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CONSERVATION AND NATURAL RESOURCES

Waste Management: Require Compilation of Inventory of Hazardous Sites in Georgia and Require Disclosure by Property Owners of Hazardous Waste Contamination

CODE SECTIONS: O.C.G.A. §§ 12-2-2, 12-8-90, -95.1, -96.1, -97 (amended)
BILL NUMBER: SB 294
ACT NUMBER: 355
SUMMARY: The Act requires the Environmental Protection Division to compile and update an inventory of hazardous sites which list all the locations in Georgia where substantial amounts of hazardous waste have been dumped or released. The Act also sets forth disclosure requirements by owners of property contaminated with hazardous waste, and provides the Environmental Protection Division flexibility to assess fees on waste generation and to enforce cleanups.
EFFECTIVE DATE: April 5, 1993

History

In response to the approximately eight hundred illegal toxic waste dumps in the state, such as the well-publicized Basket Creek Site in Douglas County, the Georgia General Assembly established a state-run Superfund program in 1992.¹ The program entitled the "Georgia Hazardous Site Response Act" empowered the Environmental Protection Division (EPD) to force cleanups of contaminated sites for which responsible parties can be found, and provided a source of funds if no financially responsible party can be located.²

The United States Environmental Protection Agency remediates sites that pose the greatest danger to human health and the environment under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund.³ However, the Georgia sites that rank on the federal Superfund only amount to about

1. Charles Seabrook, *Douglas Farm Cleanup Reveals Massive Contamination 3,200 Drums, 10,000 Tons of Soil Removed So Far*, ATLANTA J. & CONST., Feb. 3, 1992, at C1; O.C.G.A. § 12-8-90 (1992).

2. 1992 Ga. Laws 2234 (formerly found at O.C.G.A. § 12-8-90 (1992)).

3. 42 U.S.C.A. § 9601 (West Supp. 1992).

five percent of the illegal dump sites in Georgia.⁴ Therefore, the Act is important as a means for Georgia to remediate the sites that are not covered by the federal Superfund which pose a substantial endangerment to residents of the state.⁵

Pressure to pass a state Superfund bill at the end of the 1992 session of the General Assembly resulted in some uncertainty with regard to selected provisions of the Act.⁶ In 1993, the General Assembly amended and clarified those provisions in order to facilitate what the Act was intended to accomplish.⁷

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The Act amends the Georgia Hazardous Site Response Act of 1992 by changing significant parts of the Act to provide for what the General Assembly and the EPD actually intended the Act to accomplish.⁸ These changes fundamentally alter the prior Act in six specific areas. First, the Act substantially changes the notice and disclosure requirements for property owners who have had a release of hazardous substances on their property.⁹ Second, the Act changes the structure of fees to be paid into the Hazardous Waste Trust Fund such that financial incentives are provided for the "favored" methods of waste management.¹⁰ Third, the Act requires EPD to compile and update an inventory of all known or suspected sites at which hazardous substances have been disposed of or released in reportable quantities.¹¹ Fourth, the amendments clarify the language regarding the imposition of punitive damages, which appeared to have been automatic under the prior Act.¹² The imposition of punitive damages is now at the discretion of the Director of EPD.¹³ Fifth, the Act reduces the number of property owners who have been adversely affected under the Act to those whom EPD has designated their property as needing corrective action.¹⁴ Sixth, the Act provides

4. Seabrook, *supra* note 1; see *Legislative Review*, 9 GA. ST. U.L. REV. 190 (1992).

5. Leslie Fuller Secrest, *Outline of Similarities With and Differences from CERCLA and Pending Legislative Developments*, Mar. 1993 (available in Georgia State University College of Law Library).

6. *Id.*

7. Telephone Interview with Rep. Denny Dobbs, House District No. 92 (Apr. 8, 1993) [hereinafter Dobbs Interview]. Rep. Dobbs is actively involved in environmental legislation, and chairs the subcommittee on solid waste. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* The "favored" methods of waste disposal reflected by fee pricing in decreasing order of preference are as follows: source reduction, reuse or recycling, treatment or storage, and incineration or disposal. *Id.*

11. O.C.G.A. § 12-8-97 (Supp. 1993).

12. Secrest, *supra* note 5, at 4.

13. O.C.G.A. § 12-8-96.1(a) (Supp. 1993).

14. *Id.* § 12-2-2 (Supp. 1993).

the Director of EPD the discretionary authority to sever any third party contribution claims from EPD cost recovery actions.¹⁵ These changes will provide the EPD with greater flexibility to force cleanups of those hazardous waste sites that are of critical importance to Georgia, and free the EPD from obligation where no action is needed.¹⁶

The Act amends the deed notice and disclosure provisions to include only those properties which have been listed on the Hazardous Site Inventory (HSI) *and* have been designated by EPD as requiring corrective action.¹⁷ This amendment alleviates the burdens on property owners to make a determination regarding the presence and quantity of hazardous substances on their property.¹⁸ The amendment significantly curtails the instances in which a property owner will be required to make public disclosures in deeds or by way of recorded affidavits.¹⁹ Under the Act, a disclosure is required only where the Director of EPD states that corrective action is necessary.²⁰

The Act amends the language regarding punitive damages by deleting the word “shall” and replacing it with the word “may.”²¹ This amendment clarifies any uncertainty under the prior Act such that punitive damages can now be assessed at the discretion of the Director of EPD and are not automatic.²² In addition, civil penalties would not be levied in the case of an accidental spill or when a site is voluntarily cleaned up.²³ This clarification brings the Georgia statute in line with the federal standards of CERCLA.²⁴ Under CERCLA, a defendant can avoid punitive damages if he can show a “reasonable basis for failure to comply” with the statute.²⁵

The Act also amends the structure of the fee provisions such that lower costs are imposed on the preferred methods of waste management.²⁶ The Act creates an incentive to reduce waste generation at the source because even if waste is reused or recycled, fees are still imposed.²⁷ The Act also benefits those who control their own wastestreams since on-site waste management has a lower fee schedule than off-site management.²⁸

15. *Id.* § 12-8-96.1(e) (Supp. 1993).

16. Dobbs Interview, *supra* note 7.

17. Secrest, *supra* note 5, at 7.

18. *Id.*

19. *Id.*

20. O.C.G.A. § 12-8-97 (Supp. 1993).

21. *Id.* § 12-8-96.1(a) (Supp. 1993).

22. Dobbs Interview, *supra* note 7.

23. *Id.*

24. Secrest, *supra* note 5, at 4.

25. *Id.*

26. *See supra* note 10 and accompanying text.

27. *See* O.C.G.A. § 12-8-95.1 (Supp. 1993).

28. *Id.*

In addition, the Act eliminates double fees being assessed by only imposing fees on the final disposition of waste.²⁹ Fees are imposed on the waste's final disposition and without regard to the waste's point of origin as amended under the Act so it would not violate the dormant Commerce Clause of the United States Constitution.³⁰

The Act authorizes private party contribution suits from any other party who is or may be liable for the release of hazardous waste.³¹ The Act recognizes the right to contribution by any party undertaking corrective action regardless of whether the corrective action is being performed voluntarily or not.³² Contribution claims are governed under state law by allocating costs among responsible parties using such equitable factors as the court determines are appropriate.³³

The Act added a provision to authorize the Director of EPD to sever any third-party contribution claim from a cost recovery action brought by EPD.³⁴ This provision will allow EPD to pursue cost and damage recovery claims independent of third-party contribution claims, and without the delays associated with third-party joinder.³⁵

Prior to the passage of the Act, a more comprehensive standard was used to provide disclosure of real estate in Georgia contaminated with hazardous waste.³⁶ The prior law required property to be included on the HSI if the property owner had knowledge that a hazardous waste or hazardous substance had been disposed of or released in an amount exceeding its reportable quantity.³⁷ Under these circumstances, the property owner would have to provide such notice in the deed.³⁸ In addition, the property owner would have also been required to make notice in the deed if the property was included on the HSI even if it had been designated as requiring no further action.³⁹

A House floor amendment was added to the Act to increase the accessibility of the HSI.⁴⁰ Currently, this inventory of hazardous waste

29. Dobbs Interview, *supra* note 7.

30. *See* Chemical Waste Management v. Hunt, 112 S. Ct. 2009 (1992).

31. Secret, *supra* note 5, at 5.

32. O.C.G.A. § 12-8-96.1(e) (Supp. 1993).

33. *Id.*

34. *Id.*

35. Secret, *supra* note 5, at 5.

36. O.C.G.A. § 12-8-97(c)(1) (1992).

37. *Id.* The standards setting forth the level that is a reportable quantity have yet to be defined by EPD. Secret, *supra* note 5, at 6.

38. O.C.G.A. § 12-8-97(c)(1) (1992).

39. *Id.* § 12-8-97(c)(2) (1992).

40. Telephone Interview with Rep. DuBose Porter, House District No. 143 (Apr. 4, 1993) [hereinafter Porter Interview]. Rep. Porter along with Reps. Dobbs and Patten sponsored the House floor amendment to SB 294. *Id.*; SB 294 (HFA), 1993 Ga. Gen. Assem.

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sites is only located in Atlanta.⁴¹ The Act adds a requirement for EPD to provide each superior court of the state with a copy of the HSI, which shall be kept in the room where deed records are kept.⁴² Thus, in the future, when one conducts a title search on a parcel of real estate, a review of the HSI will become a recommended part of that search.⁴³

Brian Weiss

41. Porter Interview, *supra* note 40.

42. O.C.G.A. § 12-8-97(a) (Supp. 1993).

43. Porter Interview, *supra* note 40.