

AN ACT TO AMEND CHAPTER 91, TITLE 7 OF THE DELAWARE CODE RELATING TO THE DELAWARE HAZARDOUS SUBSTANCE CLEANUP ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 9103, Title 7 of the Delaware Code by making insertions as shown by underlining as follows and by re-numbering the other definitions accordingly:

(12) “Golf course” means a commercial golf course whether operated publicly or privately, excluding miniature golf establishments and stand-alone golf driving ranges that are not attached to or part of a commercial golf course.

(16) “Orchard” means any area of land intentionally planted and devoted to the commercial cultivation of fruit trees, excluding the growing of fruit trees solely for private use.

Section 2. Amend § 9103(21)c., Title 7 of the Delaware Code by making insertions as shown by underlining as follows:

c. The appropriate application of fertilizer and pesticide; provided, however, that the application of fertilizer and pesticide on golf courses or orchards shall also be subject to the provisions of § 9120A. of this subchapter;

Section 3. Amend subchapter I, chapter 91, Title 7 of the Delaware Code by making insertions as shown by underlining as follows:

§ 9120A. Golf Courses and Orchards

(a) The requirements of this section apply to facilities that have operated as golf courses or orchards under the circumstances set forth herein.

(b) When a golf course or orchard ceases operation and, anytime thereafter, a change to a non-agricultural use is proposed, the provisions of this subchapter and the regulations promulgated

pursuant thereto shall apply; provided, however, such provisions shall not apply to any natural resource damage assessment or restoration of the facility.

(c) The Department shall oversee any remedy required to be conducted at a former golf course or orchard pursuant to this section. The person performing the remedy shall enter into a settlement agreement with the Department. The settlement agreement shall provide for the Department's oversight of the remedy and payment of the Department's oversight costs by the person entering into the settlement agreement with the Department; provided, however, the first \$25,000 of oversight costs per facility shall be paid by the Department to assist with the investigation and any associated remedy. Payment of all costs exceeding \$25,000 per facility shall be the responsibility of the person entering into the settlement agreement with the Department in accordance with the provisions of this subchapter and the regulations promulgated pursuant thereto.

(d) Notwithstanding § 9105 of this subchapter, any person who seeks to purchase or otherwise take title to a golf course or orchard and to change the use of the facility to other than an agricultural use, and who otherwise complies with all of the requirements of this section, shall not be subject to liability with respect to the existing environmental condition of the facility as of the date such person enters into a settlement agreement with the Department as required by subsection (c) of this section. No owner or operator of a golf course or orchard, or a potentially responsible party associated with operation of a golf course or orchard, shall be subject to liability with respect to the environmental condition of the facility resulting from the appropriate application of fertilizers and pesticides.

Section 4. Amend §9103(11) of Title 7 of the Delaware Code by re-designating said paragraph as paragraph (13) and by re-designating each subsequent paragraph accordingly; and by inserting new paragraphs (11) and (12) as shown by underlining as follows:

(11) “Fiduciary” means:

a. A person acting for the benefit of another party as a bonafide:

1. Trustee;

2. Executor;

3. Administrator;

4. Custodian;

5. Guardian of estates or guardian ad litem;

6. Receiver;

7. Conservator;

8. Committee of estates of incapacitated persons;

9. Personal representative;

10. Trustee (including a successor to a trustee) under an indenture agreement, trust agreement, lease, or similar financing agreement, for debt securities, certificates of interest or certificates of participation in debt securities, or other forms of indebtedness as to which the trustee is not, in the capacity of trustee, the lender; or

11. Representative in any other capacity that the Administrator, after providing public notice, determines to be similar to the capacities described in paragraphs 1 through 10 above; and

b. “Fiduciary” does not mean:

1. A person that is acting as a fiduciary with respect to a trust or other fiduciary estate that was organized for the primary purpose of, or is engaged in, actively carrying on a trade or business for profit, unless the

trust or other fiduciary estate was created as part of, or to facilitate, one or more estate plans or because of the incapacity of a natural person; or

2. A person that acquires ownership or control of a facility with the objective purpose of avoiding liability of the person or of any other person.

(12) “Fiduciary capacity” means the capacity of a person in holding title to a facility, or otherwise having control of or an interest in the facility, pursuant to the exercise of the responsibilities of the person as a fiduciary.

Section 5. Amend § 9105(c)(3) of Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(3) A person who acquires ownership or control of a property to realize on a security interest held by the person ~~in that property and does not participate in management of the property;~~ or a fiduciary which has a legal title to or manages any property for purposes of administering an estate or trust of which such property is part; ~~provided, however, that this exemption shall not relieve a person from liability under this section where such liability is based on conduct entirely independent from that covered by this exemption.~~ This subparagraph (c)(3) is further limited as follows:

a. The term “participate in management” as used in this subparagraph (c)(3) and in §9103(18)e. of this chapter:

1. Means actually participating in the management or operational affairs of a facility and does not include merely having the capacity to influence, or the unexercised right to control facility operations.

2. A person that is a lender or fiduciary that holds indicia of ownership primarily to protect a security interest in a property shall be considered to participate in management only if, while the borrower is still in possession of the property encumbered by the security interest, the person:

A. Exercises decision-making control over the environmental compliance related to the facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the facility; or

B. Exercises control at a level comparable to that of a manager of the facility, such that the person has assumed or manifested responsibility:

i. For the overall management of the facility encompassing day-to-day decision-making with respect to the environmental compliance; or

ii. Over all or substantially all of the operational functions, as distinguished from financial or administrative functions, of the facility other than the function of environmental compliance.

3. The term participate in management does not include performing an act or failing to act prior to the time at which a security interest is created in a property; and, provided the actions do not rise to the level of participating in management (within the meaning of clauses 1. and 2. above) does not include:

A. Holding a security interest or abandoning or releasing a security interest;

B. Including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

C. Monitoring or enforcing the terms and conditions of the extension of credit or security interest;

D. Monitoring or undertaking one or more inspections of the facility;

E. Requiring a remedial action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the facility prior to, during, or on the expiration of the term of the extension of credit;

F. Providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the facility;

G. Restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

H. Exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

I. Conducting a response action under this chapter or under the direction of the Department.

b. A fiduciary as described in this subparagraph (c)(3) shall not be liable in its personal capacity under this chapter for:

1. Undertaking or directing another person to undertake any other lawful means of addressing a hazardous substance in connection with the facility;

2. Terminating the fiduciary relationship;
3. Including in the terms of the fiduciary agreement a covenant, warranty, or other term or condition that relates to compliance with an environmental law, or monitoring, modifying or enforcing the term or condition;
4. Monitoring or undertaking one or more inspections of the facility;
5. Providing financial or other advice or counseling to other parties to the fiduciary relationship, including the settlor or beneficiary;
6. Restructuring, renegotiating, or otherwise altering the terms and conditions of the fiduciary relationship;
7. Administering, as a fiduciary, a facility that was contaminated before the fiduciary relationship began; or
8. Declining to take any of the actions described in subparagraphs 2 through 7.

c. The liability of a fiduciary under any provision of this chapter for the release or threatened release of a hazardous substance at, from, or in connection with a facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity; provided, however, that this limitation shall not apply to the extent that a person is liable under this chapter independently of the person's ownership of a facility as a fiduciary or actions taken in a fiduciary capacity.

d. The exclusion from liability contained in this subparagraph (c)(3) does not limit liability pertaining to the release or threatened release of a hazardous substance if negligence of a fiduciary causes or contributes to the release or threatened release.

e. Nothing contained in this subparagraph (c)(3):

1. Affects the rights or immunities or other defenses that are available under this chapter or other law that is applicable to a person subject to this subparagraph; or
2. Creates any liability for a person or a private right of action against a fiduciary or any other person.

f. Nothing in this subparagraph (c)(3) applies to a person if the person:

1. Acts in a capacity other than that of a fiduciary or in a beneficiary capacity, and in that capacity, directly or indirectly benefits from a trust or fiduciary relationship; or

2. Is a beneficiary and a fiduciary with respect to the same fiduciary estate and, as a fiduciary, receives benefits that exceed customary or reasonable compensation, and incidental benefits, permitted under other applicable law.

g. This subparagraph (c)(3) does not preclude a claim under this chapter against:

1. The assets of the estate or trust administered by the fiduciary; or
2. Nonemployee agent or independent contractor retained by a fiduciary.

Section 6. Amend §9123(1)b. Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows;

b. ~~At the time of~~ Makes application for a Brownfields Development Agreement before,
but not more than 90 days after becoming an owner of the facility, and is not liable for a
release or imminent threat of release at the facility under § 9105(a)(1)-(6) of this title;
provided that:

1. the applicant has never entered into, nor applied for, entry into the Brownfields Development Program; and
2. if the applicant is a limited liability corporation (LLC), that no member has ever entered into, nor applied for, entry into the Brownfields Development Program; and

Section 7. Amend § 9113(c)(4), Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows;

(4) Reimbursing, or directly paying, any person for reasonable remedial costs incurred with the prior authorization of the Secretary in responding to a hazardous substance remedy, including remedies of releases from underground storage tanks, pursuant to authorization of the Secretary.
Direct payments may be made to the certified environmental consultant who performed the

remedial work provided that the Brownfield Developer acknowledge and sign the remedial work invoice.

Section 8. Amend § 9109(a)(3) of title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows;

(3) Has not submitted a proposed settlement or has submitted a proposed settlement and the Secretary has rejected the proposal, the Secretary may seek to have the potentially responsible party perform a remedy at a facility by giving written notice to the person;

(a) specifying the basis of the person's liability under this chapter for a remedy at the facility;

(b) identifying the remedy to be performed by the person at the facility, and the timeframe for its completion;

(c) advising that a public hearing, conducted pursuant to §§ 6004 and 6006 of this title, on the person's alleged liability, and the remedy to be performed and the timeframe for its completion, under this chapter may be had if requested by a date specified in the notice; and

(d) notifying that the proposed remedy, and the timeframe for its completion, will be ordered unless a public hearing is requested. , ~~after conducting a hearing pursuant to §§ 6004 and 6006 of this title, issue such order as the Secretary he or she deems appropriate~~

Section 9. Amend § 9109(h) of title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows;

(h) In any action brought under subsection (e) or (f) of this section for a refusal to comply with an order, the person found responsible shall be liable for payment of:

SYNOPSIS

Sections 1 through 3 may be referenced as the “Golf Course/Orchard” bill. This Act is intended to protect human health. It is predicated on the fact that while fertilizers and pesticides appropriately applied on land used for agricultural purposes may not constitute a threat to health or the environment, the residual remnants of such applications may pose an unacceptable risk when the land use changes to one whereby human contact is more prevalent and sustained.

As a result, the Act makes golf courses and orchards that seek to change their land use to anything other than an agricultural use subject to the provisions of the Delaware Hazardous Substance Cleanup Act. Specifically, the Act requires that any person seeking such a change in land use must enter into an agreement with DNREC and must conduct a remedy at the facility. It also provides certain liability protections for prospective owners of such a facility. Current and former facility owners and operators are not subject to liability for the appropriate application of fertilizer and pesticide.

Section 1 of the Act adds definitions for the terms “golf course” and “orchard”.

Section 2 of the Act modifies the exception contained in the definition of “release” to reference the provisions of newly created § 9120A.

Section 3 of the Act provides that any golf course or orchard that appropriately applied fertilizer and pesticide must perform a remedy if its use changes to a non-agricultural land use. It also provides certain liability protections for prospective owners.

Sections 4 and 5 may be referenced as revised lender liability legislation. Specifically:

Section 4 references the subsection that determines ‘participation in management’.

Section 5 is the subsection that provides details towards a determination of “participation in management”.

Sections 6 and 7 references detail the expansion the definition a ‘brownfield developer’ to include those applicants for a Brownfields Development Agreement, with an accompanying amendment to reimbursement of remedial costs to include direct payments. Specifically:

Section 6 provides a 60 day grace period for owners to make application for a BDA.

Section 7 permits reimbursements and direct payments to any person who enters into a settlement agreement with the Department and provides for dual signatures on reimbursement/direct pay checks.

Section 8 and 9 amend the enforcement section of HSCA. Specifically:

Section 8 allows orders to be issued by the Secretary without a prior public hearing but permits an appeal.

Section 9 adds civil penalties to any person refusing to provide required information or documents, access, or fails to report as release as required by the regulations.

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