

**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 1210

INTRODUCER: Senator Albritton

SUBJECT: Development of Current or Former Agricultural Land

DATE: February 4, 2022

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Collazo	Rogers	EN	<b>Pre-meeting</b>
2.			AG	
3.			AP	

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**I. Summary:**

SB 1210 creates s. 376.3065, F.S., addressing the development of current or former agricultural land. The bill:

- Contains definitions for the terms “current or former agricultural land,” “lawful application,” “pesticide,” “pesticide mixing area,” and “qualified property.”
- Finds that regulations prescribe lawful application of pesticides and limit their use in agricultural activities.
- Creates a presumption that the application of pesticides as part of agricultural operations is lawful and not a recognized environmental condition.
- Authorizes pesticide mixing areas to be legally subdivided as separate parcels of land for environmental evaluation and remediation regardless of state or local restrictions.
- Requires the new statute to be used (instead of other state or local regulations) for evaluating environmental conditions and prescribing remedial activity for a contaminated site that is current or former agricultural land.
- Exempts qualifying current or former agricultural land from Department of Environmental Protection (DEP) rules for site assessment and remedial activity associated with lawful applications.
- Requires the owner or authorized representative to provide DEP with reasonable assurances that certain risk management techniques identified in the new statute have been implemented before redeveloping the current or former agricultural land.
- Provides that owners are only responsible for environmental risk management within their legal boundaries.
- Provides that DEP is prohibited from requiring additional environmental management activities except under specified circumstances.
- Provides that notwithstanding any existing local pollution control programs, DEP has exclusive, non-delegable jurisdiction in evaluating environmental conditions and assessing potential liability for the presence of contamination on current or former agricultural land. It

is also exclusively tasked with investigating claims of pesticide impacts to potable water systems or potable private wells pursuant to state law.

## II. Present Situation:

### Agriculture in Florida

Florida's climate makes it ideal for growing a variety of crops.<sup>1</sup> The state's signature crop is citrus. According to the 2017 Census of Agriculture,<sup>2</sup> 502,886 acres were in use as orchards (known as groves in Florida), second only to California. The bulk of Florida's orchard acreage includes citrus, with 474,540 total citrus acres, which represents 57 percent of the national total.<sup>3</sup>

State agriculture has other significant commodities:

- *Vegetables*. Florida ranked fourth among all states in total vegetable acres harvested (245,375 acres).<sup>4</sup>
- *Floriculture and bedding, nursery, propagative materials, sod, food crops grown under glass or other protection, and mushroom crops*. The 2017 Census of Agriculture showed that Florida ranked second among all states with value of sales totaling \$1 billion, whereas California had \$1.07 billion in comparison. Florida ranked first among all states in sod value of sales, with sales totaling \$184 million.<sup>5</sup>
- *Sugarcane*. Florida led the country in sugarcane production in 2017 with 15.8 million tons of sugarcane for sugar, which was 51 percent of the nation's total.<sup>6</sup>
- *Livestock*. There were 21,469 operations with cattle inventory totaling 1.64 million cattle and calves with 882,000 beef cows. Florida's cattle industry is primarily run as a cow/calf arrangement as weaned calves are shipped north to feed lots. Florida's goat inventory, especially meat and other goats, showed a total of 61,159 head compared to 52,052 in the 2012 census, showing that this is an emerging industry in the state.<sup>7</sup>

### Classification of Agricultural Lands

Section 193.461(1), F.S., requires state property appraisers to classify for assessment purposes all lands within their counties as agricultural or nonagricultural.<sup>8</sup> Only lands that are used primarily for bona fide agricultural purposes may be classified agricultural.<sup>9</sup>

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<sup>1</sup> U.S. Dep't of Agriculture (USDA), *Agriculture in the Sunshine State*, <https://www.usda.gov/media/blog/2019/10/15/agriculture-sunshine-state> (last visited Jan. 7, 2022).

<sup>2</sup> The Census of Agriculture is a complete count of U.S. farms and ranches and the people who operate them. It looks at land use and ownership, operator characteristics, production practices, income and expenditures. It is taken only once every five years, thus the latest available is from 2017. See USDA, National Agricultural Statistics Service, *Census of Agriculture*, <https://www.nass.usda.gov/AgCensus/> (last visited Jan. 7, 2022).

<sup>3</sup> USDA, *Agriculture in the Sunshine State*, <https://www.usda.gov/media/blog/2019/10/15/agriculture-sunshine-state> (last visited Jan. 7, 2022).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Section 193.461(2), F.S.

<sup>9</sup> Section 193.461(3)(b), F.S.

The term “bona fide agricultural purposes” means good faith commercial agricultural use of the land.<sup>10</sup> 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.<sup>11</sup>

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, reforestation, 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.<sup>12</sup>

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.<sup>13</sup>

## **Pesticides**

### ***Use on Agricultural Lands***

Pesticides<sup>14</sup> are an important tool in agricultural production, where they are used by farmers to control weeds and insects.<sup>15</sup> About one-third of agricultural products are produced depending on the application of pesticides. Overall, without the use of pesticides, there would be a 78% loss of fruit production, a 54% loss of vegetable production, and a 32% loss of cereal production. Pesticides play a critical role in reducing diseases and increasing crop yields worldwide.<sup>16</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> Section 193.461(5), F.S.

<sup>12</sup> *Id.*

<sup>13</sup> Section 193.461(4), F.S.

<sup>14</sup> According to federal law, the term “pesticides” includes: (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest; (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant; and (3) any nitrogen stabilizer. *See* 7 U.S.C. s. 136(u) (excepting from the term new animal drugs, animal feed containing new animal drugs, and liquid chemical sterilant products).

<sup>15</sup> Muyaier Tudi et al., *Agriculture Development, Pesticide Application and Its Impact on the Environment*, 18 INT. J. ENVIRON. RES. & PUBLIC HEALTH 1112 (2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7908628/pdf/ijerph-18-01112.pdf> (last visited Jan. 7, 2022).

<sup>16</sup> *Id.*

However, pesticides and herbicides are also designed to be toxic to plants and animal pests.<sup>17</sup> Because of their intrinsic toxicity, they can be harmful to human health and the environment and can pose a risk to exposed populations through direct or indirect contact. The historical usage of these agrichemicals can result in the accumulation of residual amounts of these toxic chemicals in the environment.<sup>18</sup> The conversion of former agricultural lands into nonagricultural uses can then expose people to these chemicals.<sup>19</sup>

### ***State Regulation***

The Florida Pesticide Law (FPL)<sup>20</sup> regulates the distribution, sale, and use of pesticides to protect people and the environment from their adverse effects.<sup>21</sup>

Under the FPL, every pesticide distributed, sold, or offered for sale within the state, or transported in intrastate commerce must be registered with the Department of Agriculture and Consumer Services (DACS) and renewed biennially.<sup>22</sup> Before registration is granted, DACS staff thoroughly evaluate all pesticides to ensure that they meet state safety standards.<sup>23</sup>

Among other powers, DACS is authorized and directed to sample, test, inspect, and make analyses of pesticides sold, offered for sale, distributed, or used within Florida, at a time and place and to such an extent as it may deem necessary, to determine whether the pesticides or persons exercising control over the pesticides are in compliance with the FPL, the rules, and the provisions of the pesticide label or labeling.<sup>24</sup>

As a general rule, any product registered as a pesticide with the U.S. Environmental Protection Agency (EPA) will require registration in Florida.<sup>25</sup> Pesticides not requiring federal approval must also be registered in Florida to ensure adherence with state law.<sup>26</sup>

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<sup>17</sup> Miami-Dade County Dep't of Regulatory and Economic Resources, Division of Environmental Resources Management (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 Jan. 7, 2022).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Sections 487.011-487.175, F.S.

<sup>21</sup> Section 487.012, F.S. The Florida Pesticide Law regulates these activities except as provided in the Mosquito Control Act and the Structural Pest Control Act. *See id.*

<sup>22</sup> Section 487.041(1)(a), F.S.

<sup>23</sup> Dep't of Agriculture and Consumer Services (DACS), *Pesticide Product Registration*, <https://www.fdacs.gov/Business-Services/Pesticide-Product-Registration> (last visited Jan. 13, 2022).

<sup>24</sup> Section 487.071(2), F.S.

<sup>25</sup> DACS, *Pesticide Product Registration*, <https://www.fdacs.gov/Business-Services/Pesticide-Product-Registration> (last visited Jan. 13, 2022).

<sup>26</sup> *Id.*

### ***Federal Regulation***

EPA regulates pesticides under broad authority granted in two major statutes:<sup>27</sup> the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>28</sup> and the Federal Food, Drug, and Cosmetic Act (FFDCA).<sup>29</sup>

FIFRA provides for federal regulation of pesticide distribution, sale, and use.<sup>30</sup> All pesticides distributed or sold in the U.S. must be registered (i.e. licensed) by EPA.<sup>31</sup> Registration is based on evaluations of scientific data and assessment of risks and benefits of a product's use.<sup>32</sup> Label directions control how products are used. EPA can also authorize limited use of unregistered pesticides or pesticides registered for other uses to address emergencies and special local needs. Training is required for workers in pesticide-treated areas, and both certification and training are required for applicators of restricted use pesticides.<sup>33</sup>

FFDCA authorizes EPA to set tolerances, or maximum residue limits, for pesticide residues on foods.<sup>34</sup> A tolerance is the maximum permissible level for pesticide residues allowed in or on human food and animal feed.<sup>35</sup> In the absence of a tolerance for a pesticide residue, a food containing such a residue is subject to seizure by the government.<sup>36</sup> Once a tolerance is established, the residue level in the tolerance is the trigger for enforcement actions. That is, if residues are found above that level, the commodity will be subject to seizure.<sup>37</sup>

### **Discharges**

Any discharge of pollutants or hazardous substances “into or upon the surface or ground waters of the state or lands,” which discharge violates any of DEP’s environmental standards established pursuant to state law, is a violation of ch. 376, F.S., and is prohibited for any reason.<sup>38</sup> In this context, discharges include, but are 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

<sup>27</sup> U.S. Environmental Protection Agency (U.S. EPA), *About Pesticide Registration*, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> (last visited Jan. 13, 2022).

<sup>28</sup> 7 U.S.C. §136 et seq.

<sup>29</sup> 21 U.S.C. §301 et seq.

<sup>30</sup> U.S. EPA, *Summary of the Federal Insecticide, Fungicide, and Rodenticide Act*, <https://www.epa.gov/laws-regulations/summary-federal-insecticide-fungicide-and-rodenticide-act> (last visited Jan. 13, 2022); U.S. EPA, *About Pesticide Registration*, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> (last visited Jan. 13, 2022).

<sup>31</sup> *Id.*

<sup>32</sup> U.S. EPA, *About Pesticide Registration*, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> (last visited Jan. 13, 2022).

<sup>33</sup> *Id.*

<sup>34</sup> U.S. EPA, *Summary of the Federal Food, Drug, and Cosmetic Act*, <https://www.epa.gov/laws-regulations/summary-federal-food-drug-and-cosmetic-act> (last visited Jan. 13, 2022); U.S. EPA, *About Pesticide Registration*, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> (last visited Jan. 13, 2022).

<sup>35</sup> U.S. EPA, *About Pesticide Registration*, <https://www.epa.gov/pesticide-registration/about-pesticide-registration> (last visited Jan. 13, 2022).

<sup>36</sup> U.S. EPA, *Summary of the Federal Food, Drug, and Cosmetic Act*, <https://www.epa.gov/laws-regulations/summary-federal-food-drug-and-cosmetic-act> (last visited Jan. 13, 2022).

<sup>37</sup> *Id.*

<sup>38</sup> Section 376.302(1)(a), F.S.

the state[.]”<sup>39</sup> Unless promptly reported and removed, any person who discharges pollutants or hazardous substances in violation of the statute is liable to the state for any damage caused and for civil penalties of up to \$15,000 per offense.<sup>40</sup>

## **State and Federal Legislation Addressing Site Rehabilitation**

### ***Brownfield Redevelopment Act***

Brownfield sites are defined by the Department of Environmental Protection (DEP) as real property, the expansion, redevelopment, or reuse of which may be complicated by actual or perceived environmental contamination.<sup>41</sup>

The primary goals of Florida’s Brownfields Redevelopment Act (BRA)<sup>42</sup> 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 cleanup target levels (CTLs) and a process for obtaining a “No Further Action” letter using Risk-Based Corrective Action (RBCA) principles; and provide the opportunity for environmental equity and justice.<sup>43</sup>

After a local municipality in Florida designates an area as a brownfield to encourage redevelopment and focus upon revitalization, a resolution is passed and property owners within that designated area optionally may remediate or redevelop their property.<sup>44</sup> Executed Brownfield Site Rehabilitation Agreements (Site Agreements) are voluntary cleanup agreements between a responsible party and DEP or a delegated local pollution control program.<sup>45</sup> Site Agreements provide DEP and the public assurance that site rehabilitation will be conducted in accordance with (among other things) the cleanup criteria in the statute,<sup>46</sup> and provide liability protection for the responsible person.<sup>47</sup>

The agreement contains various commitments by the responsible person, including milestones for completion of site rehabilitation tasks and submittal of technical reports and plans as agreed

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<sup>39</sup> Section 376.301(13), F.S. This definition of discharge is applicable to surface and ground waters of the state that are not regulated by the Pollutant Discharge Prevention and Control Act (PDPCA), ss. 376.011-.21, F.S., which applies to coastal waters, estuaries, tidal flats, beaches, and lands adjoining the seacoast. *See id.*; *see also* ss. 376.021(1)-(3) (explaining that the intent of the PDPCA is to address potential discharges associated with the transfer of pollutants between vessels, onshore facilities and vessels, offshore facilities and vessels, and between terminal facilities) and 376.041 (identifying regulated waters).

<sup>40</sup> Section 376.302(2), F.S.

<sup>41</sup> Section 376.79(4), F.S.

<sup>42</sup> Ch. 97-277, Laws of Fla, codified at ss. 376.77-.85, F.S.

<sup>43</sup> *See* s. 376.78, F.S. (providing legislative intent); *see also* s. 376.81, F.S. (providing cleanup criteria, including CTLs and the conditions pursuant to which DEP may issue a “no further action” letter); *see also* Dep’t of Environmental Protection (DEP), *Brownfields Redevelopment Act*, <https://floridadep.gov/waste/waste-cleanup/content/brownfields-program> (last visited Jan. 7, 2022).

<sup>44</sup> *See* s. 376.80(1)-(2), F.S.

<sup>45</sup> *See* s. 376.80(2)(c)-(d), F.S.

<sup>46</sup> *See* s. 376.80(5), F.S.; *see also* s. 376.81, F.S. (containing statutory cleanup criteria).

<sup>47</sup> Section 376.82(2), F.S.

to by the responsible person and DEP.<sup>48</sup> It also contains a commitment by the DEP to review technical reports according to an agreed upon schedule.<sup>49</sup>

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>50</sup> 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>51</sup> DEP establishes by rule CTLs for specific contaminants.<sup>52</sup> These CTLs apply to requirements for site rehabilitation across numerous programs, including the BRA.<sup>53</sup>

### ***Comprehensive Environmental Response, Compensation, and Liability Act***

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>54</sup> is a law that was passed by Congress on December 11, 1980 to form what is commonly known as Superfund.<sup>55</sup> Thousands of contaminated sites exist nationally due to hazardous waste being dumped, left out in the open, or otherwise improperly managed.<sup>56</sup> These sites include manufacturing facilities, processing plants, landfills, and mining sites.<sup>57</sup>

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.<sup>58</sup> Superfund allows the U.S. Environmental Protection Agency (EPA) to clean up contaminated sites.<sup>59</sup> It also forces the parties responsible for the contamination to either perform cleanups or reimburse the government for EPA-led cleanup work.<sup>60</sup> When there is no viable responsible party, Superfund gives EPA the funds and authority to clean up contaminated sites.<sup>61</sup>

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<sup>48</sup> See s. 376.80(5)(a), F.S.

<sup>49</sup> See s. 376.80(5)(e), F.S.

<sup>50</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 Jan. 7, 2022).

<sup>51</sup> Section 376.301(8), F.S.

<sup>52</sup> Fla. Admin. Code Ch. 62-777.

<sup>53</sup> See s. 376.81(g), (i), F.S.; see also Fla. Admin. Code Rules 62-777.150(1) and 62-780.150(1) (applying these rules to site rehabilitation at sites governed by the terms of a brownfield site rehabilitation agreement).

<sup>54</sup> 42 U.S.C. ss. 9601 et seq.

<sup>55</sup> EPA, *What is CERCLA?*, [https://usepa.servicenowservices.com/ecss?id=kb\\_article\\_view&sys\\_kb\\_id=12ec93221bb99c1013bdb913cc4bcb32](https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=12ec93221bb99c1013bdb913cc4bcb32) (last visited Nov. 17, 2021).

<sup>56</sup> EPA, *What is Superfund?*, [https://usepa.servicenowservices.com/ecss?id=kb\\_article\\_view&sys\\_kb\\_id=2e020af01b215410a5dced39bc4bcb98](https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=2e020af01b215410a5dced39bc4bcb98) (last visited Nov. 17, 2021).

<sup>57</sup> *Id.*

<sup>58</sup> EPA, *What is CERCLA?*, [https://usepa.servicenowservices.com/ecss?id=kb\\_article\\_view&sys\\_kb\\_id=12ec93221bb99c1013bdb913cc4bcb32](https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=12ec93221bb99c1013bdb913cc4bcb32) (last visited Nov. 17, 2021).

<sup>59</sup> EPA, *What is Superfund?*, [https://usepa.servicenowservices.com/ecss?id=kb\\_article\\_view&sys\\_kb\\_id=2e020af01b215410a5dced39bc4bcb98](https://usepa.servicenowservices.com/ecss?id=kb_article_view&sys_kb_id=2e020af01b215410a5dced39bc4bcb98) (last visited Nov. 17, 2021).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*



Federal agencies must comply with substantive and procedural CERCLA requirements to the same extent as private entities.<sup>62</sup> 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.<sup>63</sup> The remedy selected for cleanup at a federal facility must meet CERCLA's cleanup standards.<sup>64</sup>

### **Lender Liability**

Lending institutions may be exposed to environmental liability for contamination on properties in which they hold security interests.<sup>65</sup> A lender may, depending on the circumstances, be held directly responsible for the costs of environmental investigation and cleanup of hazardous substances located on property used as loan collateral if it takes ownership of the property by foreclosure or participates extensively in the management of the property.<sup>66</sup>

Lending institutions that hold mortgages on property as secured lenders are exempt from CERCLA liability if certain criteria are met.<sup>67</sup> CERCLA Section 101(20) contains a secured creditor exemption that eliminates owner or operator liability for lenders who hold ownership in a CERCLA facility primarily to protect their security interest in that facility, provided they do not “participate in the management of the facility.”<sup>68</sup>

Generally, participation in the management applies if a bank exercises decision-making control over a property's environmental compliance, or exercises control at a level similar to a manager of the facility or property. Participation in management does not include actions such as conducting property inspections, requiring a response action to address contamination, providing financial advice or renegotiating or restructuring the terms of the security interest.<sup>69</sup>

The secured creditor exemption also provides that foreclosure on a property does not result in liability for a bank, provided the bank takes “reasonable steps” to divest itself of the property “at the earliest practicable, commercially reasonable time, on commercially reasonable terms.” A lending institution can usually maintain business activities and close down operations at a property as long as the property is listed for sale shortly after the foreclosure date or at the earliest practicable, commercially reasonable time.<sup>70</sup>

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<sup>62</sup> 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 Nov. 17, 2021).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Mark S. Dennison, *Lender Liability for Contamination of Property by Hazardous Substances*, 49 AM. JUR. 3d *Proof of Facts* 173 s. 1 (2021).

<sup>66</sup> *Id.*

<sup>67</sup> 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](https://www.epa.gov/sites/default/files/2017-07/documents/aai_factsheet_lender_liability_epa_560_f_17_192_508.pdf) (last visited Jan. 12, 2022).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

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



All appropriate inquiries (AAI) is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination.<sup>71</sup> 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). However, the AAI rule primarily applies to borrowers who want to claim protection from CERCLA liability as innocent landowners, BFPPs or contiguous property owners. The rule does not change the CERCLA liability exemption for banks that hold mortgages on property as secured lenders. The secured lender exemption is not conditioned by a bank or lender undertaking AAI before issuing a mortgage or before the borrower purchases the property.<sup>72</sup>

Although lending institutions have protection from CERCLA liability through the secured creditor exemption, they may choose to further protect themselves from loss (due to decreases in the value of the property or collateral) by requiring that borrowers qualify for liability protections. Banks, therefore, may want to encourage their borrowers to comply with the provisions established for BFPPs and ensure that borrowers properly conduct AAI before acquiring a property.<sup>73</sup>

### **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).<sup>74</sup> All local pollution control programs must:<sup>75</sup>

- Be approved by 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.<sup>76</sup> If these corrective measures are not implemented, DEP may reassume implementation of the FAWPCA within the jurisdiction.<sup>77</sup> Each local pollution control program must cooperate with and assist DEP in carrying out its powers, duties, and functions.<sup>78</sup>

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

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Section 403.182, F.S.; *see also* ch. 67-436, s. 2, Laws of Fla. (identifying the short title of the act).

<sup>75</sup> Section 403.182(1), F.S.

<sup>76</sup> *See* s. 403.182(4), F.S.

<sup>77</sup> *See id.*

<sup>78</sup> Section 403.182(10), F.S.

## 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.<sup>79</sup>

In August 2021, DERM issued a revised *Site Assessment Guidance for Former Agricultural Sites in Miami-Dade County, DERM Guidance 7G* (DERM Guidance).<sup>80</sup> The DERM Guidance revised earlier interim guidance on the same topic.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup>

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.”<sup>85</sup> 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, agrichemicals used, irrigation, and pest management strategies, homogenous application of agrichemicals and distribution of agrichemical residues in soils and groundwater cannot be assumed. Ancillary use areas such as agrichemical storage, mix-load areas, and fuel shortage areas may require more targeted assessment and may include additional contaminants of concern

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<sup>79</sup> DERM, *Environment*, <https://www.miamidade.gov/environment/> (last visited Jan. 7, 2022).

<sup>80</sup> 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 Jan. 7, 2022).

<sup>81</sup> DERM, *Interim Site Assessment Guidance for Developing at Former Agricultural Sites*, <https://www.miamidade.gov/environment/research-reports.asp#0> (last visited Jan. 7, 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](http://www.southdadenewsleader.com/news/landowners-urged-to-fight-back-against-miami-dade-county-derm/article_bac6b9f8-253c-11eb-915f-cf89a59e3111.html) (last visited Jan. 7, 2021).

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

<sup>83</sup> 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 Jan. 7, 2022).

<sup>84</sup> *Id.* at 1.

<sup>85</sup> *Id.*

(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.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup>

### III. Effect of Proposed Changes:

**Section 1** of the bill creates s. 376.3065, F.S., providing for the development of current or former agricultural land.

The bill provides the following definitions:

- “Current or former agricultural land” means land that is or was classified as agricultural land for property appraiser purposes.
- “Lawful application” means the application of pesticides that have been properly mixed and applied in accordance with the manufacturer specifications and U.S. Environmental Protection Agency approvals on the labels of properly registered products.
- “Pesticide” has the same meaning as in federal law.
- “Pesticide mixing area” means the area on the property where pesticide storage, mixing, or equipment maintenance facilities are located.
- “Qualified property” means a parcel of land that is part of a broader, regional, or multi property area impacted by pesticides.

In connection with the lawful application of pesticides in agricultural operations, the bill:

- Includes a Legislative finding that state and federal regulations prescribe lawful application of pesticides and limit their use in the operation of bona fide agricultural activities.
- Provides that the application of pesticides as part of agricultural operations is presumed to be a lawful application, unless a discharge as defined in state law exists, and is presumed not to be a recognized environmental condition pursuant to federal law.
- Provides that notwithstanding any other state or local law or regulation to the contrary, pesticide mixing areas may be legally subdivided as separate parcels of land for environmental evaluation and remediation.
- Requires that, upon receiving a report of a discovery of verifiable pesticide impacts to potable water systems or potable private wells caused by a property, the Department of Environmental Protection (DEP) must investigate the claim and provide any appropriate remedies pursuant to existing law.

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2-6.

<sup>88</sup> *Id.* at 6-8.

In connection with site assessments and remedial activities for current or former agricultural land, the bill provides that:

- Notwithstanding any existing state or local law or regulation for site assessment and remedial activity applicable to current or former agricultural land, the new statute must be used for evaluating environmental conditions and prescribing remedial activity for a contaminated site for such current or former agricultural land.
- The new statute does not apply to former agricultural land that has obtained local government-approved permits to initiate redevelopment or has completed redevelopment as of July 1, 2022.
- Current or former agricultural land that meets the requirements of the new statute is exempt from regulation by DEP rules for site assessment and remedial activity associated with lawful applications.
- A property owner may voluntarily apply for brownfield site rehabilitation activities in accordance with the Brownfields Redevelopment Act.
- Lenders may rely on the new statute if:
  - The lender is serving as a trustee, a personal representative, or another type of fiduciary;
  - The lender holds indicia of ownership in the site primarily to protect a security interest; or
  - The lender held a security interest in the site and has foreclosed or otherwise acted to acquire title primarily to protect its security interest; seeks to sell, transfer, or otherwise divest the assets for subsequent sale at the earliest possible time, taking all relevant facts and circumstances into account; and has not undertaken management activities beyond those necessary to protect its financial interest, to effectuate compliance with environmental statutes and rules.
- The new statute applies regardless of when a contaminant was discovered if the real property owner of the current or former agricultural land:
  - Completes environmental management activities pursuant to the environmental management provision in the new statute as part of the property's redevelopment. The incentives of this subsection do not apply to formerly cultivated land that has obtained local government-approved permits to initiate redevelopment or has completed redevelopment as of July 1, 2022, and such redeveloped properties are not required to complete the risk management activities pursuant to the environmental management provision in the new statute;
  - Has not been proved to have operated in a grossly negligent manner. Discharges as defined in state law do not exist on the current or former agricultural land;
  - Has not willfully concealed a discharge as defined in state law; and
  - Provides reasonable assurances that the property does not include:
    - A pesticide mixing area; or
    - An area, including surface or groundwater, designated as a contaminated site whose classification as a contaminated site was the result of its proximity to a pesticide mixing area.
- Current or former bona fide agricultural operations are presumed to have lawfully applied pesticides in this state, unless evidence of a point source of impacts or a discharge as defined in state law exists.

In connection with environmental management on current or former agricultural land, the bill provides that:

- Before redevelopment of current or former agricultural land that qualifies as a contaminated site, the property owner or authorized representative must provide DEP with reasonable assurances that all of the following applicable risk management techniques have been implemented:
  - A soil management plan that includes, at a minimum, exposed soils on site that are subject to human exposure, that are found between land surface and 2 feet below land surface, and that meet or exceed soil cleanup target levels (CTLs) established by DEP. The soils must be managed using appropriate institutional or engineering controls consistent with the proposed land reuse, which may be accomplished using non-contaminated fill material or by mixing or blending the soil during construction. Soil reuse or relocation must be conducted in accordance with all applicable federal, state, and local regulations. A soil management plan must follow guidance developed by DEP.
  - If surface water or groundwater sampling for the current or former agricultural land indicates the presence of contaminants at concentrations exceeding CTLs established by DEP, a water management plan for the property that incorporates institutional controls as defined in state law. Stormwater conveyance construction and dewatering requirements must be completed pursuant to applicable DEP permits. Proposed or existing improvements to a property with human occupancy which is served by a municipal drinking water supply system or which accesses drinking water must meet water management district well permitting rules.
- The property owner must notify DEP upon completion of the risk management techniques, with an affirmative demonstration that the owner has met the requirements of the new statute.
- Qualified properties are not required to meet any off-property sampling requirements under state law governing pollutant discharge prevention and removal, and a property owner of such a property is only responsible for environmental risk management within the qualified property's legal boundaries.

The bill also provides that, upon completion of environmental management activities in compliance with the new statute, the property may not be required to complete additional environmental management activities on the property unless:

- DEP determines that fraud was committed in demonstrating land or real property conditions or in completing environmental management activities;
- New information confirms the existence of a contaminant that exceeds the environmental management criteria established in accordance with the environmental management provisions in the new statute or that otherwise poses the threat of real and substantial harm to public health, safety, and the environment;
- Environmental management efforts failed to achieve the criteria established under the new statute; or
- Substantial changes in exposure conditions have increased the level of risk beyond the acceptable risk established under the environmental management provisions in the new statute. DEP may require a person who changes the land use of the property which causes the level of risk to increase beyond the acceptable risk level to undertake additional environmental management measures to assure the protection of human health and the environment.

**Section 2** amends s. 408.182, F.S., regarding local pollution control programs, to provide that notwithstanding that statute or any existing local pollution control programs, the Secretary of DEP has exclusive jurisdiction in all matters related to evaluating environmental conditions and assessing potential liability for the presence of contaminants on land that is or was classified as agricultural land pursuant to existing law, including defining what constitutes all appropriate inquiries. The bill also provides that the Secretary may not delegate the authority to a county, a municipality, or another unit of local government through a local pollution control program under that statute.

**Section 3** provides that the bill takes effect July 1, 2022.

**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:

The bill facilitates the redevelopment of current or former agricultural land by divesting local governments of the legal authority to impose more stringent requirements than what is required by state regulators.

**C. Government Sector Impact:**

The bill will increase costs to DEP because it is assuming exclusive jurisdiction in all matters related to evaluating environmental conditions and assessing potential liability for the presence of contaminants on land that is or was classified as agricultural land pursuant to state law. In contrast, local governments may experience a decrease in application fees and costs associated with reviewing the proposed redevelopment of such land.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially creates section 376.3065 and amends 403.182 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.