuel Standard Act (act)¹⁸ contains a legislative finding that it is vital to the public interest and the state's economy to require that all gasoline sold in the state contain a percentage of agriculturally derived, denatured ethanol. The act also required that all gasoline sold in Florida, beginning December 31, 2010, be "blended," meaning it must contain a mixture of gasoline and ethanol. Finally, the act makes it unlawful to sell gasoline in Florida that fails to meet the requirements of the act.

Also available to alternative energy producers were several sales tax exemptions for machinery and equipment, but many of these specifically geared to biodiesel or other alternative energy producers expired last year. Still available are state incentive programs such as the:

- Qualified Target Industry tax refund program,¹⁹ which provides refunds of certain taxes paid to targeted industry sectors, including Clean Energy, which create at least 10 jobs paying at least 115 percent of the statewide or area private-sector wage, and meet other criteria;
- Quick Action Closing Fund,²⁰ which is a grant to eligible targeted businesses focusing on job creation that can demonstrate at least \$5-to-\$1 payback of the state's investment; and
- Innovation Incentive Program,²¹ which provides a grant for alternative or renewable energy projects that create 35 jobs paying 130 percent of the statewide and area private-sector wage, and meet other criteria.

The Department of Environmental Protection and the Governor's Energy and Climate Commission (commission)²² awarded more than \$42 million in state energy grants from FY 2006-2007 through FY 2008-2009 to renewable or alternative energy projects, while the Department of Agriculture has distributed up to \$25 million in state grants appropriated by the Legislature in 2007 through the Farm-to-Fuels program. Neither program has received state

¹⁷ See the interactive U.S. map on the Department of Energy website, at http://www.afdc.energy.gov/afdc/fuels/biodiesel_laws.html. Site last visited April 7, 2011.

¹⁸ Sections 526.201-526.207, F.S. (ch. 2008-227, L.O.F.)

¹⁹ Section 288.108, F.S.

²⁰ Section 288.1088, F.S.

²¹ Section 288.1089, F.S.

²² A listing of some of the renewable and alternative energy incentives offered by Florida, and the dollar amounts expended, is available at the commission's website. See http://www.myfloridaclimate.com/climate_quick_links/florida_energy_climate_commission/state_energy_initiatives. Site last visited April 7, 2011.

funding in recent years, although the commission has administered the federal energy grants available through the American Recovery and Reinvestment Act of 2009.²³

Pursuant to s. 403.973(3)(f), F.S., an expedited permitting process is available for projects resulting in the production of biofuels cultivated on a minimum of 1,000 acres for use in a biofuel or biodiesel processing facility or a facility generating renewable energy, as defined in s. 366.91(2)(d), F.S.

III. Effect of Proposed Changes:

Section 1 amends s. 206.01, F.S., to define “renewable feedstocks” to mean crops and animal products that may be used to produce fuel or energy.

Section 2 amends s. 206.02, F.S., to eliminate the requirement for a bond for a biodiesel manufacturer whose annual production of B100 is derived at least 50 percent from renewable feedstocks originating in Florida.

Section 3 amends s. 206.874, F.S., to create an exemption from the motor fuel taxes imposed by s. 206.87, F.S., for biodiesel fuel produced by a manufacturer whose annual production of B100 is derived at least 50 percent from renewable feedstocks originating in Florida.

Section 4 amends s. 206.9925, F.S., to amend the definition of “pollutants” to exclude biodiesel manufactured in this state by a manufacturer whose annual production of B100 is derived at least 50 percent from renewable feedstocks originating in Florida. This excludes such manufacturers from having to pay excise taxes into the Coastal Protection and Inland Protection trust funds.

Section 5 amends s. 526.202, F.S., to extend legislative findings concerning the importance of requiring gasoline offered for sale to contain a percentage of ethanol to include a finding that diesel offered for sale contain a certain, but unspecified, percentage of biodiesel.

Section 6 amends s. 526.203, F.S., to incorporate definitions for “biodiesel” and “diesel fuel” by reference to other sections of the Florida Statutes.

CS/SB 1284 also amends the definition of statutory “fuel standards” to require that all diesel fuel contain at least 2 percent biodiesel (B2), effective December 31, 2011. That percentage will increase to 5 percent (B5) when the annualized capacity of biodiesel production facilities in Florida reaches 233 million gallons, which is determined to be approximately 8 percent of the annual biodiesel consumption in this state.

The bill also:

- Requires DACS to notify all dealers and wholesalers when that goal has been attained;
- Requires all dealers and wholesalers to begin selling diesel fuel that contains a minimum of 5 percent of biodiesel no later than 2 months after receiving the DACS notice;

²³ See:

http://www.myfloridaclimate.com/climate_quick_links/florida_energy_climate_commission/arra_funding_and_opportunities
Site last visited April 7, 2011.

- Requires the dealers and wholesalers to provide DACS a certified fuel analysis of any biodiesel received, upon the agency's request;
- Creates an exemption from the requirements for using renewable or alternative fuels in gasoline-powered boats; and
- Requires each terminal supplier, importer, blender, and wholesaler to submit in their monthly report to the DOR the number of gallons of diesel and biodiesel sold.

Section 7 amends s. 526.205, F.S., to make it unlawful to sell or distribute diesel which fails to meet the state's requirements for the sale of liquid fuels. Additionally, it allows any terminal supplier, importer, blender, or wholesaler until September 30, 2011, to seek an extension from DACS from compliance with the new biodiesel requirements.

Section 8 provides an effective date of July 1, 2011.

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:

CS/SB 1284 potentially raises Commerce Clause issues.

Congress is expressly permitted by the U.S. Constitution to regulate interstate commerce, by the Commerce Clause (Article I, Section 8). The powers over commerce not delegated to the federal government by the U.S. Constitution are reserved to the states.

The states retain exclusive control over intrastate commerce - commerce that begins and ends entirely within the borders of a single state. In other words, states may control that commerce which is completely internal, which is carried on between one person and another in a state, and which does not extend to or affect other states.

The power of Congress generally does not extend to the purely internal commerce of the states, and Congress cannot, under the Commerce Clause, enact a regulation which by its terms applies to intrastate commerce unless the regulated activity exerts a substantial affect on interstate commerce.²⁴

²⁴ Interstate commerce is generally trade and other business activities between those located in different states, for example traffic in goods and travel of people between states. Black's Law Dictionary (8th ed. 2004), Commerce.

In fact, Congress may control commingled interstate and intrastate operations wherever the interstate and intrastate transactions are so related that the regulation of the one involves the control of the other; otherwise Congress would be denied the exercise of its constitutional authority and the states, not the nation, would be supreme within the national field.

Additionally, states may not enact legislation nominally of local concern, that in reality is aimed at interstate commerce or by its necessary operation is a means of gaining a local benefit by burdening those outside the state.²⁵ Any state or local regulation that discriminates against out-of-state commerce by providing an advantage to in-state commerce is suspect under the Dormant Commerce Clause of the U.S. Constitution.

A state or local regulation offering economic protectionism or isolation, whether by design or in effect is ripe for challenge under the Dormant Commerce Clause. For example, the U.S. Supreme Court held in *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988), that Ohio's tax credit for ethanol producers from Ohio, or for states granting a reciprocal tax credit for Ohio-produced ethanol, was constitutionally invalid under the Dormant Commerce Clause as an unlawful burden on interstate commerce.

It could be argued that, to the extent that producers of biodiesel made with at least 50-percent, Florida-grown renewable feedstocks gain a competitive pricing and regulatory advantage over out-of-state biodiesel producers without access to Florida-grown renewable feedstocks, this bill may enact a discriminatory burden on interstate commerce. If this is so, the bill could be ripe for a Dormant Commerce Clause challenge by an affected party.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

Indeterminate. The Revenue Estimating Conference is scheduled to evaluate the fiscal impact of CS/SB 1284 at its April 11, 2011, meeting.

B. Private Sector Impact:

Manufacturers of biodiesel fuel and growers of renewable feedstock used for that purpose would realize financial savings of an indeterminate amount depending on their volume of production due to tax and bonding requirements being exempted by the bill.

C. Government Sector Impact:

DOR estimates it would incur a one-time expense of \$53,812 to implement the change in tax provisions brought about by the bill.

²⁵ Adapted from AMJUR COMMERCE § 29, AMJUR COMMERCE § 21

VI. Technical Deficiencies:

DOR has suggested that elimination of the bond requirement in s. 206.02, F.S., to assure payment of tax for each biodiesel manufacturer that is licensed as a wholesaler which processes at least 50 percent of its B100 biodiesel production from renewable feedstocks has the effect of removing a bond requirement on the manufacturer's other products, potentially exposing the state to a significant loss if the manufacturer defaults on payment of tax on products other than the exempt biodiesel.

Committee staff also suggests that the use of the phrase "B100 biodiesel production" is a limiting criterion for the various tax exemptions and other incentives in the bill, and possibly incongruent with the requirements elsewhere in the bill requiring sale of blended B2 biodiesel by the end of 2011.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Agriculture on March 21, 2011:

The CS defined "renewable feedstocks" and it deleted that section in the bill that would have exempted the cultivation of nonnative plants from compliance with certain statutory permit and bonding requirements.

- B. **Amendments:**

None.