

**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.)

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Prepared By: The Professional Staff of the Committee on Environment and Natural Resources

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BILL: SB 1054

INTRODUCER: Senator Broxson

SUBJECT: Brownfield Site Rehabilitation

DATE: March 19, 2021

REVISED: \_\_\_\_\_

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Schreiber	Rogers	EN	<b>Pre-meeting</b>
2.	_____	_____	AEG	_____
3.	_____	_____	AP	_____

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**I. Summary:**

SB 1054 does the following:

- Requires the Department of Environmental Protection (DEP) to provide maps and other information on the delineation of areas of groundwater contamination from perfluoroalkyl and polyfluoroalkyl substances (PFAS).
- Requires DEP, upon request, to delineate areas of groundwater contamination.
- Redefines the term “institutional controls” in ch. 376, F.S., to include site restrictions involving PFAS and to include local governmental requirements for water systems and groundwater contamination.
- Requires DEP to provide constructive notice when issuing a site rehabilitation completion order.
- Narrows the scope of liability for causes of action arising under s. 376.313, F.S., to damages to real or personal property directly resulting from pollution, excluding personal injury damages.
- Restricts someone from bringing suit under s. 376.313, F.S., when the discharge or other condition of pollution was authorized by any federal, state, or local government approval, requirement, or permit (current law only applies this limitation to discharges authorized under chapter 403, F.S.).
- Adds the use of a contaminant as a potential cause of damages sought under s. 376.313, F.S.
- Expands the defenses to causes of action under s. 376.313, F.S., to include the limitation of liability for those who complete a brownfield site rehabilitation agreement.
- Requires DEP to adopt rules for statewide cleanup target levels for PFAS in soils and groundwater.
- Provides that rules for cleanup target levels for PFAS may not take effect until ratified by the Legislature, the effect of this may be to override DEP’s existing cleanup target levels.
- Provides liability protections for responsible parties who cooperate in good faith with DEP’s investigations of PFAS contamination.

- Provides liability protections for persons who execute a PFAS voluntary site rehabilitation agreement.
- Provides a grace period of 90 days for persons responsible for site contamination who fail to comply with the site rehabilitation agreement unless an imminent hazard exists.
- Requires DEP to develop and implement a PFAS Assessment and Site Rehabilitation Program and provide an annual report on the program to the Governor and Legislature. The program must include cost estimates, risk assessments, identification of contaminated areas, and recommendations for response strategies.

## II. Present Situation:

### Delineation of Areas of Groundwater Contamination

A “delineated area” is a surface area identified by the Department of Environmental Protection (DEP) within which ground water contamination is known to exist or which encompasses vulnerable areas or areas in which DEP provides a subsidy for restoration or replacement of contaminated drinking water supplies.<sup>1</sup> Under s. 373.309, F.S., DEP administers the Delineated Areas Program, through a coordinated effort with the water management districts, the Department of Health (DOH), and local county health departments.<sup>2</sup> Delineated areas are adopted by rule under ch. 62-524 of the Florida Administrative Code, and are typically drawn and mapped using a 1,000-foot protective setback distance from a contaminated well or site.<sup>3</sup> Within delineated areas, all new potable water wells must be cleared for potable use by DOH or a county health department and permitted by the appropriate water management district.<sup>4</sup> Under the Delineated Areas Program, approximately 427,897 acres in 38 counties have been delineated as areas of known groundwater contamination, with the majority delineated for ethylene dibromide contamination, and a few areas delineated for solvents and gasoline contamination.<sup>5</sup>

Section 373.309, F.S., requires DEP to adopt and enforce rules governing the location, construction, repair, and abandonment of water wells.<sup>6</sup> The statute requires DEP to conduct activities preventing the contamination of potable water wells and promoting the cost-effective remediation of contaminated potable water supplies.<sup>7</sup> These responsibilities include establishing by rule requirements for well location and construction, testing, permitting, and clearance.<sup>8</sup> As part of these efforts, DEP is required to make available to the water management districts, regional planning councils, DOH, and county building and zoning department maps or other information on areas of contamination, including areas of ethylene dibromide. Upon request and payment of appropriate costs, DEP must also make such maps and information available to

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<sup>1</sup> Fla. Admin. Code 62-524.200(2); *see* s. 376.307(e), F.S. DEP is authorized to use the Water Quality Assurance Trust Fund to restore or replace contaminated private potable water wells or water systems.

<sup>2</sup> DEP, *Delineated Areas*, <https://floridadep.gov/water/source-drinking-water/content/delineated-areas> (last visited Mar. 18, 2021).

<sup>3</sup> *Id.*; *see* Fla. Admin. Code Rules 62-524.420 and 62-524.430.

<sup>4</sup> Fla. Admin. Code Rules 62-524.650 and 62-524.700.

<sup>5</sup> DEP, *Delineated Areas*, <https://floridadep.gov/water/source-drinking-water/content/delineated-areas> (last visited Mar. 18, 2021).

<sup>6</sup> *See* Fla. Admin. Code Chapters 62-524 and 62-532.

<sup>7</sup> Section 373.309(e), F.S.

<sup>8</sup> Section 373.309(e)1., F.S.

property owners, realtors, real estate associations, property appraisers, and other interest persons.<sup>9</sup>

### **Water Quality Assurance Act**

In 1983, the Legislature passed the Water Quality Assurance Act.<sup>10</sup> These statutes comprise a comprehensive statutory scheme designed to protect Florida's lands, surface waters, and groundwaters.<sup>11</sup> The Act is to be liberally construed to effect the purposes set forth thereunder.<sup>12</sup>

Section 376.313(3), F.S., authorizes any person to bring a cause of action for all damages resulting from a discharge<sup>13</sup> or other condition of pollution which is covered by ss. 376.30-376.317, F.S., and not authorized pursuant to ch. 403, F.S.<sup>14</sup> The statute states that it is not necessary for a person to plead or prove negligence in any form, a person need only plead and prove that the prohibited discharge or other pollutive condition has occurred.<sup>15</sup> Thus, s. 376.313, F.S., imposes "strict liability," as elements such as negligence and causation need not be proven.<sup>16</sup> All a plaintiff must allege to state a plausible claim is: (1) a prohibited discharge or other pollutive condition occurred; and (2) damages.<sup>17</sup>

Section 376.313, F.S., authorizes joint and several liability.<sup>18</sup> The statute authorizes a court to award attorney's fees and other costs of litigation whenever a court determines it is in the public interest.<sup>19</sup> The only defenses to a cause of action arising under s. 376.313(3), F.S., are those specified in s. 376.308, F.S. These defenses include: an act of war; an act of government; an act of God, meaning an unforeseeable act of the violence of nature without the interference of human agency; or an act or omission of a third party.<sup>20</sup> These defenses create exceptions to the strict liability imposed by the statute.<sup>21</sup>

The Water Quality Assurance Act does not define the term "damages." In a 2010 case involving a cause of action under s. 376.313(3), F.S., the Florida Supreme Court applied a definition from a different portion of ch. 376, F.S., which defines damages as "the documented extent of any destruction to or loss of any real or personal property, or the documented extent, pursuant to s. 376.121, of any destruction of the environment and natural resources, including all living things

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<sup>9</sup> *Id.*

<sup>10</sup> Chapter 83-310, Laws of Fla.; see ss. 376.30-376.317, F.S.

<sup>11</sup> See *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 22 (Fla. 2004).

<sup>12</sup> Section 376.315, F.S.

<sup>13</sup> Section 376.301(13), F.S. "Discharge" includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, releasing, or dumping of any pollutant or hazardous substance which occurs and which affects lands and the surface and ground waters of the state not regulated by ss. 376.011-376.21, F.S.

<sup>14</sup> Section 376.313(3), F.S.

<sup>15</sup> *Id.* Certain exceptions exist for suits involving petroleum storage systems or drycleaning facilities or their suppliers.

<sup>16</sup> *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 26 (Fla. 2004).

<sup>17</sup> *Irizarry v. Orlando Utilities Comm'n*, 393 F. Supp. 3d 1110, 1116 (M.D. Fla. 2019).

<sup>18</sup> Section 376.313(3), F.S.; see BLACK'S LAW DICTIONARY 997 (9th ed. 2009). Joint and several liability generally means liability that may be apportioned among two or more parties.

<sup>19</sup> Section 376.313(6), F.S.

<sup>20</sup> Section 376.308, F.S. The section contains additional defenses for situations involving petroleum, petroleum products, or drycleaning solvents.

<sup>21</sup> See *Gen. Dynamics Corp. v. Brottem*, 53 So. 3d 334, 337 (Fla. Dist. Ct. App. 2010)(describing the defenses as "fault-focused defenses or, put another way, strict liability exceptions").

except human beings, as the direct result of the discharge of a pollutant.”<sup>22</sup> In 2019, the Florida Supreme Court receded from the application of this definition, and held that the meaning of “all damages” in s. 376.313(3), F.S., includes personal injury damages.<sup>23</sup>

In addition to providing a statutory cause of action, s. 376.313(3), F.S., expressly preserves common law causes of action.<sup>24</sup> This means a plaintiff may also pursue common law causes of action to obtain relief for damages resulting from pollution covered by the Water Quality Assurance Act.<sup>25</sup> However, the strict liability provisions applying to statutory causes of action arising under s. 376.313(3), F.S., would not apply to causes of action arising under common law.

### **Cleanup Target Levels**

A cleanup target level (CTL) is the concentration for each contaminant identified by an applicable analytical test method, in the medium of concern, at which a site rehabilitation program is deemed complete.<sup>26</sup> DEP establishes by rule CTLs for specific contaminants.<sup>27</sup> These CTLs apply to requirements for site rehabilitation across numerous programs.

### **Florida’s Brownfields Redevelopment Act**

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.<sup>28</sup> Unsafe levels of environmental contamination on a brownfield may result from past or current industrial, commercial, residential, agricultural, or recreational uses and practices.<sup>29</sup> Contaminants may be found in the soil, water, or air. In 1995, the U.S. 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.<sup>30</sup>

In 1997, the Legislature passed Florida’s Brownfields Redevelopment Act (Act).<sup>31</sup> The Act was created to provide incentives for local governments and individuals to voluntarily clean up and

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<sup>22</sup> *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1221 (Fla. 2010)(applying a definition from the 1970 Pollutant Discharge and Control Act, ss. 376.011-376.021, F.S.); s. 376.031(5), F.S.

<sup>23</sup> *Charles L. Lieupo v. Simon’s Trucking, Inc.*, 286 So. 3d 143, 147 (Fla. 2019).

<sup>24</sup> Section 376.313(3), F.S.; see *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045, 1050 (Fla. Dist. Ct. App. 2001)(stating that s. 376.313(3), F.S. preserves common law causes of action by its very terms).

<sup>25</sup> *Irizarry*, 393 F. Supp. 3d at 1118-1119.

<sup>26</sup> Section 376.301(8), F.S.

<sup>27</sup> Fla. Admin. Code Ch. 62-777.

<sup>28</sup> EPA, *Overview of EPA’s Brownfields Program*, <https://www.epa.gov/brownfields/overview-epas-brownfields-program> (last visited Mar. 18, 2021).

<sup>29</sup> EPA, *Cleaning Up Brownfield Sites* (2019), available at [https://www.epa.gov/sites/production/files/2019-10/documents/cleaning\\_up\\_brownfield\\_sites.pdf](https://www.epa.gov/sites/production/files/2019-10/documents/cleaning_up_brownfield_sites.pdf) (last visited Mar. 18, 2021).

<sup>30</sup> EPA, *Overview of EPA’s Brownfields Program*, <https://www.epa.gov/brownfields/overview-epas-brownfields-program> (last visited Mar. 18, 2021); EPA, *Brownfields Community Reinvestment Act (CRA) Fact Sheet*, <https://www.epa.gov/brownfields/brownfields-community-reinvestment-act-cra-fact-sheet> (last visited Mar. 18, 2021).

<sup>31</sup> Chapter 97-277, Laws of Fla; ss. 376.77–376.85, F.S.

redevelop brownfield sites.<sup>32</sup> The primary goals of the Act are to reduce public health and environmental hazards on existing commercial and industrial sites that are abandoned or underused due to these hazards; create financial and regulatory incentives to encourage voluntary cleanup and redevelopment of sites; derive CTLs and a process for obtaining a "No Further Action" letter using risk-based corrective action principles;<sup>33</sup> and provide the opportunity for environmental equity and justice.<sup>34</sup> The Act requires DEP to establish by rule criteria for determining, on a site-specific basis, tasks comprising a brownfield site rehabilitation program and the level at which a task and a program may be deemed to be completed.<sup>35</sup>

### ***Brownfield Designations***

Under the Act, a brownfield area is defined as a contiguous area of one or more brownfield sites,<sup>36</sup> some of which may not be contaminated, and which has been designated by a local government resolution.<sup>37</sup> Brownfield areas may include all or portions of community redevelopment areas, enterprise zones, empowerment zones, other such designated economically deprived communities and areas, and EPA-designated brownfield pilot projects.<sup>38</sup>

For a property to participate in the program, the local government with jurisdiction over the property must first adopt a resolution designating the area as a brownfield area.<sup>39</sup> A brownfield area designation may be proposed by the jurisdictional local government or any person other than a governmental entity.<sup>40</sup> To designate a brownfield area, the jurisdictional local government must go through a process of passing a resolution that includes a map clearly delineating the parcels to be included in the brownfield area.<sup>41</sup>

### ***Brownfield Site Rehabilitation Agreements (BSRA)***

Following designation of a brownfield area by resolution, the local government may identify a person responsible for brownfield site rehabilitation, which simply entitles the identified person to negotiate a Brownfield Site Rehabilitation Agreement (BSRA) with DEP or an approved local pollution control program.<sup>42</sup> If actual contamination exists at the site, the responsible person must enter into such a BSRA.<sup>43</sup> A BSRA provides assurance to DEP and the public that site rehabilitation will be conducted in accordance with applicable legal requirements, and it provides

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<sup>32</sup> DEP, *Florida Brownfields Redevelopment Program, Annual Report: August 2020*, 3 (2020)[hereinafter *DEP 2020 Brownfields Report*], available at [https://floridadep.gov/sites/default/files/2019-20\\_BF\\_Annual\\_Report\\_Final\\_Cover\\_Letter.pdf](https://floridadep.gov/sites/default/files/2019-20_BF_Annual_Report_Final_Cover_Letter.pdf) (last visited Mar. 18, 2021).

<sup>33</sup> Fla. Admin. Code R. 62-780.680.

<sup>34</sup> DEP, *Brownfields Program*, <https://floridadep.gov/waste/waste-cleanup/content/brownfields-program> (last visited Mar. 18, 2021).

<sup>35</sup> Section 376.81, F.S.; see Fla. Admin. Code Ch. 62-780.

<sup>36</sup> Section 376.79(4), F.S. "Brownfield sites" means real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination.

<sup>37</sup> Section 376.79(5), F.S.

<sup>38</sup> *Id.*

<sup>39</sup> Section 376.80(1), F.S.

<sup>40</sup> *Id.*

<sup>41</sup> Section 376.80(1), F.S.

<sup>42</sup> Section 376.80(2)(d), F.S.; see s. 376.82(1), F.S. Discussing eligibility for participation in the brownfield program; *DEP 2020 Brownfields Report*, at 9. DEP has delegated authority to administer the program to three county governments: Broward, Hillsborough, and Miami-Dade counties.

<sup>43</sup> Section 376.80(5), F.S.

limited liability protection for the responsible person.<sup>44</sup> BSRA's must include each of the following elements:

- 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;<sup>45</sup>
- 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 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.<sup>46</sup>

DEP issues site rehabilitation completion orders for sites that have completed cleanup of property to standards protective of human health and the environment and for which no further action is required at that time.<sup>47</sup> Site rehabilitation completion orders may be conditioned on specified requirements, including institutional controls. For a site rehabilitation completion order with institutional controls, Risk Management Options Level II and III are available when the controls are sufficiently protective and are agreed to by the property owners of the affected properties.<sup>48</sup>

### ***Liability Protection***

Any person, including his or her successors and assigns, who executes and implements to successful completion a BSRA is relieved of:

- Further liability for remediation of the contaminated 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.
- Liability for claims of property damages, including, but not limited to, diminished value of real property or improvements; lost or delayed rent, sale, or use of real property or

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<sup>44</sup> DEP 2020 Brownfields Report, at 5.

<sup>45</sup> Section 376.81, F.S.; Fla. Admin. Code Ch. 62-780. This chapter contains cleanup criteria requirements that apply to site rehabilitation governed by a BSRA.

<sup>46</sup> Section 376.80(5), F.S.

<sup>47</sup> DEP 2020 Brownfields Report, at 5; Fla. Admin. Code R. 62-780.680; *see also* s. 376.82(2)(e), F.S.

<sup>48</sup> Fla. Admin. Code R. 62-780.680(2) and (3).

improvements; or stigma to real property or improvements caused by contamination addressed by a BSRA.<sup>49</sup>

This liability protection takes effect upon execution of a BSRA and remains effective provided that the responsible person complies with the terms of the BSRA.<sup>50</sup> If the responsible person fails to comply with the BSRA, and the project is not returned to compliance with the BSRA or a modification cannot be negotiated, the immunity provisions are revoked.<sup>51</sup> Upon completion of site rehabilitation in compliance with the Act, no additional site rehabilitation is required unless certain conditions, labeled as “reopeners,” are demonstrated.<sup>52</sup>

### **Institutional Controls**

Institutional controls<sup>53</sup> are non-engineering<sup>54</sup> legal and legislative controls intended to affect human activities by prevent or reducing exposure to contamination.<sup>55</sup> Chapter 376, F.S., in two different places, defines institutional controls as the restriction on use of or access to a site to eliminate or minimize exposure to chemicals of concern from petroleum products, drycleaning solvents, or other contaminants, and such restrictions may include, but are not limited to, deed restrictions, restrictive covenants, or conservation easements.<sup>56</sup> The use of institutional controls to eliminate or control the potential exposure to contamination is authorized in state statutes governing Risk Based Corrective Action,<sup>57</sup> petroleum cleanup,<sup>58</sup> drycleaning solvent cleanup,<sup>59</sup> and brownfields<sup>60, 61</sup>.

Chapter 62-780 of the Florida Administrative Code authorizes the use of institutional controls to achieve DEP approval for a Site Rehabilitation Completion Order with Conditions if the controls

<sup>49</sup> Section 376.82(2)(a)1.-3. The relief of liability for claims of property damages applies to causes of action accruing on or after July 1, 2014, and does not apply to a person who discharges contaminants on property subject to a brownfield site rehabilitation agreement, who commits fraud in demonstrating site conditions or completing site rehabilitation of a property subject to a brownfield site rehabilitation agreement, or who exacerbates contamination of a property subject to a brownfield site rehabilitation agreement in violation of applicable laws which causes property damages.

<sup>50</sup> Section 376.82(2)(d), F.S.; *see s.* 376.82(2)(b) and (c), F.S. This liability protection does not limit the right of a third party other than the state to pursue an action for damages to persons for bodily harm; however, such an action may not compel site rehabilitation in excess of that required in the approved BSRA or otherwise required by DEP or a local program. Section 376.82, F.S., does not affect the ability or authority to seek contribution from any person who may have liability with respect to the contaminated site and who did not receive cleanup liability protection under the Act.

<sup>51</sup> Section 376.80(8), F.S.

<sup>52</sup> Section 376.82(3)(a)-(e), F.S.

<sup>53</sup> *See* DEP, *Institutional Controls Procedures Guidance*, <https://floridadep.gov/waste/waste/content/institutional-controls-procedures-guidance> (last visited Mar. 18, 2021).

<sup>54</sup> DEP, *ICPG Section B.1*, <https://floridadep.gov/waste/waste/documents/icpg-section-b1> (last visited Mar. 18, 2021).

Engineering controls include physical barriers, caps, covers, slurry walls, fences, methane collection systems, and impermeable barriers, and are designed to limit or prevent access and exposure to contamination or are designed to eliminate further migration of the contamination. Where an engineering control is necessary, an institutional control should be put in place to ensure that the engineering control is properly maintained and that DEP has access to inspect the engineering control.

<sup>55</sup> DEP, *ICPG Section A*, <https://floridadep.gov/waste/waste/documents/icpg-section> (last visited Mar. 18, 2021).

<sup>56</sup> Sections 376.301(21) and 376.79(11), F.S.

<sup>57</sup> Section 376.30701(2)(d), F.S.

<sup>58</sup> Section 376.3071(5)(b)4, F.S.

<sup>59</sup> Section 376.3078(4)(d), F.S.

<sup>60</sup> Section 376.81(1)(d), F.S.

<sup>61</sup> DEP, *ICPG Section B*, <https://floridadep.gov/waste/waste/documents/icpg-section-b> (last visited Mar. 18, 2021).



are protective of human health, public safety, and the environment.<sup>62</sup> The rules allow the use of institutional controls and alternative CTLs instead of the default CTLs contained in ch. 62-777 of the Florida Administrative Code.<sup>63</sup>

The most common type of institutional control is restrictive covenants, which are created by the execution of documents that are recorded in the public records of the appropriate county to ensure proper notice and continued effectiveness of the control.<sup>64</sup> Other types that may be acceptable to DEP include government controls such as local ordinances, permits, agency rules, delineated areas, comprehensive land use planning and management, and DEP consent orders.<sup>65</sup> States statutes and ch. 62-780 of the Florida Administrative Code establish circumstances where institutional controls are appropriate, involving factors such as which media are contaminated, current and projected use of the property and resources, whether alternative CTLs maintain site-specific conditions, and the probability of contamination spreading.<sup>66</sup> DEP guidance discusses considerations for evaluating local governments controls.<sup>67</sup>

### **Risk-Based Corrective Action**

Risk-Based Corrective Action (RBCA) is a decision-making process that combines site assessments and responses to chemical releases with human health and environmental risk assessments to determine the need for remedial action and tailor corrective actions to site-specific conditions and risks, which can vary greatly.<sup>68</sup> In Florida, prior to 2003, RBCA was only used under specific DEP programs such as the brownfields or petroleum programs, and contamination at a site was typically remediated to the default CTLs contained in ch. 62-777 of the Florida Administrative Code.<sup>69</sup> This meant there was little flexibility for site-specific remediation strategies.<sup>70</sup>

In 2003, the Legislature created s. 376.30701, F.S., to establish a “global RBCA” process. The original goal was a flexible site-specific cleanup process reflecting the intended use of the property following cleanup, while maintaining adequate protection of human health, safety, and the environment through the evaluation of contamination toxicity and exposure pathways.<sup>71</sup> Section 376.30701, F.S., applies to all contaminated sites resulting from a discharge of pollutants or hazardous substances where legal responsibility for site rehabilitation exists, except for those contaminated sites subjected to the risk-based corrective action cleanup criteria established for

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<sup>62</sup> *Id.*; Fla. Admin. Code R. 62-780.680(2) and (3).

<sup>63</sup> DEP, *ICPG Section B*, <https://floridadep.gov/waste/waste/documents/icpg-section-b> (last visited Mar. 18, 2021).

<sup>64</sup> DEP, *ICPG Section A*, <https://floridadep.gov/waste/waste/documents/icpg-section> (last visited Mar. 18, 2021).

<sup>65</sup> *Id.*

<sup>66</sup> DEP, *ICPG Section B*, <https://floridadep.gov/waste/waste/documents/icpg-section-b> (last visited Mar. 18, 2021).

<sup>67</sup> DEP, *ICPG Section C.2*, <https://floridadep.gov/waste/waste/documents/icpg-section-c2> (last visited Mar. 18, 2021).

<sup>68</sup> DEP, *Contaminated Soils Forum -- Policy Group, Waste Cleanup Focus Group, Issues paper-- “Universal” Applicability of Risk-Based Correction Action at Florida Waste Cleanup Sites*, 2 (1998), available at <https://floridadep.gov/sites/default/files/Universal-applicability-of-risk-based-corrective-action.pdf> (last visited Mar. 18, 2021).

<sup>69</sup> DeMeo et al., *Risk-Based Corrective Action in Florida: How is it Working?* (2015), <https://www.floridabar.org/the-florida-bar-journal/risk-based-corrective-action-in-florida-how-is-it-working/> (last visited Mar. 18, 2021).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*



the petroleum, brownfields, and drycleaning programs pursuant to ss. 376.3071, 376.81, and 376.3078, F.S., respectively.<sup>72</sup> The statute authorizes DEP to approve alternative CTLs.

The statute requires DEP to establish by rule criteria for determining on a site-specific basis the tasks comprising a site rehabilitation program and the level at which a task and a program may be deemed completed.<sup>73</sup> The criteria must allow the use of institutional or engineering controls at contaminated sites, where appropriate, to eliminate or control the potential exposure to contaminants of humans or the environment.<sup>74</sup> The use of controls requires preapproval by DEP, as well as providing constructive notice, and the opportunity to comment within 30 days, to: local governments, owners of any property into which the point of compliance is allowed to extend, and residents on any property into which the point of compliance is allowed to extend.<sup>75</sup> Where institutional or engineering controls are implemented to control exposure, removal of the controls must have prior approval from DEP, and must be accompanied by the resumption of active cleanup, or other approved controls, unless CTLs under s. 376.30701, F.S., have been achieved.<sup>76</sup>

### **Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)**

Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS) are a group of thousands of man-made compounds developed to provide oil and water repellency, chemical and thermal stability, and friction reduction.<sup>77</sup> Perfluorooctane sulfonic acid (PFOS) and perfluorooctanoic acid (PFOA) are the most common and the best-studied of these compounds.<sup>78</sup> PFAS were widely used since the 1950's, with applications in many industries, including the aerospace, semiconductor, medical, automotive, construction, electronics, and aviation industries, as well as in consumer products (e.g., carpets, clothing, furniture, outdoor equipment, food packaging) and firefighting applications.<sup>79</sup> While U.S. manufacturers have voluntarily phased out use of the chemicals,<sup>80</sup> they persist in the environment, particularly at fire colleges, airports, and military installations.<sup>81</sup> Although PFOA and PFOS are no longer manufactured in the United States, they are still produced internationally and can be imported into the United States in consumer goods such as carpet, leather and apparel, textiles, paper and packaging, coatings, rubber, and plastics.<sup>82</sup>

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<sup>72</sup> Section 376.30701(1), F.S.

<sup>73</sup> Section 376.30701(2), F.S.

<sup>74</sup> Section 376.30701(2)(d), F.S.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Interstate Technology Regulatory Council, *History and Use of PFAS*, 1 (2020), available at [https://pfas-1.itrcweb.org/wp-content/uploads/2020/10/history\\_and\\_use\\_508\\_2020Aug\\_Final.pdf](https://pfas-1.itrcweb.org/wp-content/uploads/2020/10/history_and_use_508_2020Aug_Final.pdf) (last visited Mar. 18, 2021).

<sup>78</sup> DOH, *PFAS Chemical Awareness*, [http://www.floridahealth.gov/environmental-health/hazardous-waste-sites/contaminant-facts/\\_documents/doh-pfas-poster.pdf](http://www.floridahealth.gov/environmental-health/hazardous-waste-sites/contaminant-facts/_documents/doh-pfas-poster.pdf) (last visited Mar. 18, 2021).

<sup>79</sup> Interstate Technology Regulatory Council, *History and Use of PFAS*, 1, 8 (2020).

<sup>80</sup> DEP, *PFAS Update, Presentation to the Florida Senate Committee on Environment and Natural Resources*, 18:00 (Dec. 9, 2019)[hereinafter *DEP PFAS Update*], available at <https://thefloridachannel.org/videos/12-9-19-senate-committee-on-environment-and-natural-resources/>. In the U.S., PFOS was phased out of production around 2002, and PFOA was phased out around 2015.

<sup>81</sup> EPA, *Basic Information on PFAS*, <https://www.epa.gov/pfas/basic-information-pfas> (last visited Feb. 18, 2021).

<sup>82</sup> *Id.*

PFAS chemicals do not break down in the environment, can move through soil and water, and can accumulate in fish and wildlife.<sup>83</sup> Because of the widespread use and ease of transport, they can be found virtually everywhere. The Centers for Disease Control and Prevention has detected PFAS in nearly all persons it has tested, indicating widespread exposure in the U.S. population.<sup>84</sup> Based on recent studies, health effects from PFAS potentially include increased risk of certain cancers, increased cholesterol levels, impacts on hormones and the immune system, and fetal and infant developmental effects.<sup>85</sup>

While the health effects from low-level concentrations of PFAS are not yet fully understood, litigation and public interest is increasing nation-wide.<sup>86</sup> In Florida, generally, issues exist regarding liability for cleanup and third-party liability.<sup>87</sup>

In addition to regulated contaminants, the EPA also prioritizes research and data collection for new chemicals that are being discovered in water that previously had not been detected or are being detected at levels that may be different than expected.<sup>88</sup> These are called “contaminants of emerging concern” (CEC). While CECs do not have regulatory limits, there may be a long-term potential risk to human health or the environment associated with them. As part of EPA’s data collection on CECs, all large and selected smaller public water systems across the U.S. are required to monitor for CECs.<sup>89</sup> Once EPA’s study and evaluation is complete, if EPA decides not to regulate a CEC, then it may decide to develop a health advisory level (HAL) for the detected contaminants. While HALs are non-enforceable federal limits, they serve as technical guidance for federal, state, and local officials.<sup>90</sup> For drinking water, the EPA has established a HAL of 70 parts per trillion for PFOA and PFOS.<sup>91</sup> DOH has adopted the same HAL for those compounds.<sup>92</sup>

DEP has established provisional CTLs for PFAS to enable site cleanup under DEP’s contaminated site cleanup criteria.<sup>93</sup> DEP has created numerical provisional CTLs and screening levels for PFOS and PFOA in the following categories: Provisional Groundwater CTLs,

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<sup>83</sup> Centers for Disease Control and Prevention, *Per- and Polyfluorinated Substances (PFAS) Factsheet*, [https://www.cdc.gov/biomonitoring/PFAS\\_FactSheet.html](https://www.cdc.gov/biomonitoring/PFAS_FactSheet.html) (last visited Mar. 18, 2021).

<sup>84</sup> *Id.*

<sup>85</sup> DOH, *PFAS Chemical Awareness*, 2, [http://www.floridahealth.gov/environmental-health/hazardous-waste-sites/contaminant-facts/\\_documents/doh-pfas-poster.pdf](http://www.floridahealth.gov/environmental-health/hazardous-waste-sites/contaminant-facts/_documents/doh-pfas-poster.pdf) (last visited Mar. 18, 2021).

<sup>86</sup> Ralph A. DeMeo and Jorge Caspary, *PFApocalypse Now: The PFAS Firestorm and Implications for Florida*, FLORIDA BAR JOURNAL, Vol. 94, No. 3, pg. 46 (2020), <https://www.floridabar.org/the-florida-bar-journal/pfapocalypse-now-the-pfas-firestorm-and-implications-for-florida/#u7068> (last visited Mar. 19, 2021).

<sup>87</sup> *Id.*

<sup>88</sup> DEP, *Regulated Drinking Water Contaminants and Contaminants of Emerging Concern*, <https://floridadep.gov/comm/press-office/content/regulated-drinking-water-contaminants-and-contaminants-emerging-concern> (last visited Jan. 19, 2020).

<sup>89</sup> *Id.*

<sup>90</sup> EPA, *How EPA Regulates Drinking Water Contaminants*, <https://www.epa.gov/dwregdev/how-epa-regulates-drinking-water-contaminants> (last visited Mar. 18, 2021).

<sup>91</sup> EPA, *Drinking Water Health Advisories for PFOA and PFOS*, <https://www.epa.gov/ground-water-and-drinking-water/drinking-water-health-advisories-pfoa-and-pfos> (last visited Mar. 18, 2021).

<sup>92</sup> DOH, *Maximum Contaminant Levels and Health Advisory Levels*, 5 (2016) available at [http://www.floridahealth.gov/environmental-health/drinking-water/\\_documents/hal-list.pdf](http://www.floridahealth.gov/environmental-health/drinking-water/_documents/hal-list.pdf).

<sup>93</sup> *DEP PFAS Update*, at 25:00, available at <https://thefloridachannel.org/videos/12-9-19-senate-committee-on-environment-and-natural-resources/>; see Fla. Admin. Code Ch. 62-780.

Provisional Soil CTLs, Provisional Irrigation Water Screening Levels, and Surface Water Screening Levels.<sup>94</sup> These provisional standards are designed to protect human health, and the provisional groundwater CTLs are the same as the EPA's HAL for drinking water.

PFAS is common in firefighting foams that have been stored and used for fire suppression, fire training, and flammable vapor suppression.<sup>95</sup> These firefighting agents include Class B fluorine-containing firefighting foams, such as aqueous film-forming foam (AFFF).<sup>96</sup> PFAS are so prevalent in firefighting agents that at least nine states have passed legislation to restrict or prohibit the use of PFAS in firefighting agents or activities.<sup>97</sup> In Florida, DEP has already assessed each fire training facility in the state to ensure that PFAS-containing firefighting agents are disposed of and that only firefighting agents that do not have PFAS are being used.<sup>98</sup> Of the 25 active facilities in the state with known or suspected use of AFFF, investigations indicate that 22 of the 25 had analytical results for PFOA and PFOS above the provisional groundwater CTL.<sup>99</sup> Where contamination is identified, DEP will help the facility develop a cleanup plan to remove or contain the contamination to prevent future environmental impact and human exposure.<sup>100</sup>

In February of 2021, DEP published the current version of its PFAS Dynamic Plan.<sup>101</sup> The Dynamic Plan establishes a comprehensive path forward with the understanding that it may be necessary to change the approach as the science associated with these emerging contaminants continues to develop.<sup>102</sup> The plan describes the development of the current screening and provisional CTLs, and summarizes data and lessons learned from prior and ongoing investigations. The plan states that future investigations will be based on potential risk and will include a continued coordinated response with DOH to quickly evaluate and address any impacts to drinking water resources.<sup>103</sup>

### III. Effect of Proposed Changes:

The bill contains numerous "whereas clauses" that describe perfluoroalkyl and polyfluoroalkyl substances (PFAS) and related regulation, scientific study, liability, and concerns regarding health and safety.

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<sup>94</sup> DEP, *PFAS - Provisional Cleanup Target Levels and Screening Levels* (Sept. 2019), [https://floridadep.gov/sites/default/files/PFAS-Presentation-CTLs\\_12Sep19\\_0.pdf](https://floridadep.gov/sites/default/files/PFAS-Presentation-CTLs_12Sep19_0.pdf) (last visited Jan. 20, 2020).

<sup>95</sup> Interstate Technology Regulatory Council, *PFAS*, <https://pfas-1.itrcweb.org/3-firefighting-foams/> (last visited Mar. 18, 2021).

<sup>96</sup> *Id.*

<sup>97</sup> National Law Review, *Expert Focus: US States Outpace EPA on PFAS Firefighting Foam Laws*, <https://www.natlawreview.com/article/expert-focus-us-states-outpace-epa-pfas-firefighting-foam-laws> (last visited Jan. 29, 2020); The New York State Senate, *Senate Bill S439A*, <https://www.nysenate.gov/legislation/bills/2019/S439> (last visited Jan. 29, 2020).

<sup>98</sup> *DEP PFAS Update*, at 36:00.

<sup>99</sup> DEP, *Per- and Polyfluoroalkyl Substances (PFAS) Dynamic Plan* (Feb. 2021)[hereinafter *DEP Dynamic Plan*], available at [https://floridadep.gov/sites/default/files/Dynamic\\_Plan\\_Revised\\_Feb2021.pdf](https://floridadep.gov/sites/default/files/Dynamic_Plan_Revised_Feb2021.pdf) (last visited Mar. 18, 2021).

<sup>100</sup> DEP, *Fire Training Facility Preliminary Site Assessments*, <https://floridadep.gov/waste/waste-cleanup/content/fire-training-facility-preliminary-site-assessments> (last visited Mar. 18, 2021).

<sup>101</sup> *See DEP Dynamic Plan.*

<sup>102</sup> *Id.* at 3.

<sup>103</sup> *Id.*

**Section 1** amends s. 373.309, F.S., which authorizes the Department of Environmental Protection (DEP) to adopt rules governing water wells and requires DEP to conduct related activities.

The bill requires DEP, upon request of a local government entity or a person otherwise responsible for site rehabilitation, to delineate areas of groundwater contamination without further action by the Environmental Regulation Commission.<sup>104</sup> The bill states this is required in order to facilitate the prompt and efficient prevention of potable water well contamination and promote cost-effective remediation of contaminated potable water supplies to protect human health and the environment.

The bill requires DEP to make available maps or other information on areas contaminated by PFAS, as defined in section 6 of the bill, for water management districts, regional planning councils, the Department of Health, county building and zoning departments. Upon request and payment of appropriate costs, DEP must make such maps and information available to property owners, realtors, real estate associations, property appraisers, and other interested persons. Such information is part of DEP's program for delineating areas of groundwater contamination for implementation of potable water well location, construction, testing, permitting, and clearance requirements.

**Sections 2 and 5**, respectively: amend s. 376.301, F.S., which provides definitions for the Water Quality Assurance Act and other sections; and s. 376.79, F.S., which provides definitions for Florida's Brownfields Redevelopment Act.

The bill changes the definition of "institutional controls" that applies throughout the Brownfields Redevelopment Act, the Water Quality Assurance Act, and ss. 376.70 and 376.75, F.S.<sup>105</sup> PFAS, as defined in section 6 of the bill, is added to the specified contaminants to which institutional controls may apply. The bill also adds local governmental requirements to the types of restrictions specified in the definition, which under current law include deed restrictions, restrictive covenants, and conservation easements. The bill provides that institutional controls may include local governmental requirements to:

- Require mandatory connection to available potable or reuse water systems;
- Describe an area of groundwater contamination in a shared electronic record system between DEP and a water management district or delegated permitting authority documenting the location and extent of groundwater contamination for use in processing well construction permit applications; or
- Delineate an area of groundwater contamination pursuant to s. 373.309, F.S.

**Section 3** amends s. 376.30701, F.S., which establishes a risk-based correction action process to be applied at certain sites where legal responsibility for site rehabilitation exists.

The bill requires DEP, when issuing a site rehabilitation completion order under the risk-based correction action process in s. 376.30701, F.S., that relies upon an institutional control not

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<sup>104</sup> Section 20.255(6), F.S. The Environmental Regulation Commission is an unpaid seven-member board within DEP that approves, modifies, or disapproves of proposed rules that contain standards.

<sup>105</sup> Sections 376.70 and 376.75, F.S. These sections apply to drycleaning facilities.

recorded in public records, to provide constructive notice to the local government entities, owners of any property into which the point of compliance is allowed to extend, and residents on any property into which the point of compliance is allowed to extend.

**Section 4** amends s. 376.313, F.S., which provides for a cause of action for unauthorized discharges or conditions of pollution.

The bill narrows the authorized scope of a cause of action under s. 376.313, F.S., to damages to real property or personal property directly resulting from the use of a contaminant or a discharge or other condition of pollution covered by the Water Quality Assurance Act and which was not authorized by any federal, state, or local government approval, requirement, or permit. This changes the current scope, which is for all damages, including personal injury damages, resulting from such a condition of pollution that was not authorized by ch. 403, F.S. The bill adds the use of a contaminant as a potential cause of the damages.

The bill adds to the authorized defenses to statutory causes of action under s. 376.313, F.S., the liability protections provided for persons who execute and implement to successful completion a brownfield site rehabilitation agreement. Under existing law, the only authorized defenses to such causes of action are an act of war, an act of government, an act of God, or an act or omission of a third party (with additional defenses for petroleum products or drycleaning solvents), as enumerated in s. 376.308, F.S.

**Section 6** creates s. 376.91, F.S., entitled “Statewide cleanup of PFAS.”

As used in s. 376.91, F.S., the bill defines “PFAS” as “perfluoroalkyl and polyfluoroalkyl substances, including perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS).”

The bill requires DEP to adopt rules for statewide cleanup target levels (CTLs) for PFAS in soils and groundwater, with priority given to PFOA and PFOS. These rules may not take effect until ratified by the Legislature. The effect of this change could be to invalidate DEP’s existing provisional CTLs.

The bill authorizes DEP to require site assessments and sampling by potentially responsible parties to assist in its investigation of PFAS contamination that occurs in the state before rules for PFAS target levels go into effect.

The bill provides that a responsible party who is cooperating in good faith with DEP’s investigations by conducting or assisting with the site assessment, providing site access, sampling, or taking other cooperative action have limitations on liability provided under the bill. Additionally, a person who executes a PFAS voluntary site rehabilitation agreement with DEP also has these protections from liability. Specifically, such persons are immune from and have no liability for claims of any person, for 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;
- Statutory causes of action arising under s. 376.313(3) (see above); or
- Stigma to real property or improvements caused by PFAS contamination.

Such a party is not subject to any administrative or judicial action brought by or on behalf of any person, state or local government, or agency to compel or enjoin site rehabilitation or pay for the cost of rehabilitation of environmental contamination or to pay any fines or penalties regarding rehabilitation based on the presence of a particular PFAS constituent until DEP's rules for that constituent has been ratified by the Legislature.

This liability protection is effective upon execution of a PFAS voluntary site rehabilitation agreement and remains effective as long as the following conditions are met:

- A person is responsible for site rehabilitation, provided each person responsible for site rehabilitation complies with the terms of the site rehabilitation agreement.
- Any subsequent property owner of the site maintains compliance, as applicable, with any institutional controls or engineering controls required for site rehabilitation.

The bill states that this liability protection does not affect an individual's ability or authority to seek contribution from any person who may have liability with respect to the site and who did not receive the cleanup liability protection provided by the bill. Any statute of limitations that would bar DEP from pursuing relief under its existing authority is tolled from the time the agreement is executed until site rehabilitation is completed or immunity is revoked pursuant to the bill.

The bill requires DEP, if a person responsible for site rehabilitation fails to comply with the site rehabilitation agreement, to allow 90 days for such person to return to compliance with the provision at issue or negotiate a modification to the site rehabilitation agreement with DEP for good cause shown. This 90-day grace period does not apply if an imminent hazard exists. The bill revokes the immunity provisions if the project is not returned to compliance with the site rehabilitation agreements and a modification cannot be negotiated.

The bill requires DEP, in consultation with the Department of Health, to develop and implement a PFAS Assessment and Site Rehabilitation Program within DEP to study PFAS' impacts on human health and the environment, develop strategies to protect human health and the environment from the harmful effects of PFAS, and develop cost-effective strategies for remediation of PFAS.

The bill requires that the program do all of the following:

- Estimate costs incurred by the state, local governmental entities, businesses, and individuals in response to human and ecological exposure to PFAS.
- Estimate the costs attributable to each source of PFAS identified in the state.
- Inventory all ongoing direct and indirect discharges of PFAS to the air and surface waters, likely instances of PFAS contamination in soil and groundwater, and the amount of such discharges and contaminations.
- Include a risk assessment, based on the best available scientific information, of the risks to human health from exposure to PFAS present in the state in various media, including air, water, and soil.
- Estimate the ongoing and anticipated future costs of the aggregate impact of the discharge, emission, and contamination of PFAS in the state, including the costs of sampling, testing,

cleanup, and decontamination; health care-related costs for treating individuals who have been exposed to PFAS; infrastructure improvements; and any other associated costs.

- Evaluate the impact of PFAS on public health and natural resources.
- Identify areas of potential or known contamination.
- Recommend response strategies that minimize the health risks of exposure to PFAS and protect the state's resources in a cost-effective manner.
- Recommend risk mitigation and remedial strategies.
- Recommend public education and outreach strategies to increase awareness and understanding of PFAS impacts and the relative risk of exposure to PFAS through various exposure pathways.
- Recommend a program for site cleanup, rehabilitation, mitigation, funding, financial assistance, and liability protection for responsible persons.

The bill requires DEP, in consultation with the Department of Health, to prepare and submit a report to the Governor and the Legislature by December 31, 2021, and annually thereafter, on the progress of DEP's findings under the program, including any recommendations for legislative action.

**Section 7** states that the act takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.



**B. Private Sector Impact:**

Narrowing the scope of liability, and expanding the potential defenses, for causes of action arising under s. 376.313, F.S., may impact the amounts of damages plaintiffs are able to recover in causes of action arising under the statute.

The liability protections for responsible parties cooperating with Department of Environmental Protection (DEP) investigations, or for persons who execute a PFAS voluntary site rehabilitation agreement with DEP, may have an indeterminate, positive fiscal impact on parties eligible for such liability protections.

**C. Government Sector Impact:**

The bill may result in increased costs for the Department of Environmental Protection (DEP). The bill requires DEP to: add PFAS to its program for delineating areas of groundwater contamination, delineate areas of groundwater contamination upon request by certain parties, provide constructive notice to various parties when issuing a site rehabilitation completion order, adopt statewide rules for PFAS cleanup target levels, create and implement a new program for PFAS assessment and site rehabilitation, and submit an annual report to the Legislature on the finding from the new program.

**VI. Technical Deficiencies:**

Section 6 of the bill provides for immunity from causes of action arising under s. 376.313, F.S. Line 327 authorizes new defenses to such causes of action, but it does not mention the immunity in section 6 of the bill. Language to address this may include adding s. 376.91, F.S., created in section 6 of the bill, to line 327.

Section 376.91, F.S., uses many terms that are used in the Brownfields Redevelopment Act, but s. 376.91, F.S., is not part of the Act so the Act's definitions technically do not apply to it. An amendment to address this may involve amending section 5 of the bill to include s. 376.91, F.S., as one of the statutes to which the definitions in s. 376.79, F.S., apply.

On line 344 of the bill, the word "described" is unnecessary and inconsistent with line 230, where the bill is creating essentially the same definition.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 373.309, 376.301, 376.30701, 376.313, and 376.79.

This bill creates section 376.91 of the Florida Statutes.

**IX. Additional Information:**

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

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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