

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/CS/HB 1001 Contamination

SPONSOR(S): State Affairs Committee, Ways & Means Committee, Agriculture & Natural Resources Subcommittee, Stone

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1350

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Agriculture & Natural Resources Subcommittee	12 Y, 0 N, As CS	Melkun	Moore
2) Ways & Means Committee	17 Y, 0 N, As CS	Curry	Langston
3) State Affairs Committee	22 Y, 0 N, As CS	Melkun	Williamson

SUMMARY ANALYSIS

A brownfield is a property of which the expansion, redevelopment, or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. The Brownfields Program within the Department of Environmental Protection (DEP) created a process for designating brownfield areas as well as environmental contamination cleanup criteria, eligibility criteria, and liability protections that apply to brownfields in the state. The program also provides incentives, such as tax credits, to redevelop abandoned or underused real property, which was complicated by real or perceived environmental contamination.

Current law provides that a person can bring a cause of action in court for all damages resulting from specified discharges or other conditions of pollution if the discharge was not authorized pursuant to DEP regulations.

The bill removes the requirement that a claim for a tax credit on an additional 25 percent of the total rehabilitation costs for a brownfield site must be made in the final year of cleanup. Instead, the bill specifies that the tax credit may only be claimed if DEP has approved the applicant's annual site rehabilitation applications. The bill further requires the applicant to submit the claim within two years of receiving the "No Further Action" order for the site.

The bill requires DEP to inform tax credit applicants of their eligibility status and the amount of the tax credit due by June 1 of each year, rather than May 1.

The bill revises the conditions that, when met, require a local government to designate a site as a brownfield area.

The bill specifies that liability protections for brownfield sites are considered defenses against causes of action for all damages resulting from a discharge or certain other conditions of pollution. The bill further specifies that liability protections apply to any subsequent property owner of the brownfield site if such owner maintains compliance, as applicable, with any institutional controls or engineering controls required for site rehabilitation.

For a cause of action brought for damages resulting from a discharge or other condition of pollution, the bill specifies that such damages may include damages to real or personal property directly resulting from the pollution rather than all damages resulting from the pollution.

The bill may have an indeterminate fiscal impact on state and local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Brownfields

A brownfield is a property of which the expansion, redevelopment, or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.¹ Unsafe levels of environmental contamination on a brownfield may result from past or current industrial, commercial, residential, agricultural, or recreational uses and practices. Contaminants may be found in soil, water or air.²

In 1995, the United States Environmental Protection Agency (EPA) initiated a program to empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and reuse brownfields.³ Under the program, states and tribes use a risk-based approach to determine the required level of cleanup necessary at brownfield properties. Cleaning up contaminants on a brownfield reduces or eliminates potential health risks to residents, workers, pets, and the surrounding environment. The degree of cleanup necessary depends on the specific contaminants found at the brownfield, the extent of contamination, and how the property will be reused.⁴

In 1997, the Legislature enacted the Brownfields Redevelopment Act⁵ (act) to create a state program within the Department of Environmental Protection (DEP) for designating brownfield areas as well as environmental contamination cleanup criteria, eligibility criteria, and liability protections that apply to brownfields in the state.⁶ The program also provides incentives for private sector entities to redevelop abandoned or underused real property, which may be complicated by real or perceived environmental contamination.⁷

Brownfield Designations

A brownfield area is a contiguous area of one or more brownfield sites,⁸ portions of which may not be contaminated, that has been designated by local government resolution. Brownfield areas may include all or portions of community redevelopment areas, enterprise zones, empowerment zones, other similarly designated economically deprived communities and areas, and EPA-designated brownfield pilot projects.⁹

The designation of a brownfield area may be initiated by a local government to encourage redevelopment of an area of specific interest to the community or by a person with a plan to rehabilitate and redevelop a brownfield site.¹⁰ To designate a brownfield area, a local government must pass a local resolution specifying the exact area to be designated. Once a brownfield area has been

¹ EPA, *Overview of EPA's Brownfields Program*, available at <https://www.epa.gov/brownfields/overview-epas-brownfields-program> (last visited Jan. 27, 2020).

² EPA, *Cleaning Up Brownfields Sites*, available at https://www.epa.gov/sites/production/files/2019-10/documents/cleaning_up_brownfield_sites.pdf (last visited Jan. 28, 2020).

³ EPA, *Brownfields Community Reinvestment Fact Sheet*, available at <https://www.epa.gov/brownfields/brownfields-community-reinvestment-act-cra-fact-sheet> (last visited Jan. 27, 2020).

⁴ EPA, *Cleaning Up Brownfields Sites*, available at https://www.epa.gov/sites/production/files/2019-10/documents/cleaning_up_brownfield_sites.pdf (last visited Jan. 28, 2020).

⁵ Ch. 97-277, L.O.F.; codified at ss. 376.77 – 376.86, F.S., are known as the “Brownfields Redevelopment Act.”

⁶ The act authorizes various financial, regulatory, and technical assistance to persons and businesses involved in the redevelopment of brownfields, including the Brownfield Areas Loan Guarantee Program under s. 376.86, F.S. See ss. 376.78 – 376.84, F.S.

⁷ Section 376.78, F.S.

⁸ Section 376.79(4), F.S., defines “brownfield sites” as real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination.

⁹ Section 376.79(4), F.S.

¹⁰ Section 376.80, F.S.

designated, the local government must notify DEP and attach a map that clearly identifies the parcels proposed for designation. If a property owner within the proposed area requests in writing to have his or her property removed from the proposed designation, then the local government must grant the request.¹¹

If a local government proposes to designate a brownfield area that is outside a community redevelopment area, enterprise zone, empowerment zone, closed military base, or designated brownfield pilot project area, the local government must provide notice, adopt the resolution, and conduct public hearings.¹² At least one of the required public hearings must be conducted as close as reasonably practicable to the area proposed for designation to provide an opportunity for the public to provide input as to the size of the area, the objectives for rehabilitation, job opportunities and economic developments anticipated, neighborhood residents' considerations, and other local issues.¹³

When determining the area to be designated, the local government must consider whether: the brownfield area warrants economic development and has a reasonable potential for such activities; the proposed area to be designated represents a reasonable focused approach and is not overly large in geographic coverage; the area has potential to interest the private sector in participating in rehabilitation; and the area contains sites or parts of sites suitable for limited recreational open space, cultural or historical preservation purposes.¹⁴

A local government must designate a site as a brownfield area when all of the following requirements are met:

- The person who owns or controls a potential brownfield site is requesting the designation and has agreed to rehabilitate the site;
- Redevelopment and rehabilitation of the proposed brownfield site will result in economic productivity of the area and will create at least five new permanent jobs at the brownfield site;¹⁵
- Redevelopment of the proposed brownfield site is consistent with the local comprehensive plan and is a permissible use under the applicable local land development regulations;
- Notice has been provided to neighbors and nearby residents of the proposed area to be designated, and the person proposing the area for designation has provided the neighbors and residents an opportunity to comment and make suggestions about rehabilitation; and
- The person proposing the area for designation has provided reasonable assurance that there are sufficient financial resources to implement and complete the rehabilitation agreement and redevelopment of the brownfield area.¹⁶

Eligibility Criteria

A person who has not caused or contributed to the contamination of a brownfield site on or after July 1, 1997, is eligible to participate in the brownfield program.¹⁷ However, areas that are subject to an ongoing formal judicial or administrative enforcement or corrective action pursuant to federal authority or have obtained or are required to obtain a hazardous waste operation, storage, or disposal facility permit are not eligible.¹⁸ Such areas may become eligible for participation if:

- The proposed site is currently idle or underutilized as a result of the contamination, and participation in the program would immediately result in increased economic productivity at the site, including the creation of 10 new permanent jobs; and
- The person is complying in good faith with the terms of an existing consent order or DEP-approved corrective action plan.¹⁹

¹¹ Section 376.80(1), F.S.

¹² Section 376.80(2)(a), F.S.

¹³ *Id.*

¹⁴ Sections 376.80(2)(a)1.-4., F.S.

¹⁵ The full-time positions must not be associated with the implementation of the brownfield site rehabilitation agreement or the redevelopment project's demolition or construction activities pursuant to the redevelopment of the proposed brownfield site or area.

¹⁶ Section 376.80(2)(b) 1.-5., F.S.

¹⁷ Section 376.82(1), F.S.

¹⁸ Section 376.82(1)(a), F.S.

¹⁹ Section 376.82(1)(b), F.S.

Brownfield Site Rehabilitation Agreements

Any person responsible for brownfield site rehabilitation must enter into a brownfield site rehabilitation agreement (BSRA) with DEP or an approved local pollution control program if actual contamination exists at the brownfield site.²⁰ BSRAs provide DEP and the public assurance that site rehabilitation will be conducted in accordance with current law and provides liability protection for the responsible person.²¹ BSRAs must include:

- A brownfield site rehabilitation schedule;
- A commitment to conduct site rehabilitation activities under the observation of professional engineers or geologists who are registered in accordance with applicable law;
- A commitment to conduct site rehabilitation in accordance with DEP quality assurance rules;
- A commitment to conduct site rehabilitation consistent with the brownfield site contamination cleanup criteria;
- Timeframes for DEP's review of technical reports and plans submitted in accordance with the BSRA;
- A commitment to secure site access for DEP or the approved local pollution control program to all brownfield sites within the eligible brownfield area for activities associated with site rehabilitation;
- A commitment to consider appropriate pollution prevention measures and to implement those that are reasonable and cost-effective, taking into account the ultimate use or uses of the brownfield site;
- Certification that the person responsible for brownfield site rehabilitation has consulted with the local government about the proposed redevelopment of the brownfield site, that the local government approves the proposed redevelopment, and that the proposed redevelopment complies with applicable laws and requirements for such redevelopment; and
- Any other provisions that the person responsible for brownfield site rehabilitation and DEP agree upon.²²

A person, including his or her successors and assigns, who executes, implements, and complies with a BSRA is relieved of further liability for remediation of the site or sites to the state and to third parties; liability in contribution to any other party who has or may incur cleanup liability for the contaminated site or sites; and liability for claims of property damages.²³ Until a person successfully completes a BSRA, liability protection may be revoked.²⁴ In an effort to secure federal liability protection for those persons willing to undertake remediation responsibility at a brownfield site, DEP must attempt to negotiate an agreement with the EPA to forego federal enforcement of corrective action authority.²⁵

Since the program's inception in 1997, Florida has amassed 481 designated brownfield areas in 151 communities across the state, averaging 22 newly designated brownfield areas each year.²⁶ From those designations, 137 contaminated sites have been cleaned up, approximately 66,600 confirmed and projected direct and indirect jobs have been created, and \$2.86 billion in capital investment is projected in designated brownfield areas.²⁷

Brownfields Tax Credit

In 1998, the Legislature granted DEP the authority to issue tax credits as an additional incentive to encourage site rehabilitation in brownfield areas and to encourage voluntary cleanup of certain other types of contaminated sites.²⁸ This corporate income tax credit may be claimed in the amount of 50

²⁰ Section 376.80(5), F.S. Section 379.79(12), F.S., defines "local pollution control program" as a local pollution control program that has received delegated authority from DEP to administer the brownfield program within their jurisdictions.

²¹ DEP, *Brownfield Sites*, available at <https://geodata.dep.state.fl.us/datasets/brownfield-sites> (last visited Jan. 28, 2020),

²² Section 376.80(5), F.S.

²³ Sections 376.82(2)(a) and 376.82(2)(d), F.S.

²⁴ Section 376.80(8), F.S.

²⁵ Section 376.82(2)(g), F.S.

²⁶ DEP, *Florida Brownfields Redevelopment Program Annual Report* (Aug. 2019), 4, available at <https://floridadep.gov/sites/default/files/Florida%20Brownfields%20Annual%20Report%20August%2019%202019.pdf> (last visited Jan. 29, 2020).

²⁷ *Id.* at 1.

²⁸ Chapter 98-189, Laws of Fla.

percent of the costs of voluntary cleanup activity that is integral to site rehabilitation at a brownfield site in a designated brownfield area.²⁹

Eligible tax credit applicants may receive up to \$500,000 per site per year in tax credits.³⁰ Due to concern that some participants in a voluntary cleanup might only conduct enough work to eliminate or minimize their exposure to third party lawsuits, current law also provides a completion incentive in the form of an additional 25 percent supplemental tax credit, capped at \$500,000, for those applicants that have completed site rehabilitation and have received a “No Further Action” order from DEP.³¹

In order to encourage the construction of affordable housing, applicants are allowed a one-time application for an additional 25 percent of the total site rehabilitation costs, up to \$500,000, for brownfield sites at which the land use is restricted to affordable housing.³² Applicants may also submit a one-time application claiming 50 percent of the costs, up to \$500,000, for the removal, transportation, and disposal of solid waste at a brownfield site.³³ A solid waste disposal area is defined as a landfill, dump, or other area where solid waste has been disposed.³⁴ To qualify for the credit, the applicant must submit an affidavit to DEP or the local pollution control program that states the brownfield site was never operated as a permitted solid waste disposal area and was never operated for monetary compensation.³⁵

Site rehabilitation tax credit applications must be submitted by January 31 of each year and DEP must, by May 1 of each year, inform each tax credit applicant of their eligibility status and the amount of any tax credit due.³⁶ The total amount of tax credits for all sites that may be granted by DEP is capped at \$10 million annually.³⁷ In the event that approved tax credit applications exceed the \$10 million annual authorization, remaining applications roll over into the next fiscal year to receive tax credits in first come, first served order from the next year’s authorization.³⁸

Between 2008 and 2013, the approved tax credits exceeded the available authorization. As a result, the Legislature increased the annual tax credit authorization from the initial amount of \$2 million to \$5 million in 2011, and then to \$10 million in 2017. Additionally, there have been multiple one-time, supplemental authorizations to address the growing backlog of approved tax credits.³⁹ As of July 1, 2018, there was approximately \$21.6 million in approved tax credits, with \$3.2 million carried over as backlog. DEP received 135 voluntary cleanup tax credit applications for the 2018 calendar year with \$14.6 million allocated for tax credits for 122 brownfield sites.⁴⁰

Affordable Housing

Affordable housing is generally defined in relation to the annual area median household income adjusted for family size. Section 420.0004, F.S., defines the term “affordable” to mean that monthly rents or monthly mortgage payments including taxes, insurance, and utilities do not exceed 30 percent of the amount that represents the percentage of the median adjusted gross annual income for:

²⁹ Section 220.1845(2)(a), F.S.

³⁰ Sections 220.1845(2)(b) and 376.30781(3)(b), F.S.

³¹ Sections 220.1845(2)(h) and 376.30781(3)(c), F.S.

³² Sections 220.1845(2)(i) and 376.30781(3)(d), F.S.

³³ Sections 220.1845(2)(j) and 376.30781(3)(e), F.S.

³⁴ Section 376.30781(3)(e)1., F.S.

³⁵ Section 376.30781(3)(e), F.S.

³⁶ Sections 220.1845(1) and 376.30781(9), F.S.

³⁷ Section 220.1845(2)(f), F.S.

³⁸ DEP, Voluntary Cleanup Tax Credit, available at <https://floridadep.gov/waste/waste-cleanup/content/voluntary-cleanup-tax-credit> (last visited Jan. 29, 2020).

³⁹ DEP, *Florida Brownfields Redevelopment Program Annual Report* (Aug. 2019), 1, available at <https://floridadep.gov/sites/default/files/Florida%20Brownfields%20Annual%20Report%20August%202019%202019.pdf> (last visited Jan. 29, 2020).

⁴⁰ *Id.* at 7.

- Extremely-low-income households, i.e., total annual household income does not exceed 30 percent of the median annual adjusted gross income for households within the state;⁴¹
- Very-low-income households, i.e., total annual gross household income does not exceed 50 percent of the median annual income within the state or the metropolitan statistical area, whichever is greater;⁴²
- Low-income households, i.e., total annual gross household income does not exceed 80 percent of the median annual income within the state or the area, whichever is greater;⁴³
- Moderate-income households, i.e., total annual gross household income does not exceed 120 percent of the median annual income within the state or the area, whichever is greater.⁴⁴

Damages for Pollutant Discharges

Section 376.313, F.S., provides that a person can bring a cause of action in court for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.317, F.S. (relating to various types of pollution, such as discharges caused by petroleum storage, drycleaning facilities, or wholesale supply facilities), if the discharge was not authorized pursuant to DEP regulations.

To state a claim under s. 376.313, F.S., a person is only required to allege damages and that a prohibited discharge or other pollutive condition occurred.⁴⁵ In many cases, it is not necessary for such person to allege that negligence has occurred. In the case of a discharge of petroleum, petroleum products, or drycleaning solvents, the owner of the facility is liable for any discharges unless the owner can establish that he or she acquired title to property contaminated by the activities of a previous owner or operator or other third party, that he or she did not cause or contribute to the discharge, and that he or she did not know of the polluting condition at the time the owner acquired title.⁴⁶

Effect of the Bill

The bill removes the requirement that a claim for a tax credit on an additional 25 percent of the total rehabilitation costs for a brownfield site must be made in the final year of cleanup. Instead, the bill specifies that the tax credit may only be claimed if DEP has approved the applicant's annual site rehabilitation applications. The bill further requires the applicant to submit the claim within two years of receiving the "No Further Action" order for the site.

The bill removes the requirement for an applicant claiming the rehabilitation cost tax credit for costs for solid waste removal to submit an affidavit that states the brownfield site was never operated for monetary compensation and instead requires the applicant to meet the eligibility criteria for participation in the brownfields program.

The bill requires DEP to inform tax credit applicants of their eligibility status and the amount of the tax credit due by June 1 of each year, rather than May 1.

The bill specifies that liability protections for brownfield sites are considered defenses against causes of action for all damages resulting from certain discharges or other conditions of pollution mitigation and prevention.

The bill removes the requirement that the identification of a person responsible for brownfield site rehabilitation entitles the identified person to negotiate a BSRA.

The bill revises the conditions that, when met, require a local government to designate a site as a brownfield area. Specifically, the bill states the job creation requirement does not apply to the

⁴¹ Section 420.0004(9), F.S. Florida Housing Finance Corporation may adjust this amount annually by rule to provide that in lower income counties, extremely low income may exceed 30 percent of area median income and that in higher income counties, extremely low income may be less than 30 percent of area median income.

⁴² Section 420.0004(17), F.S.

⁴³ Section 420.0004(11), F.S.

⁴⁴ Section 420.0004(12), F.S.

⁴⁵ Section 376.313(3), F.S.

⁴⁶ Section 376.308(1)(c), F.S.

rehabilitation and redevelopment of a brownfield site that will create recreational areas, conservation areas, or parks; be maintained for cultural or historical preservation purposes; or provide affordable housing.

The bill specifies that liability protections apply to any person who executes and implements to successful completion a BSRA, his or her successors and assigns, and any subsequent property owner of the brownfield site if such owner maintains compliance, as applicable, with any institutional controls or engineering controls required for site rehabilitation.

For a cause of action brought under s. 376.313, F.S., for damages resulting from a discharge or other condition of pollution, the bill specifies that such damages may include damages to real or personal property directly resulting from the pollution rather than *all* damages resulting from the pollution.

B. SECTION DIRECTORY:

Section 1. Amends s. 376.30781, F.S., relating to tax credits for brownfields.

Section 2. Amends s. 376.313, F.S., relating to nonexclusiveness of remedies and individual cause of action for damages.

Section 3. Amends s. 376.78, F.S., relating to legislative intent.

Section 4. Amends s. 376.80, F.S., relating to the brownfield program administration process.

Section 5. Amends s. 376.82, F.S., relating to eligibility criteria and liability protection.

Section 6. Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate fiscal impact on DEP for the costs to implement the provisions of the bill; however, such costs would likely be absorbed through existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate fiscal impact on local government pollution control programs for the costs to implement the provisions of the bill; however, such costs would likely be absorbed through existing resources.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate positive fiscal impact on the members of the private sector that will become eligible for the tax credit under the provisions of the bill.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2020, the Agriculture & Natural Resources Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment removed the sales tax exemption for building materials used to construct affordable housing or mixed-use units in a designated brownfield area.

On February 11, 2020, the Ways & Means Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment returned the definition of the term "solid waste disposal area" to current law.

On March 2, 2020, the State Affairs Committee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS added a provision to the bill to specify that, for a cause of action for damages resulting from a discharge or other condition of pollution, such damages may only include real or personal property damages directly resulting from the pollution.

This analysis is drafted to the committee substitute as approved by the State Affairs Committee.