

073-432—November 26, 1973

OIL SPILL PREVENTION AND POLLUTION CONTROL ACT
SUBSTANCES REGULATED BY THE ACT

To: Lew Brantley, Senator, 8th District, Jacksonville

Prepared by: Kenneth F. Hoffman, Assistant Attorney General

QUESTIONS:

1. Does the statutory language "other hazardous materials" of §376.031(7), F. S., defining "pollutants" limit the application of the Oil Spill Prevention and Pollution Control Act to the derivatives or by-products of oil, gasoline, pesticides, ammonia, and chlorine, or does it extend jurisdiction to other commonly shipped substances?

2. Would the Department of Legal Affairs be estopped from prosecuting a shipper who had spilled a substance such as diamonium phosphate, granular (triple super) phosphate, potash, nitrate of soda, dry sodium hydroxide, sodium carbonate, elemental phosphorus, sodium chlorate, borax, alum, mixed fertilizer (bulk), copper sulphate, calcium oxide, or nitrate of soda-potash by the assertion of a defense based upon detrimental reliance on a prior Department of Natural Resources ruling that these substances are not covered by the act?

SUMMARY:

The term pollutants as used in §376.031(7), F. S., does not limit the application of the act (Ch. 376, F. S.) to oil, gasoline, pesticides, ammonia, chlorine, or their derivatives or by-products. The term includes any elements or compounds which, when discharged in any quantity into state waters, present an imminent and substantial danger to the public health or welfare.

In answer to question 1, it is my opinion that the term "pollutants," as used in §376.031(7), F. S., does not limit the application of the act (Ch. 376, F. S.) to oil, gasoline, pesticides, ammonia, chlorine, or their derivatives or by-products.

Proper statutory construction, with regard to the term "other hazardous materials" requires a reading, *in pari materia*, of several sections of Ch. 376, F. S., along with the relevant provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1321.

Section 376.041, F. S., forbids the discharge of "oil, petroleum products or their by-products, and other pollutants into or upon any coastal waters." Pollutants are defined at §376.031(7) to include, but not be limited to, oil, gasoline, pesticides, ammonia, chlorine, and other hazardous materials.

Chapter 376, F. S., does not define other hazardous materials. A lengthy consideration of the rules of statutory construction is saved, however, by turning to federal law for assistance. Section 376.021(6) specifies the legislative intent "to support and complement applicable provisions of the Federal Water Quality Improvement Act of 1970, specifically those provisions relating to the national contingency plan for removal of oil and other pollutants."

Hazardous substances are defined at 33 U.S.C. §1321(a)(14) and §1321(b)(2) (A) as

... such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone, present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

This definition, as written into the 1972 amendment to the federal act, Public Law 92-500, is identical to the definition as it was in 1970, found at 33 U.S.C. §1162.

The definition of pollutants then, when considering the definition of other hazardous substances, would include any elements or substances as defined by the federal act. As explained at §376.21, F. S., Ch. 376 "shall be liberally construed to effect the purposes set forth under this chapter and the Federal Water Quality Improvement Act of 1970." This is emphasized by §376.031(8), F. S., which defines pollution to include

. . . the presence in the outdoor atmosphere or waters of the state of any one or more *substances* or *pollutants*, in quantities which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which may unreasonably interfere with the enjoyment of life or property, including outdoor recreation. (Emphasis supplied.)

The only substances specifically excluded are liquefied petroleum gas and industrial effluents discharged pursuant to a permit issued by the Department of Pollution Control. Section 376.20, F. S.

The main theme of both state and federal statutes is the prompt removal of hazardous materials from the public waters. [See] 33 U.S.C. §1321; §376.09, F. S. The spills, discharges, and escapes of pollutants which Ch. 376, F. S., is specifically created to control are those which originate from the "transfer, storage and transportation of such products" Section 376.021(3)(b).

The provisions of Ch. 376, F. S., when read *in pari materia*, and in conjunction with the Federal Water Pollution Control Act, do not limit the application of the act (Ch. 376) to oil, gasoline, pesticides, ammonia, chlorine, or their derivatives or by-products. Although the interpretation of a statute by the head of an agency charged with its enforcement and interpretation will be followed by the courts unless clearly erroneous [Daniel v. Florida State Turnpike Authority, 213 So.2d 585 (1968)], I can envision no way in which the head of the Department of Natural Resources could limit, by rule or otherwise, which materials are "hazardous substances." This is so because it is impossible to know what substance is hazardous until its quantity is known. This is true both in law [33 U.S.C. §1321(a) (14) and §1321(b)(2)(A)] and in practical application. For instance, even excessive amounts of fresh water dumped into a marine environment could result in deaths of marine organisms due to physiological shock.

Your second question is answered simply by explaining that my office is not designated as the state office responsible for "prosecuting" a party who has spilled a pollutant in violation of the act. Felony prosecutions under §376.12, F. S., would be handled by the state attorneys. Section 27.02, F. S. Penalties are to be assessed by the Department of Natural Resources (the governor and cabinet). Section 376.16, F. S.

In addition, there has been no interpretation of the statute with regard to the definition of pollutants or hazardous substances by the head (governor and cabinet) of the Department of Natural Resources through the passage of regulations or otherwise.

For these reasons, your question becomes whether the proper agencies can enforce the statute with regard to the substances you have listed. With regard to civil penalties, that determination is made by statute, and the Department of Natural Resources can enforce the statute with regard to those substances you list. The same answer would cover criminal prosecutions.