

Waste Cleanup Teleconference
October 7, 2010

“The Ag Exemption”

Have you heard responsible parties refer to the “Ag Exemption”; the “Legally-Applied Defense”; the “Pesticide Provision”; the “FIFRA Exemption”; or some other similar phrase as a basis for a person claiming they don’t have to clean up a pesticide-contaminated site pursuant to Ch. 62-780, F.A.C.?

We often get questions about this topic in OGC, and we hear private sector attorneys and environmental consultants use these terms and assert that their clients have no obligation to clean up a pesticide-contaminated site. There is no such broad exemption under Florida law.

Outline of Issues for Discussion:

I. Federal vs. State Law

A. FIFRA is a federal law (possible defense against federal action, such as enforcement by EPA).

B. No such broad provision under Florida law; no preemption provision in FIFRA to preempt state law from being more stringent than federal law.

II. Florida’s Pesticide Exemption under Section 487.081(6), F.S.:

(6)The Department of Environmental Protection is not authorized to institute proceedings against any property owner or leaseholder of property under the provisions of s. 376.307(5) to recover any costs or damages associated with pesticide contamination of soil or water, or the evaluation, assessment, or remediation of pesticide contamination of soil or water, including sampling, analysis, and restoration of soil or potable water supplies, subject to the following conditions:

(a)The pesticide contamination of soil or water is determined to be the result of the use of pesticides by the property owner or leaseholder, in accordance with state and federal law, applicable registered labels, and rules on property classified as agricultural land pursuant to s. 193.461;

(b)The property owner or leaseholder maintains records of such pesticide applications and such records are provided to the department [DACs] upon request;

(c)In the event of pesticide contamination of soil or water, the department [DACs], upon

request, shall make such records available to the Department of Environmental Protection;

(d) This subsection does not limit regulatory authority under a federally delegated or approved program; and

(e) This subsection is remedial in nature and shall apply retroactively.

The department [DACs], in consultation with the secretary of the Department of Environmental Protection, may adopt rules prescribing the format, content, and retention time for records to be maintained under this subsection.

A. Very narrow exemption that prohibits DEP cost-recovery actions under s. 376.307(5), F.S., if criteria are met.

1. Does not prohibit actions against the PRSR to compel cleanup; we may also pursue pesticide manufacturer as in *Great Lakes Chemical Company* case (mfr of EDB)
2. Land must be "Agricultural Land" (the test is not the zoning classification, but whether it's used for "bona fide ag purposes") (e.g., a golf course doesn't qualify).
3. Must comply with state/federal laws and rules and applicable registered labels
4. Owner/leaseholder must have maintained records

B. Legislative Intent

III. Enforcement Discretion and Case-By-Case Determination

A. Operating Farms with active Ag Fields or operating Golf Courses at which "legal application" has occurred or is occurring.

B. Groundwater versus Soil

1. Contamination on source property versus beyond property boundaries
2. Moving contaminated soil; potential for new "discharge"

C. Mix/Rinse Areas; Maintenance Areas; etc.

D. Changes in Land Use (no longer farm field or golf course; often converting to residential use)