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Handbook of Florida Water Regulation: Comprehensive Environmental Response, Compensation, and Liability Act[1]

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Preface

This handbook is designed to provide an accurate, current, and authoritative summary of the principle Federal and Florida laws that directly or indirectly relate to agriculture. This handbook should provide a basic overview of the many rights and responsibilities that farmers and farmland owners have under both Federal and Florida laws as well as the appropriate contact information to obtain more detailed information. However, the reader should be aware that because the laws, administrative rulings, and court decisions on which this handbook is based are subject to constant revision, portions of this publication could become outdated at anytime. Several details of cited laws are also left out due to space limitations.

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Overview

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or Superfund), was passed in 1980 and amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA) and in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act, ("Brownfields Amendments", which provided

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important liability limitations for landowners who qualify as contiguous property owners, bona fide prospective purchasers, or innocent landowners). It empowers and provides a trust fund for the Environmental Protection Agency (EPA) to investigate and clean up sites contaminated by hazardous substances. CERCLA also extends liability for site pollution to several tiers of potential defendants at once and is a potent measure for forcing responsible parties to contribute to the costs of cleanup.

The EPA has created a list of "hazardous substances" that are within the reach of CERCLA regulation. In addition, CERCLA includes by reference all hazardous substances or hazardous pollutants that are identified by the federal RCRA, the Clean Air Act, and the Clean Water Act. The only express exclusions from CERCLA coverage are petroleum (although the EPA reserves the power to classify specific petroleum products as hazardous) and natural or synthetic gas.

Who Enforces CERCLA?

The EPA is, and has been, the chief enforcer of CERCLA, although the President is authorized to enter into agreements with states that wish to enforce the provisions of CERCLA. Also, the EPA must consult with the relevant state and local officials before deciding upon remedies for pollution at federal facilities, especially where the facilities or the remedies chosen fall within the reach of state environmental law.

Who Investigates CERCLA Violations?

The EPA Administrator has authority to begin investigations whenever there is reason to believe that a release has occurred or may occur. The EPA, or a state or local authority acting under agreement with the EPA, may require the person or entity under investigation to provide information about the nature and handling of all hazardous materials on the site, as well as information related to the subject's ability to pay for the cleanup.

CERCLA also authorizes entry, at reasonable times, to any site dealing or has dealt with hazardous materials and further authorizes the taking of samples from the site. If EPA requests are denied during the investigation phase, the EPA may issue compliance orders to compel cooperation. The EPA can enforce these orders with civil fines of up to $25,000 per day.

What Does a Cleanup Involve?

If the investigation confirms that a hazardous substance (or a pollutant or contaminant with the potential to pose an imminent threat to public health) has been released or may be released, the EPA may exercise any combination of several response options. These options include removal action, remedial action, or enforcement. A removal action is an immediate interim intervention, while remedial action is a more permanent measure. Permanent, cost-effective measures are encouraged by CERCLA wherever possible. Also, the cleanup must be in accordance with other appropriate federal or state environmental acts. The EPA, or the state in many cases, is empowered to undertake the cleanup, although the responsible parties may be permitted to begin a private cleanup if they can demonstrate to the EPA that it will be as effective as the proposed EPA measures. This option may be much less costly for parties who would otherwise be forced to pay for any EPA cleanup.

Who Is Liable for the Cleanup Costs?

The CERCLA is aimed at five types of potentially liable parties (also known as potentially responsible parties) as follows:

1. Owners of sites.
2. Operators of sites.
3. Transporters of hazardous substances.
4. Those who arrange for such transportation (Arrangers).
5. Generators of hazardous substances (including small quantity generators).

For the specific EPA requirements for each of these potentially liable parties under CERCLA, see FE612, Hazardous Waste Management.

CERCLA imposes strict liability and therefore does not require a specific finding of negligence before penalties may be imposed. Also, *joint and several liability* allows the EPA to force a party who may be responsible for only part of the damage to pay the entire cost of cleanup. (The rule of joint and several liability is explained more fully in FE598, Private Regulation).

It is important to note that owners may be held liable even if they purchased land without knowledge that hazardous waste was buried there. This has been a source of great concern to land buyers, foreclosing banks, and others on the verge of acquiring land.

Also under CERCLA, no indemnification, hold harmless, or similar agreements will be effective in transferring liability for releases or potential releases of hazardous substances from the potentially responsible parties to any other parties.

Furthermore, under CERCLA, the EPA can offer a reward of up to $10,000 to any individual who provides information leading to the arrest and conviction of a person for a violation of CERCLA subject to a criminal penalty. CERCLA also has a whistleblower provision that protects employees from being fired or discriminated against due to providing information to the EPA or any state of potential violations of CERCLA by their employers.

What Are the Penalties?

Under CERCLA prompt notification to the EPA is required after any spill or release of hazardous substances into the environment. CERCLA also requires that the location of any site containing hazardous materials be reported to the EPA. Failure to report in either case may result in fines and/or imprisonment for up to three to five years.

Along with the costs of cleaning up the contaminated site, the potentially liable parties (also known as potentially responsible parties) may also be assessed a fine of no more than $25,000 per violation. These violations include failure to report to the EPA any spill or release of hazardous substances into the environment, destruction of records pertaining to the release of hazardous substances and contamination of the site, and violations of settlement agreements. If the violation(s) continues the potentially liable parties will be assessed a fine of no more than $25,000 a day for each day the violation continues. In the case of a second or subsequent violation, the fine may be increased to $75,000 a day for each day the violation continues. Also, CERCLA has a citizen suit provision under which a person may sue the potentially liable parties for any personal injury or property damage caused by the release of the hazardous substance.

What Are the Defenses to Liability under CERCLA?

Defenses to liability are limited to the following:

- Acts of God.
- Acts of war.
- Actions or omissions of a third party not employed by or in a contractual relationship with the defendant.
- Innocent landowner defense.
- Security interest exemption.
- The application and disposal of pesticides registered under FIFRA.
- Contiguous property owner exemption (next door or neighboring property owners).
- De micromis exemption.
- Federally authorized renovation of a Brownfield (contaminated) site.

The third party defense is usable only where someone else is entirely responsible for the damage and where there is no contractual relationship between the defendant and the third party. The innocent landowner defense applies when a new landowner through reasonable due diligence did not know, and had no reason to know, that a previous landowner had contaminated the property. In many cases, liability can be placed on both the present and past owners irrespective of culpability. The security interest exemption protects lenders (e.g., banks) from liability when the lender does not participate in the management of the facility. Persons who apply

pesticides that are registered under FIFRA will not be subject to liability under CERCLA only if the pesticides are applied according to the labeling instructions. Also farmers who dispose of their own pesticides are exempt from CERCLA requirements governing generators as long as they comply with the disposal instructions on the pesticide label and must triple-rinse each container. Under the contiguous property owner exemption, owners of land that borders or is located near the contaminated land/site, and that is or may be contaminated by the release of hazardous substances on the neighboring site, do not fall under the category of owners or operators and are exempt from liability as long as they did not cause, contribute, or consent to the release or threatened release of hazardous substances; are not potentially liable or affiliated with a potentially liable party through any direct or indirect familial relationship, or any contractual, corporate, or financial relationship not based on the sale of goods or services, or the result of a reorganization of a business entity that was potentially liable; and take reasonable steps to stop any continuing release, prevent or limit human or environmental exposure to the hazardous substance released from the contaminated site, and cooperate with the EPA. Under the De micromis exemption, a person who arranged for the transportation of or transported the hazardous substance is not liable for the cleanup costs of the contaminated site as long as they can demonstrate that the amount of the hazardous substances they arranged for the transportation of or transported was less than 110 gallons of liquid materials or less than 200 pounds of solid material and all or part of the disposal, treatment, or transport occurred before April, 1, 2001. Under the Brownfield exemption, persons or private entities purchasing known or suspected Brownfield sites for renovation as business complexes, open public parks, etc, will not be liable for the cleanup of contamination on the site, unless they cause the release (i.e., pouring out the contents of drums while clearing the site). These owners must clean up the site to an acceptable lower standard than that mandated by CERCLA.

If a developer qualifies, both the federal and state governments have programs (in Florida it is the Brownfields Redevelopment Act) that provide grants to help redevelop contamined sites.

For a list of federal grant qualifications and an application, please contact the EPA.

Under the Florida Brownfields Redevelopment Act (BRA), the state government will provide incentives for the redevelopment of Brownfield sites in Florida under certain terms and requirements.

The local government with jurisdiction over the brownfield site must notify the DEP of its decision to designate the site for rehabilitation for purposes of this Act. Along with the requirement that the local government must give notice of the designation to and an opportunity for its citizens to be heard concerning the designation, the Act further requires that the local government, in determining the areas to designate as brownfield sites, use factors including:

- Whether the site has reasonable economic potential.
- Whether the site has the potential to attract private sector participation in rehabilitating the site.
- Whether the site contains areas suitable for limited recreational space, or cultural or historical preservation purposes.

Also in order to qualify under this Act, the site must not be subject to an ongoing formal enforcement or corrective action pursuant to federal authority including but not limited to CERCLA, SWDA, CWA, or RCRA.

Incentives for redeveloping brownfield sites under BRA include:

- Tax exemptions.
- Grants, including community development block grants.
- Zoning incentives, etc.

Just like the Federal programs, BRA requires that the brownfield site be cleaned up according to specific criteria. For a list of BRA cleanup criteria and for more information on the terms and requirements of BRA, please contact the DEP.

What Are Environmental Audits?

An audit is basically an evaluation of the land's condition and an appraisal of the consequent likelihood of the lender or new property owner becoming subject to some type of enforcement lien that might impair the lender's security. Such a lien might arise, for example, from the liability CERCLA imposes upon owners for hazardous substances buried on their land. CERCLA can threaten innocent buyers since it applies even if the pollution was left by a previous owner and the buyer had no knowledge of it. If the audit reveals that the land is in some way "unclean", the transaction will inevitably be delayed until the lender is reassured that its interest in the land will not be devalued. Having an environmental audit performed on the land, preferably before it is purchased, will help to satisfy the reasonable due diligence standard of the innocent landowner defense against liability under CERCLA.

Source

42 United States Code, Sections 9601 to 9675; Chapter 376, Florida Statutes, Sections 376.77 to 376.85

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