

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.)

Prepared By: The Professional Staff of the Committee on Agriculture

BILL: CS/SB 1210

INTRODUCER: Environment and Natural Resources Committee and Senator Albritton

SUBJECT: Pollution Control Standards and Liability

DATE: February 9, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Roger</u>	<u>EN</u>	Fav/CS
2.	<u>Becker</u>	<u>Becker</u>	<u>AG</u>	Favorable

Please see Section IX. for Additional Information:

PLEASE MAKE SELECTION

I. Summary:

CS/SB 1210 amends s. 403.182, F.S., regarding local pollution control programs. The bill provides that notwithstanding existing law or any existing local pollution control programs, the Secretary of the Department of Environmental Protection (DEP) has exclusive jurisdiction in setting standards or procedures for evaluating environmental conditions and assessing potential liability for the presence of contaminants on land that is classified as agricultural land pursuant to state law and being converted to a nonagricultural use. This exclusive jurisdiction includes defining what constitutes all appropriate inquiry required by federal law relating to the innocent landowners defense under CERCLA and associated guidance.

For land that is classified as agricultural land pursuant to state law and being converted to a nonagricultural use, the bill provides that the Secretary of DEP may not delegate the authority to set standards or procedures for evaluating environmental conditions and assessing potential liability described in the bill to a county, a municipality, or another unit of local government through a local pollution control program. However, the bill does not preempt the enforcement authority of a county, a municipality, or another unit of local government through a local pollution control program.

The bill does not apply to former agricultural land for which a permit has been approved by a local government to initiate development or for which development was completed on or before July 1, 2022.

II. Present Situation:

Classification of Agricultural Lands

Section 193.461(1), F.S., requires state property appraisers to classify for ad valorem tax assessment purposes all lands within their counties as agricultural or nonagricultural.¹ Only lands that are used primarily for bona fide agricultural purposes may be classified agricultural.²

The term “bona fide agricultural purposes” means good faith commercial agricultural use of the land.³ The term “agricultural purposes” includes, but is not limited to, horticulture; floriculture; viticulture; forestry; dairy; livestock; poultry; bee; pisciculture, if the land is used principally for the production of tropical fish; aquaculture as defined in state law; algaculture; sod farming; and all forms of farm products as defined in state law; and farm production.⁴

In determining whether the use of the land for agricultural purposes is bona fide, the following factors may be taken into consideration:

- The length of time the land has been so used;
- Whether the use has been continuous;
- The purchase price paid;
- Size, as it relates to specific agricultural use, but a minimum acreage may not be required for agricultural assessment;
- Whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforesting, and other accepted agricultural practices;
- Whether the land is under lease and, if so, the effective length, terms, and conditions of the lease; and
- Such other factors as may become applicable.⁵

In contrast, nonagricultural lands are lands that have either been diverted from an agricultural to a nonagricultural use, or are no longer being utilized for agricultural purposes.⁶

Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁷ is commonly known as Superfund.⁸ Thousands of contaminated sites exist nationally due to

¹ Section 193.461(2), F.S.

² Section 193.461(3)(b), F.S.

³ *Id.*

⁴ Section 193.461(5), F.S.

⁵ *Id.*

⁶ Section 193.461(4), F.S.

⁷ 42 U.S.C. ss. 9601 et seq.

⁸ EPA, *What is CERCLA?*, https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=12ec93221bb99c1013bdb913cc4bcb32 (last visited Feb. 9, 2022).

hazardous waste being dumped, left out in the open, or otherwise improperly managed.⁹ These sites include manufacturing facilities, processing plants, landfills, and mining sites.¹⁰

CERCLA created a tax on the chemical and petroleum industries and required that the money collected be used to clean up hazardous waste sites throughout the country.¹¹ Superfund allows the U.S. Environmental Protection Agency (EPA) to clean up contaminated sites.¹² It also forces the parties responsible for the contamination to either perform cleanups or reimburse the government for EPA-led cleanup work.¹³ When there is no viable responsible party, Superfund gives EPA the funds and authority to clean up contaminated sites.¹⁴

Federal agencies must comply with substantive and procedural CERCLA requirements to the same extent as private entities.¹⁵ The following sequence of events generally applies to all sites, both privately and federally-owned or operated: preliminary assessment; site investigation; listing on the National Priorities List; remedial investigation; feasibility study; record of decision; remedial design; remedial action; long-term operation; and maintenance.¹⁶ The remedy selected for cleanup at a federal facility must meet CERCLA's cleanup standards.¹⁷

All Appropriate Inquiries

All appropriate inquiries (AAI)¹⁸ is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination.¹⁹ AAI requirements apply to any party who can potentially claim protection from CERCLA liability as an innocent landowner, contiguous property owner, or bona fide prospective purchasers (BFPPs).²⁰

Title 40, Part 312 of the Code of Federal Regulations (AAI Final Rule) provides that AAI investigations must be documented in a written report prepared by an environmental

⁹ EPA, *What is Superfund?*, https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=2e020af01b215410a5dced39bc4bcb98 (last visited Feb. 9, 2022).

¹⁰ *Id.*

¹¹ EPA, *What is CERCLA?*, https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=12ec93221bb99c1013bdb913cc4bcb32 (last visited Feb. 9, 2022).

¹² EPA, *What is Superfund?*, https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=2e020af01b215410a5dced39bc4bcb98 (last visited Feb. 9, 2022).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ EPA, *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Facilities*, <https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal> (last visited Feb. 9, 2022).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See 40 C.F.R. pt. 312 (entitled "Innocent Landowners, Standards for Conducting All Appropriate Inquiries," also known as the "AAI Final Rule"); see also EPA, *Memorandum: Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners ("Common Elements")* (July 29, 2019), available at <https://www.epa.gov/sites/default/files/2019-08/documents/common-elements-guide-mem-2019.pdf> (last visited Feb. 9, 2022) (providing Common Elements guidance).

¹⁹ EPA, *Lender Liability and Applicability of All Appropriate Inquiries*, available at https://www.epa.gov/sites/default/files/2017-07/documents/aai_factsheet_lender_liability_epa_560_f_17_192_508.pdf (last visited Feb. 9, 2022).

²⁰ *Id.*

professional.²¹ These reports often take the form of a Phase I Environmental Site Assessment.²² A Phase I Environmental Site Assessment uses existing information to help understand the property conditions by examining current and historical uses of the site and potential threats to human health or the environment. When a potential owner conducts an AAI in compliance with Title 40, Part 312 of the Code of Federal Regulations, he or she may have a defense to liability if contamination is later discovered.²³

A Phase II Environmental Site Assessment is recommended if the Phase I Environmental Site Assessment results reveal known or potential contamination on the property.²⁴ In that event, an environmental professional develops a sampling plan to evaluate the potential presence of contamination from hazardous substances and petroleum on the property and determines the sources and exposures.²⁵ If the contamination found at the property exceeds risk thresholds for the proposed reuse, a cleanup plan may be necessary.²⁶

Local Pollution Control Programs

Section 403.182, F.S., provides that each county and municipality (or any combination thereof) may establish and administer a local pollution control program, so long as it complies with all other provisions of the Florida Air and Water Pollution Control Act (FAWPCA).²⁷ All local pollution control programs must:²⁸

- Be approved by the Department of Environmental Protection (DEP) as adequate to meet the requirements of the FAWPCA and any applicable rules and regulations pursuant thereto;
- Provide by ordinance, regulation, or local law for requirements compatible with, or stricter or more extensive than those imposed by the FAWPCA and regulations issued thereunder;
- Provide for the enforcement of such requirements by appropriate administrative and judicial process; and
- Provide for administrative organization, staff, financial, and other resources necessary to effectively and efficiently carry out its program.

If DEP determines that a local pollution control program is inadequate to prevent and control pollution, or is being administered in a manner inconsistent with the requirements of the FAWPCA, it may require necessary corrective measures.²⁹ If these corrective measures are not implemented, DEP may reassume implementation of the FAWPCA within the jurisdiction.³⁰

²¹ EPA, *All Appropriate Inquiries Rule: Reporting Requirements and Suggestions on Report Content*, available at https://www.epa.gov/sites/default/files/2015-05/documents/aa_i_reporting_factsheet.pdf (last visited Feb. 9, 2022).

²² See EPA, *Assessing Brownfield Sites*, available at https://www.epa.gov/sites/default/files/2020-07/documents/assessing_brownfield_sites.pdf (last visited Feb. 9, 2022) (explaining that performing a Phase I Environmental Site Assessment pursuant to ASTM International Standards E1527-13 prior to owning a property is often equivalent to conducting all appropriate inquiries).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 403.182, F.S.; see also ch. 67-436, s. 2, Laws of Fla. (identifying the short title of the act).

²⁸ Section 403.182(1), F.S.

²⁹ See s. 403.182(4), F.S.

³⁰ See *id.*

Each local pollution control program must cooperate with and assist DEP in carrying out its powers, duties, and functions.³¹

Site Assessment Guidance for Former Agricultural Sites in Miami-Dade County

The Miami-Dade County (County) Division of Environmental Resources Management (DERM) implements monitoring, education, restoration, regulatory, and land management programs to protect water quality, drinking water supply, air quality and natural resources that are vital to the health and well-being of all County residents and visitors and the ecosystem.³²

In August 2021, DERM issued a revised *Site Assessment Guidance for Former Agricultural Sites in Miami-Dade County, DERM Guidance 7G* (DERM Guidance).³³ The DERM Guidance revised earlier interim guidance on the same topic.³⁴ DERM states that the guidance was developed in response to requests to provide environmental professionals and practitioners clear guidance for evaluating potential environmental concerns at sites transitioning from a former bona fide agriculture land use (e.g. crops and orchards) to a nonagricultural land use, such as residential use.³⁵

According to the DERM Guidance, the conversion of former agricultural lands into nonagricultural uses like residences and schools results in different exposed populations (e.g. expectant mothers, children, and construction workers), different exposure scenarios (e.g. increased exposure frequency and duration), and different exposure pathways.³⁶ Under these new scenarios, residual agrichemical concentrations in the environment may pose an unacceptable health risk to exposed populations and have the potential to cause a nuisance, ground pollution, or water pollution as defined in the Miami-Dade County Code.³⁷

To address these concerns, the DERM Guidance requires “testing/proper assessment and, if necessary, risk mitigation to ensure the protection of public health, safety, and welfare.”³⁸ It addresses areas historically utilized for growing agricultural crops and provides minimum requirements to characterize the site’s environmental conditions resulting from agricultural activities at the site. DERM notes that based upon changes in types of crops grown,

³¹ Section 403.182(10), F.S.

³² DERM, *Environment*, <https://www.miamidade.gov/environment/> (last visited Feb. 9, 2022).

³³ DERM, *Site Assessment Guidance for Former Agricultural Sites in Miami-Dade County, DERM Guidance 7G*, available at <https://www.miamidade.gov/resources/legal-ads/2021-08-interim-guidance-assessment-at-former-agricultural-sites.pdf> (last visited Feb. 9, 2022).

³⁴ DERM, *Interim Site Assessment Guidance for Developing at Former Agricultural Sites*, <https://www.miamidade.gov/environment/research-reports.asp#0> (last visited Feb. 9, 2022). The Dade County Farm Bureau opposed the interim guidance, asserting (among other things) that it unfairly targeted agricultural lands, assumed without evidence that they are polluted, and imposed on them heavy-handed environmental testing protocols. See *Landowners Urged to Fight Back against Miami-Dade County DERM*, SOUTH DADE NEWSLEADER, Nov. 13, 2020, http://www.southdadenewsleader.com/news/landowners-urged-to-fight-back-against-miami-dade-county-derm/article_bac6b9f8-253c-11eb-915f-cf89a59e3111.html (last visited Feb. 9, 2022).

³⁵ *Id.*

³⁶ DERM, *Site Assessment Guidance for Former Agricultural Sites in Miami-Dade County, DERM Guidance 7G*, available at <https://www.miamidade.gov/resources/legal-ads/2021-08-interim-guidance-assessment-at-former-agricultural-sites.pdf> (last visited Feb. 9, 2022).

³⁷ *Id.* at 1.

³⁸ *Id.*

agricultural use, irrigation, and pest management strategies, homogenous application of agricultural chemicals and distribution of agricultural chemical residues in soils and groundwater cannot be assumed. Ancillary use areas such as agricultural storage, mix-load areas, and fuel storage areas may require more targeted assessment and may include additional contaminants of concern (COCs). And additional assessment may be necessary on a case-by-case basis for properties at which a nonagricultural land use predated the bona fide agricultural use (such as landfills and military installations) or where the land use history indicates a period during which bona fide agricultural use was interrupted by a nonagricultural use.³⁹

The DERM Guidance provides guidance on soil assessment issues like sampling methodologies (including discrete sampling, composite sampling, and Incremental Sampling Methodology (ISM) sampling); sampling intervals; COCs; Synthetic Precipitation Leaching Procedure (SPLP) analysis; acute toxicity considerations; assessment of bioavailability from soil; and background concentrations.⁴⁰ It also provides guidance on groundwater assessment issues like sampling frequency and COCs, the substance of technical reports that property owners submit to DERM, and notifications.⁴¹

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 403.182, F.S., regarding local pollution control programs. The bill provides that notwithstanding existing law or any existing local pollution control programs, the Secretary of the Department of Environmental Protection (DEP) has exclusive jurisdiction in setting standards or procedures for evaluating environmental conditions and assessing potential liability for the presence of contaminants on land that is classified as agricultural land pursuant to state law and being converted to a nonagricultural use. This exclusive jurisdiction includes defining what constitutes all appropriate inquiry required by federal law relating to innocent landowners defense under CERCLA and associated guidance.

For land that is classified as agricultural land pursuant to state law and being converted to a nonagricultural use, the bill provides that the Secretary of DEP may not delegate the authority to set standards or procedures for evaluating environmental conditions and assessing potential liability described in the bill to a county, a municipality, or another unit of local government through a local pollution control program. However, the bill also provides that it does not preempt the enforcement authority of a county, a municipality, or another unit of local government through a local pollution control program.

The bill does not apply to former agricultural land for which a permit has been approved by a local government to initiate development or for which development was completed on or before July 1, 2022.

Section 2 provides that the bill takes effect July 1, 2022.

³⁹ *Id.*

⁴⁰ *Id.* at 2-6.

⁴¹ *Id.* at 6-8.

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:

None.

C. Government Sector Impact:

The bill may increase costs to DEP because it is assuming exclusive jurisdiction in setting standards or procedures for evaluating environmental conditions and assessing potential liability for the presence of contaminants on land that is classified as agricultural land pursuant to state law and being converted to a nonagricultural use. In contrast, local governments may experience a decrease in costs associated with setting such standards or procedures.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 403.182 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Environment and Natural Resources on February 7, 2022**

- Narrows the scope of the underlying bill to the following:
 - Provides that the Secretary of the Department of Environmental Protection has exclusive jurisdiction from “all matters related to” (in the underlying bill) evaluating environmental conditions and assessing potential liability for the presence of contaminants, to “setting standards or procedures” for same.
 - Modifies the scope of the evaluation and assessment, from land that is or was classified as agricultural land, to land that is classified as agricultural land and is being converted to a nonagricultural use.
 - Clarifies that the secretary’s exclusive jurisdiction includes defining what constitutes all appropriate inquiry consistent with federal law and guidance.
 - Clarifies that the secretary may not delegate this authority to set standards or procedures to a county, a municipality, or another unit of local government through a local pollution control program for land that is classified as agricultural under state law and being converted to nonagricultural use.
 - Provides that the bill does not preempt the enforcement authority of a county, a municipality, or another unit of local government through a local pollution control program.
 - Provides that the bill does not apply to former agricultural land for which a permit has been approved by a local government to initiate development or for which development was completed on or before July 1, 2022.

B. Amendments:

None.