

Committee Substitute for Senate Bill No. 956

An act relating to liability under the drycleaning solvent cleanup program; amending s. 376.301, F.S.; defining the term “nearby real property owner” with respect to protection and restoration of lands and surface and ground waters; amending s. 376.3078, F.S.; providing additional legislative findings with respect to drycleaning facility restoration; exempting certain real property owners and nearby real property owners from liability for damages arising from contamination by drycleaning solvents in certain circumstances; providing for retroactive application; amending s. 376.30781, F.S.; conforming a cross-reference; amending s. 376.3079, F.S.; redefining the term “third-party liability” with respect to third-party liability insurance; amending s. 376.308, F.S.; revising applicability of provisions that set out liabilities and defenses of facilities; amending s. 376.313, F.S.; revising provisions that provide nonexclusiveness of remedies and individual causes of action; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (47) is added to section 376.301, Florida Statutes, to read:

376.301 Definitions of terms used in ss. 376.30-376.319, 376.70, and 376.75.—When used in ss. 376.30-376.319, 376.70, and 376.75, unless the context clearly requires otherwise, the term:

(47) “Nearby real property owner” means 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 facility or wholesale supply facility eligible for site rehabilitation under s. 376.3078(3) or from a drycleaning facility or wholesale supply facility that is approved by the department for voluntary cleanup under s. 376.3078(11).

Section 2. Subsections (1), (3), and (11) of section 376.3078, Florida Statutes, are amended to read:

376.3078 Drycleaning facility restoration; funds; uses; liability; recovery of expenditures.—

(1) FINDINGS.—In addition to the legislative findings set forth in s. 376.30, the Legislature finds and declares that:

(a) Significant quantities of drycleaning solvents have been discharged in the past at drycleaning facilities as part of the normal operation of these facilities.

(b) Discharges of drycleaning solvents at such drycleaning facilities have occurred and are occurring, and pose a significant threat to the quality of the groundwaters and inland surface waters of this state.

(c) Where contamination of the groundwater or surface water has occurred, remedial measures have often been delayed for long periods while determinations as to liability and the extent of liability are made, and such delays result in the continuation and intensification of the threat to the public health, safety, and welfare; in greater damage to the environment; and in significantly higher costs to contain and remove the contamination.

(d) Adequate financial resources must be readily available to provide for the expeditious supply of safe and reliable alternative sources of potable water to affected persons and to provide a means for investigation and rehabilitation of contaminated sites without delay.

(e) It is the intent of the Legislature to encourage real property owners to undertake the voluntary cleanup of property contaminated with drycleaning solvents and that the immunity provisions of this section and all other available defenses be construed in favor of real property owners.

(f) Strong public interests are served by subsections (3) and (11). These include improving the marketability and use of, and the ability to borrow funds as to, property contaminated by drycleaning solvents and encouraging the voluntary remediation of contaminated sites. The extent to which claims or rights are affected by subsections (3) and (11) is offset by the remedies created in this section. The limitations imposed by these subsections on such claims or rights are reasonable when balanced against the public interests served. The claims or rights affected by subsections (3) and (11) are speculative, and these subsections are intended to prevent judicial interpretations allowing windfall awards that thwart the public-interest provisions of this section.

(3) REHABILITATION LIABILITY.—

(a) In accordance with the eligibility provisions of this section, ~~a~~ a real property owner, nearby real property owner, or ~~a~~ person who owns or operates, or who otherwise could be liable as a result of the operation of, a drycleaning facility or a wholesale supply facility is not liable for or shall 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 of environmental contamination resulting from the discharge of drycleaning solvents.

Subject to the delays that may occur as a result of the prioritization of sites under this section for any qualified site, costs for activities described in paragraph (2)(b) shall be absorbed at the expense of the drycleaning facility restoration funds, without recourse to reimbursement or recovery from the real property owner, nearby real property owner, or ~~the~~ owner or operator of the drycleaning facility or the wholesale supply facility. Notwithstanding any other provision of this chapter, this subsection applies to causes of action accruing on or after the effective date of this act and applies retroactively to causes of action accruing before the effective date of this act for which a lawsuit has not been filed before the effective date of this act.

~~(b)(a)~~ With regard to drycleaning facilities or wholesale supply facilities that have operated as drycleaning facilities or wholesale supply facilities on

or after October 1, 1994, any such drycleaning facility or wholesale supply facility at which there exists contamination by drycleaning solvents shall be eligible under this subsection regardless of when the drycleaning contamination was discovered, provided that the drycleaning facility or the wholesale supply facility:

1. Has been registered with the department;
2. Is determined by the department to be in compliance with the department's rules regulating drycleaning solvents, drycleaning facilities, or wholesale supply facilities on or after November 19, 1980;
3. Has not been operated in a grossly negligent manner at any time on or after November 19, 1980;
4. Has not been identified to qualify for listing, nor is listed, on the National Priority List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986, and as subsequently amended;
5. Is not under an order from the United States Environmental Protection Agency pursuant to s. 3008(h) of the Resource Conservation and Recovery Act as amended (42 U.S.C.A. s. 6928(h)), or has not obtained and is not required to obtain a permit for the operation of a hazardous waste treatment, storage, or disposal facility, a postclosure permit, or a permit pursuant to the federal Hazardous and Solid Waste Amendments of 1984;

and provided that the real property owner or the owner or operator of the drycleaning facility or the wholesale supply facility has not willfully concealed the discharge of drycleaning solvents and has remitted all taxes due pursuant to ss. 376.70 and 376.75, has provided documented evidence of contamination by drycleaning solvents as required by the rules developed pursuant to this section, has reported the contamination prior to December 31, 1998, and has not denied the department access to the site.

(c)(b) With regard to drycleaning facilities or wholesale supply facilities that cease to be operated as drycleaning facilities or wholesale supply facilities prior to October 1, 1994, such facilities, at which there exists contamination by drycleaning solvents, shall be eligible under this subsection regardless of when the contamination was discovered, provided that the drycleaning facility or wholesale supply facility:

1. Was not determined by the department, within a reasonable time after the department's discovery, to have been out of compliance with the department rules regulating drycleaning solvents, drycleaning facilities, or wholesale supply facilities implemented at any time on or after November 19, 1980;
2. Was not operated in a grossly negligent manner at any time on or after November 19, 1980;

3. Has not been identified to qualify for listing, nor is listed, on the National Priority List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, and as subsequently amended; and

4. Is not under an order from the United States Environmental Protection Agency pursuant to s. 3008(h) of the Resource Conservation and Recovery Act, as amended, or has not obtained and is not required to obtain a permit for the operation of a hazardous waste treatment, storage, or disposal facility, a postclosure permit, or a permit pursuant to the federal Hazardous and Solid Waste Amendments of 1984;

and provided that the real property owner or the owner or operator of the drycleaning facility or the wholesale supply facility has not willfully concealed the discharge of drycleaning solvents, has provided documented evidence of contamination by drycleaning solvents as required by the rules developed pursuant to this section, has reported the contamination prior to December 31, 1998, and has not denied the department access to the site.

~~(d)~~(e) For purposes of determining eligibility, a drycleaning facility or wholesale supply facility was operated in a grossly negligent manner if the department determines that the owner or operator of the drycleaning facility or the wholesale supply facility:

1. Willfully discharged drycleaning solvents onto the soils or into the waters of the state after November 19, 1980, with the knowledge, intent, and purpose that the discharge would result in harm to the environment or to public health or result in a violation of the law;

2. Willfully concealed a discharge of drycleaning solvents with the knowledge, intent, and purpose that the concealment would result in harm to the environment or to public health or result in a violation of the law; or

3. Willfully violated a local, state, or federal law or rule regulating the operation of drycleaning facilities or wholesale supply facilities with the knowledge, intent, and purpose that the act would result in harm to the environment or to public health or result in a violation of the law.

~~(e)~~(d)1. With respect to eligible drycleaning solvent contamination reported to the department as part of a completed application as required by the rules developed pursuant to this section by June 30, 1997, the costs of activities described in paragraph (2)(b) shall be absorbed at the expense of the drycleaning facility restoration funds, less a \$1,000 deductible per incident, which shall be paid by the applicant or current property owner. The deductible shall be paid within 60 days after receipt of billing by the department.

2. For contamination reported to the department as part of a completed application as required by the rules developed under this section, from July 1, 1997, through September 30, 1998, the costs shall be absorbed at the expense of the drycleaning facility restoration funds, less a \$5,000 deduct-

ible per incident. The deductible shall be paid within 60 days after receipt of billing by the department.

3. For contamination reported to the department as part of a completed application as required by the rules developed pursuant to this section from October 1, 1998, through December 31, 1998, the costs shall be absorbed at the expense of the drycleaning facility restoration funds, less a \$10,000 deductible per incident. The deductible shall be paid within 60 days after receipt of billing by the department.

4. For contamination reported after December 31, 1998, no costs will be absorbed at the expense of the drycleaning facility restoration funds.

~~(f)(e)~~ The provisions of this subsection shall not apply to any site where the department has been denied site access to implement the provisions of this section.

~~(g)(f)~~ In order to identify those drycleaning facilities and wholesale supply facilities that have experienced contamination resulting from the discharge of drycleaning solvents and to ensure the most expedient rehabilitation of such sites, the owners and operators of drycleaning facilities and wholesale supply facilities are encouraged to detect and report contamination from drycleaning solvents related to the operation of drycleaning facilities and wholesale supply facilities. The department shall establish reasonable guidelines for the written reporting of drycleaning contamination and shall distribute forms to registrants under s. 376.303(1)(d), and to other interested parties upon request, to be used for such purpose.

~~(h)(g)~~ A report of drycleaning solvent contamination at a drycleaning facility or wholesale supply facility made to the department by any person in accordance with this subsection, or any rules promulgated pursuant hereto, may not be used directly as evidence of liability for such discharge in any civil or criminal trial arising out of the discharge.

~~(i)(h)~~ The provisions of this subsection shall not apply to drycleaning facilities owned or operated by the state or Federal Government.

~~(j)(i)~~ Due to the value of Florida's potable water, it is the intent of the Legislature that the department initiate and facilitate as many cleanups as possible utilizing the resources of the state, local governments, and the private sector. The department is authorized to adopt necessary rules and enter into contracts to carry out the intent of this subsection and to limit or prevent future contamination from the operation of drycleaning facilities and wholesale supply facilities.

~~(k)(j)~~ It is not the intent of the Legislature that the state become the owner or operator of a drycleaning facility or wholesale supply facility by engaging in state-conducted cleanup.

~~(l)(k)~~ The owner, operator, and either the real property owner or agent of the real property owner may apply for the Drycleaning Contamination Cleanup Program by jointly submitting a completed application package to the department pursuant to the rules that shall be adopted by the department. If the application cannot be jointly submitted, then the applicant shall

provide notice of the application to other interested parties. After reviewing the completed application package, the department shall notify the applicant in writing as to whether the drycleaning facility or wholesale supply facility is eligible for the program. If the department denies eligibility for a completed application package, the notice of denial shall specify the reasons for the denial, including specific and substantive findings of fact, and shall constitute agency action subject to the provisions of chapter 120. For the purposes of ss. 120.569 and 120.57, the real property owner and the owner and operator of a drycleaning facility or wholesale supply facility which is the subject of a decision by the department with regard to eligibility shall be deemed to be parties whose substantial interests are determined by the department's decision to approve or deny eligibility.

(m)(4) Eligibility under this subsection applies to the drycleaning facility or wholesale supply facility, and attendant site rehabilitation applies to such facilities and to any place where drycleaning-solvent contamination migrating from the eligible facility is found. A determination of eligibility or ineligibility shall not be affected by any conveyance of the ownership of the drycleaning facility, wholesale supply facility, or the real property on which such facility is located. Nothing contained in this chapter shall be construed to allow a drycleaning facility or wholesale supply facility which would not be eligible under this subsection to become eligible as a result of the conveyance of the ownership of the ineligible drycleaning facility or wholesale supply facility to another owner.

~~(n)(m)~~ If funding for the drycleaning contamination rehabilitation program is eliminated, the provisions of this subsection shall not apply.

~~(o)(n)~~1. The department shall have the authority to cancel the eligibility of any drycleaning facility or wholesale supply facility that submits fraudulent information in the application package or that fails to continuously comply with the conditions of eligibility set forth in this subsection, or has not remitted all fees pursuant to s. 376.303(1)(d), or has not remitted the deductible payments pursuant to paragraph ~~(e)~~ (d).

2. If the program eligibility of a drycleaning facility or wholesale supply facility is subject to cancellation pursuant to this section, then the department shall notify the applicant in writing of its intent to cancel program eligibility and shall state the reason or reasons for cancellation. The applicant shall have 45 days to resolve the reason or reasons for cancellation to the satisfaction of the department. If, after 45 days, the applicant has not resolved the reason or reasons for cancellation to the satisfaction of the department, the order of cancellation shall become final and shall be subject to the provisions of chapter 120.

~~(p)(o)~~ A real property owner shall not be subject to administrative or judicial action brought by or on behalf of any person or local or state government, or agency thereof, for gross negligence or violations of department rules prior to January 1, 1990, which resulted from the operation of a drycleaning facility, provided that the real property owner demonstrates that:

1. The real property owner had ownership in the property at the time of the gross negligence or violation of department rules and did not cause or contribute to contamination on the property;
2. The real property owner was a distinct and separate entity from the owner and operator of the drycleaning facility, and did not have an ownership interest in or share in the profits of the drycleaning facility;
3. The real property owner did not participate in the operation or management of the drycleaning facility;
4. The real property owner complied with all discharge reporting requirements, and did not conceal any contamination; and
5. The department has not been denied access.

The defense provided by this paragraph does not apply to any liability under a federally delegated program.

~~(q)~~(p) 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:

1. 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;
2. Did not participate in the operation or management of the drycleaning facility at the source location; and
3. 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.

~~(r)~~(q) Nothing in this subsection precludes the department from considering information and documentation provided by private consultants, local government programs, federal agencies, or any individual which is relevant to an eligibility determination if the department provides the applicant with reasonable access to the information and its origin.

(11) VOLUNTARY CLEANUP.—A real property owner is authorized to conduct site rehabilitation activities at any time pursuant to department rules, either through agents of the real property owner or through responsible response action contractors or subcontractors, whether or not the facility has been determined by the department to be eligible for the drycleaning solvent cleanup program. A real property owner or any other person who

~~that~~ conducts site rehabilitation may not seek cost recovery from the department or the Water Quality Assurance Trust Fund for any such rehabilitation activities. A real property owner ~~who that~~ voluntarily initiates conducts such site rehabilitation, whether commenced before or on or after October 1, 1995, shall upon initiation of such site rehabilitation be immune from and have no liability for claims of any person, for property damages of any kind, including, but not limited to, diminished value of real property or improvements; lost or delayed rent, sale, or use of real property or improvements; or stigma to real property or improvements caused by drycleaning-solvent contamination or be subject to any administrative or judicial action brought by or on behalf of ~~to~~ any person, state or local government, or agency thereof to compel or enjoin site rehabilitation or pay for the cost of rehabilitation of environmental contamination, and ~~or~~ to pay any fines or penalties regarding rehabilitation, as soon as the real property owner:

- (a) Conducts contamination assessment and site rehabilitation consistent with state and federal laws and rules;
- (b) Conducts such site rehabilitation in a timely manner according to a rehabilitation schedule approved by the department; and
- (c) Does not deny the department access to the site. Upon completion of such site rehabilitation activities in accordance with the requirements of this subsection, the department shall render a site rehabilitation completion order.

The immunity set forth in this subsection also applies to any nearby real property owner. This immunity shall continue to apply to any real property owner who transfers, conveys, leases, or sells property on which a drycleaning facility is located so long as the voluntary cleanup activities continue. Notwithstanding any other provision of this chapter, this subsection applies to causes of action accruing on or after the effective date of this act and applies retroactively to causes of action accruing before the effective date of this act for which a lawsuit has not been filed before the effective date of this act.

Section 3. Subsection (4) of section 376.30781, Florida Statutes, is amended to read:

376.30781 Partial tax credits for rehabilitation of drycleaning-solvent-contaminated sites and brownfield sites in designated brownfield areas; application process; rulemaking authority; revocation authority.—

(4) To claim the credit, each applicant must apply to the Department of Environmental Protection for an allocation of the \$2 million annual credit by December 31 on a form developed by the Department of Environmental Protection in cooperation with the Department of Revenue. The form shall include an affidavit from each applicant certifying that all information contained in the application, including all records of costs incurred and claimed in the tax credit application, are true and correct. If the application is submitted pursuant to subparagraph (2)(a)2., the form must include an affidavit signed by the real property owner stating that it is not, and has

never been, the owner or operator of the drycleaning facility where the contamination exists. Approval of partial tax credits must be accomplished on a first-come, first-served basis based upon the date complete applications are received by the Division of Waste Management. An applicant shall submit only one application per site per year. To be eligible for a tax credit the applicant must:

(a) Have entered into a voluntary cleanup agreement with the Department of Environmental Protection for a drycleaning-solvent-contaminated site or a Brownfield Site Rehabilitation Agreement, as applicable; and

(b) Have paid all deductibles pursuant to s. 376.3078(3)(e) ~~s. 376.3078(3)(d)~~ for eligible drycleaning-solvent-cleanup program sites.

Section 4. Subsection (3) of section 376.3079, Florida Statutes, is amended to read:

376.3079 Third-party liability insurance.—

(3) For purposes of this section and s. 376.3078, the term:

(a) “Third-party liability” means the insured’s liability, other than for site rehabilitation costs and property damage as applied to sites utilizing the provisions of s. 378.3078(3) and (11), for bodily injury ~~or property damage~~ caused by an incident of contamination related to the operation of a drycleaning facility or wholesale supply facility.

(b) “Incident” means any sudden or gradual discharge of drycleaning solvents arising from the operation of a drycleaning facility or wholesale supply facility that results in a need for site rehabilitation or results in bodily injury or property damage neither expected nor intended by the drycleaning facility owner or operator or wholesale supply facility.

Section 5. Subsection (6) of section 376.308, Florida Statutes, is amended to read:

376.308 Liabilities and defenses of facilities.—

(6) This section may not ~~Nothing herein shall~~ be construed to affect cleanup program eligibility under ss. 376.305(6), 376.3071, 376.3072, 376.3078, and 376.3079. Except as otherwise expressly provided in this chapter, nothing in this chapter shall affect, void, or defeat any immunity of any real property owner or nearby real property owner under s. 376.3078.

Section 6. Subsection (3) and paragraph (a) of subsection (5) of section 376.313, Florida Statutes, are amended to read:

376.313 Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319.—

(3) Except as provided in s. 376.3078(3) and (11) ~~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.

(5)(a) In any civil action 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 facility is not eligible under s. 376.3078(3) and is not involved in voluntary cleanup under s. 376.3078(11), for damages arising from the discharge of drycleaning solvents from a drycleaning facility or wholesale supply facility, the provisions of subsection (3) shall not apply if it can be proven that, at the time of the discharge the alleged 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.

Section 7. This act shall take effect upon becoming a law.

Approved by the Governor July 11, 2003.

Filed in Office Secretary of State July 11, 2003.