

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 Committee on Environmental Preservation and Conservation

BILL: CS/SB 532

INTRODUCER: Environmental Preservation and Conservation Committee and Senator Galvano and others

SUBJECT: Public Notification of Pollution

DATE: March 7, 2017 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|------------|---------------|
| 1. | <u>Mitchell</u> | <u>Rogers</u> | <u>EP</u> | <u>Fav/CS</u> |
| 2. | _____ | _____ | <u>AEN</u> | _____ |
| 3. | _____ | _____ | <u>AP</u> | _____ |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 532 creates the Public Notice of Pollution Act. The bill defines a reportable pollution release as a release to the air, land, or water that is discovered by the owner or operator of an installation, is not authorized by law, and is:

- Reportable to the State Watch Office;
- Reportable to the Department of Environmental Protection (DEP) or a contracted county pursuant to rules governing storage tank systems;
- Reportable to DEP pursuant to rules governing underground injection control systems;
- A hazardous substance; or
- An extremely hazardous substance.

The owner or operator of any installation where a reportable pollution release occurs must provide a notice of the release to DEP. The notice must be submitted to DEP within 24 hours after discovery of the reportable pollution release and must contain detailed information described in the bill about the installation, the substance, and the circumstances surrounding the release. The bill also requires additional notice to DEP if a release migrates outside the property boundaries of the installation.

The bill requires DEP to publish each notice to the Internet within 24 hours after DEP receives it. DEP must also create a system for electronic mailing that allows interested parties to subscribe to and receive direct announcements of notices received by DEP. DEP must establish an email

address and an online form so that installation owners and operators are able to submit a notice of a reportable pollution release electronically. The bill provides that submitting a notice of a reportable pollution release does not constitute an admission of liability or harm. Finally, the bill provides for \$10,000 per day in civil penalties for violations of these notice requirements and authorizes DEP to adopt rules to administer these provisions.

II. Present Situation:

Public Notice

Many commercial, industrial, agricultural, and utility operations and entities are required to report various releases, discharges, or emissions as a condition of permitted operations or pursuant to law or rule. Under state law, to the extent notification is required, it typically must be made to the Department of Environmental Protection (DEP).¹ In some cases, notice to DEP is provided to the State Watch Office, an emergency communications center in the Division of Emergency Management. The State Watch Office, also known as the State Warning Point, serves as Florida's primary point of contact for a wide variety of both natural and man-made emergencies. It serves as the contact point in Florida for communications between local governments and emergency agencies of both the state and federal governments and also provides emergency information to newspapers and radio and television stations.² Examples of notification to the State Watch Office include DEP rule requirements for notification of petroleum discharges,³ wastewater discharges,⁴ and releases of hazardous substances,⁵ and a DEP statutory and rule requirement for notification of a discharge of drycleaning solvents.⁶ Requirements to notify the State Watch Office may also appear in DEP orders, permits, or variances, if required or authorized.

Notifications directly to DEP or a county under contract with DEP to perform compliance verification activities are required for certain releases or discharges of pollutants, including petroleum products, pesticides, ammonia, chlorine, hazardous substances, and specified mineral acids from underground or aboveground storage tanks.⁷ Notification is also required to be made to DEP of any noncompliance with an underground injection control permit that may endanger health or the environment.⁸ Requirements for notifications of the release of hazardous substances in DEP rule define "hazardous substance" and "extremely hazardous substance" by referencing definitions in federal regulations.⁹ Those federal regulations contain extensive lists of substances defined as hazardous substances and extremely hazardous substances.¹⁰ In certain circumstances,

¹ See, e.g., ss. 377.371(2), 376.30702, 403.862(1)(b), and 403.93345(5), F.S.; Fla. Admin. Code R. 62S-6.022.

² Division of Emergency Management, *Florida State Watch Office*, <http://www.floridadisaster.org/Response/Operations/swp.htm> (last visited February 28, 2017); see, e.g., Fla. Admin. Code R. 27P-14.011.

³ Fla. Admin. Code R. 62-780.210(1) and Fla. Admin. Code R. 62S-6.022.

⁴ Fla. Admin. Code R. 62-620.610 and Fla. Admin. Code R. 62-604.550

⁵ Fla. Admin. Code R. 62-150.300.

⁶ Section 376.3078(9)(c) and Fla Admin. Code R. 62-780.210(2).

⁷ Sections 376.303 and 376.322, F.S., Fla. Admin. Code R. 62-761.440, Fla. Admin. Code R. 62-762.441.

⁸ Fla. Admin. Code R. 62-528.307(1)(x).

⁹ Fla. Admin. Code R. 62-150.200 and Fla. Admin. Code R. 62-150.300.

¹⁰ 40 C.F.R. s. 302.4 and 40 C.F.R. part 355, Appendices A and B.

statutes and rules require the owner or operator of an installation to directly notify a local government or the public of actions taken or conditions or occurrences at installations.¹¹

At present, there is no comprehensive notice requirement that all releases of substances be reported under state law. There is also no requirement in current law that all such reporting be accessible to the public.

Public Notice Rule

In response to recent pollution incidents, DEP initiated rulemaking in 2016 to establish a requirement for notification of releases of pollution from installations throughout the state. On September 27, 2016, DEP published an emergency rule. The following day, DEP published a notice of proposed rule with the same language. The emergency rule was in effect during the development of the proposed rule. The proposed rule would have:

- Required owners and operators of installations¹² to provide a notification of pollution within 24 hours of the incident resulting in the pollution or the discovery of the pollution to:
 - DEP;
 - Local government officials; and
 - The general public.¹³ Notification to the general public under the proposed rule would have required an owner or operator to provide notice of the pollution to local broadcast television affiliates and a newspaper of general circulation in the area of the contamination.
- Required further notifications by owners and operators of installations on the status of the pollution.
- Provided that failure to give a notification of pollution subjected an owner or operator to statutory penalties of up to \$10,000 per day.¹⁴

Following publication of the proposed rule, DEP received three written proposals for a lower cost regulatory alternative (LCRA) to the rule. DEP prepared a statement of estimated regulatory costs (SERC) for the rule in response to the proposed LCRAs, as required by s. 120.541(1), F.S.¹⁵ In the SERC, DEP estimated regulatory costs of \$182,000 per year, a calculation based on the number of notifications made under the newly-minted emergency rule. The LCRAs proposed that the rule be altered to require DEP to provide notification to local government officials and the general public and that notification requirements under the rule be loosened. DEP rejected the proposals because it determined that installations in compliance with law would have no costs under the rule and other proposals were inconsistent with the intent of the rule.¹⁶

¹¹ See, e.g., s. 376.707(11), F.S., Fla. Admin. Code R. 62-550.828, Fla. Admin. Code R. 62-560.410(1)(a), Fla. Admin. Code R. 62-761.405(3) and (4), Fla. Admin. Code R. 62-761.430, Fla. Admin. Code R. 62-761.440, Fla. Admin. Code R. 62-762.411, Fla. Admin. Code R. 62-762.431, Fla. Admin. Code R. 62-762.441, Fla. Admin. Code R. 62-560.400, Fla. Admin. Code R. 62-560.410, Fla. Admin. Code R. 62-560.430.

¹² An installation is defined in s. 403.031(4), F.S., as “any structure, equipment, or facility, or appurtenances thereto, or operation which may emit air or water contaminants in quantities prohibited by rules of the department.”

¹³ Proposed Rule 62-4.161, Florida Administrative Register Vol. 42/No. 189.

¹⁴ *Id.*

¹⁵ Statement of Estimated Regulatory Costs, Proposed Rule 62-4.161, available at <http://dep.state.fl.us/pollutionnotice/SERC%20for%20Rule%2062-4.161%20w%20attachments.pdf>.

¹⁶ *Id.*

A notice of change for the proposed rule was published on November 15, 2016. In the change notice, DEP altered the proposed rule by expanding and clarifying the operation of the notice requirement. DEP added the following:

- An intent section.
- A reportable release as the trigger for the requirement to provide notice; reportable release defined in the rule as a release of a substance not authorized by law which is discovered by an owner or operator after the effective date of the rule and which is:
 - Reportable to the State Watch Office or to DEP or a county administering a DEP program under certain rules; or
 - A hazardous or extremely hazardous substance at or above quantities established in certain federal regulations.
- Specific information that must be contained in the notice and the manner the notice must be submitted to various parties.
- Language providing that as long as one party provides notice in compliance with the rule, then other parties are not required to provide notice for the same reportable release.¹⁷

Rule Challenge

On November 18, 2016, several commercial associations filed an administrative challenge to the proposed rule in *Associated Industries of Florida, Inc. et al. v. Department of Environmental Protection*.¹⁸ The petitioners argued that the rule violated statutory requirements and was invalid on four grounds:

- DEP materially failed to follow the applicable rulemaking procedures and requirements;
- DEP exceeded its grant of rulemaking authority;
- The proposed rule enlarges, modifies, or contravenes the specific provisions of law implemented; and
- The proposed rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.¹⁹

On December 30, 2016, the administrative law judge (ALJ) entered a final order, holding that DEP lacked the rulemaking authority for the proposed rule. The final order concluded that the authorities cited by DEP as providing it with the statutory authority to adopt the rule are general grants of authority and not specific enough to authorize DEP to require that owners and operators of installations provide notices to local governments, the general public, and broadcast media.²⁰ The ALJ also found that the proposed rule enlarges the provisions of law implemented because the statutory provisions cited by DEP did not contain specific language regarding reporting requirements for the release of contaminants. The ALJ concluded that the proposed rule was an invalid exercise of delegated legislative authority, affirming the petitioners' grounds for

¹⁷ Notice of Change for Proposed Rule 62-4.161, Florida Administrative Register Vol. 42/No. 222.

¹⁸ Case No. 16-6889RP (Fla. DOAH 2016).

¹⁹ Section 120.52(8), F.S.

²⁰ Final Order, *Associated Industries of Florida, Inc. et al. v. Department of Environmental Protection*, Case No. 16-6889RP (Fla. DOAH 2016), 13, 16, available at <https://www.doah.state.fl.us/ROS/2016/16006889.pdf>.

challenging the rule.²¹ The ALJ did not evaluate the issue of whether the LCRAAs were properly rejected by DEP because he deemed the rule invalid on other grounds.²²

DEP has not appealed the final order. The rule, therefore, is invalid because there is insufficient statutory authority for DEP to adopt this notice of pollution requirement by rule. Immediately following the invalidation of DEP's proposed rule, the department began providing links on its website regarding notices of releases it receives from permitted and non-permitted facilities throughout the state.²³ DEP continues to maintain an email list for those who want to subscribe to notices of pollution releases.²⁴ Upon its receipt of a notice of pollution from an installation, DEP sends it to email list subscribers, local governments, and media outlets,²⁵ fulfilling the function the proposed rule had required of owners and operators of installations for the subset of all releases that are required to be reported to DEP under current law.

III. Effect of Proposed Changes:

CS/SB 532 creates the Public Notice of Pollution Act.

The bill sets forth goals and findings related to notifying the public about reportable releases. It defines a reportable pollution release as a release to the air, land, or water that is discovered by the owner or operator of an installation, is not authorized by law, and is:

- Reportable to the State Watch Office pursuant to DEP rule, permit, order, or variance;
- Reportable to DEP or a contracted county pursuant to rules governing storage tank systems;
- Reportable to DEP pursuant to rules requiring notice for noncompliance from underground injection control systems where such noncompliance:
 - May endanger public health or the environment; and
 - Has the potential to contaminate potable water wells outside the property boundaries of the installation;
- A hazardous substance as defined in statute at or above quantities established in Federal Regulations; or
- An extremely hazardous substance as defined in Federal Regulations.

The bill requires the owner or operator of an installation at which a reportable pollution release occurs to provide a notice to DEP within 24 hours after discovery of a reportable pollution release. The notice must include:

- The name and address of the installation where the reportable pollution release occurred.
- The name and title of the reporting person and the nature of his or her relationship to the installation.
- The identification number for any active DEP permits, variances, registrations, or orders that are relevant to the reportable pollution release.
- The name and telephone number of a contact person for further information.

²¹ *Id.* at 16.

²² *Id.* at 18.

²³ DEP, *Notice of an Incident or Discovery of Pollution*, <http://dep.state.fl.us/pollutionnotice/> (last visited March 5, 2017).

²⁴ DEP, *Notice of an Incident or Discovery of Pollution*, <http://lists.dep.state.fl.us/mailman/listinfo/pollution.notice> (last visited March 5, 2017).

²⁵ DEP, *Notice of an Incident or Discovery of Pollution*, <http://lists.dep.state.fl.us/pipermail/pollution.notice/> (last visited March 5, 2017).

- The substance released.
- The estimated quantity of the substance released and, if applicable, the estimated quantity that has since been recovered.
- The cause of the release.
- The source of the release.
- The location of the release.
- The date, time, and duration of the release.
- The medium into which the substance was released, such as, but not limited to, the outdoor air, land, groundwater, aquifer, or specified waters or wetlands.
- Whether the released substance has migrated to land or waters of the state outside the property boundaries of the installation and the location of such migration.
- To the extent available, toxicological information associated with the substance released as specified on a safety data sheet or comparable source published by the Occupational Safety and Health Administration or the Centers for Disease Control and Prevention, or their successor agencies.
- Other information to assist in the protection of the public health, safety, and welfare, at the discretion of the owner or operator.

The bill also requires that an additional notice be provided to DEP if, after submitting the initial notice, the owner or operator determines that a release has migrated outside the property boundaries of the installation. Such additional notice must be given within 24 hours of discovery of the migration and must provide all of the information required in an initial notice and specify the extent of the migration.

A notification of a reportable pollution release made by a party in accordance with statutory requirements constitutes compliance on behalf of all parties subject to the notice requirement for that reportable pollution release. However, if the notification is not made in accordance with statutory requirements, DEP may pursue enforcement against all parties subject to the notice requirement. After providing a notice of a reportable pollution release, an installation owner or operator may submit a letter to DEP documenting additional information if an amendment to the notice is warranted or the owner or operator has determined that a reportable pollution release did not, in fact, occur.

DEP must publish, on a website accessible to the public, all notices submitted by an owner or operator within 24 hours of receipt by the department. DEP must also create an electronic mailing list for notices and allow the public, including local governments, health departments, news media, and other interested persons, to subscribe to and receive periodic direct announcements of any reportable pollution release notices submitted. DEP must establish regional electronic mailing lists, such as by county or district boundaries, to allow subscribers to determine the notices they wish to receive by geographic area. DEP must also establish an e-mail address and an online form as options for owners and operators to provide notices of reportable pollution release.

The bill provides that a reportable pollution release notice provided by an owner or operator to DEP does not constitute an admission of liability or harm. It also provides that the owner or operator of an installation is subject to civil penalties of up to \$10,000 per day for each day the

owner or operator is in violation of the requirement to provide notification of a reportable pollution release. The bill authorizes DEP to adopt rules to administer these provisions.

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The county/municipality mandates provision of Art. VII, section 18, of the Florida Constitution may apply because this bill may require certain local governments to spend money or take action that requires the expenditures of money. If so, the insignificant fiscal impact exemption to the mandates provision likely applies. Costs to local governments for gathering and reporting information regarding reportable pollution releases within 24 hours of discovery may have an insignificant fiscal impact.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Owners and operators of installations which use, produce, or contain substances listed by DEP will likely incur some costs for gathering and reporting information regarding reportable pollution releases within 24 hours of discovery.

C. Government Sector Impact:

Installations owned or operated by governmental entities, including local governments, will likely incur some costs for gathering and reporting information regarding reportable pollution releases within 24 hours of discovery.

DEP also will likely incur some costs in promulgating rules to administer the provisions of the bill and in developing the website and electronic mailing lists required by the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends section 403.121 of the Florida Statutes.

This bill creates sections 403.076, 403.077, and 403.078 of the Florida Statutes.

IX. Additional Information:

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

CS by Environmental Preservation and Conservation on March 7, 2017:

- Makes a technical change to add land to components of nature of which DEP has the authority and duty to control and prohibit pollution.
- Changes the definition of releases that must be reported by eliminating the requirement that DEP determine the releases by establishing and publishing a list of substances that present an immediate and substantial risk to the public health, safety, or welfare at or above specified quantities determined by DEP. Instead, the CS provides that a reportable pollution release is a release to the air, land, or water that is discovered by the owner or operator of an installation, is not authorized by law, and is:
 - Reportable to the State Watch Office;
 - Reportable to DEP or a contracted county pursuant to rules governing storage tank systems;
 - Reportable to DEP pursuant to rules governing underground injection control systems;
 - A hazardous substance as defined in statute at or above quantities established in Federal Regulations; or
 - An extremely hazardous substance as defined in Federal Regulations.
- Requires additional notice to DEP if, after providing the initial notice, the owner or operator determines that a release has migrated outside the property boundaries of the installation. Such additional notice must be given within 24 hours of discovery of the migration and must provide all of the information required in an initial notice and specify the extent of the migration.

- B. **Amendments:**

None.