

ENROLLED SENATE
BILL NO. 1167

By: Morgan of the Senate

and

Wells of the House

An Act relating to environment and natural resources; amending 27A, O.S. 2001, Sections 2-3-501, 2-7-123, 2-15-102, 2-15-103, 2-15-105, 2-15-106, and 2-15-108, which relate to Superfund and Brownfield sites; authorizing the Department of Environmental Quality to enter certain federally identified sites to conduct certain activities; authorizing Department to seek certain remedies upon refusal; modifying certain reference; requiring certain identification of engineering controls be filed in recordable notice; stating requirements for certain notice; modifying terms; modifying definitions; providing definition; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 27A O.S. 2001, Section 2-3-501, is amended to read as follows:

Section 2-3-501. A. Any duly authorized representative of the Department of Environmental Quality shall have the power to enter at reasonable times upon any private or public property for the purpose of sampling, inspecting and investigating conditions relating to pollution, damage to natural resources or the possible pollution of any air, land or waters of the state or the environment or relating to any other environmental or permitting responsibility authorized by law.

B. If the property to be entered has been identified on the federal National Priority List as a Superfund site or otherwise identified for an action under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, 42 U.S.C. 9601 et seq.) and the Department of Environmental Quality has been designated by the United States Environmental Protection Agency as lead agency for CERCLA activities at the site, any duly authorized representative of the Department shall have the power, in addition to the powers listed in subsection A of this section, to enter for purposes of conducting those CERCLA activities or to prevent unreasonable interference with such activities or remedies. The Department may seek administrative or judicial remedies for any person's refusal to allow or interference with entry for these purposes.

C. The Department may require the establishment and maintenance of records and reports relating to any activity regulated by the Department. Copies of such records shall be submitted to the Department on request. Any authorized representative of the Department shall be allowed access and may examine such reports or records.

~~C.~~ D. The Department may apply to and obtain from a judge of the district court, an order authorizing an administrative warrant to enforce access to premises for sampling, investigation, inquiry and inspection under the provisions of this Code and the rules promulgated by the Board. Failure to obey an administrative warrant of the district court may be punished by the district court as a contempt of court.

~~D.~~ E. The Executive Director may appoint commissioned peace officers, certified by the Council on Law Enforcement Education and Training, to investigate environmental crimes. Peace officers who become employed under this section who have service credit in the Oklahoma Law Enforcement Retirement System may, within thirty (30) days after becoming employed, elect to continue membership in the Oklahoma Law Enforcement Retirement System; otherwise they shall be eligible to enroll only in the Oklahoma Public Employees Retirement System.

SECTION 2. AMENDATORY 27A O.S. 2001, Section 2-7-123, is amended to read as follows:

Section 2-7-123. A. Upon issuance of any permit issued pursuant to the requirements of the Oklahoma Hazardous Waste Management Act, the Department of Environmental Quality shall file a recordable notice of the permit in the land records of the county in which the site is located. The notice shall contain the legal description of the site as well as the terms under which the permit was issued.

B. The Department shall file a recordable notice of remediation or related action taken pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act in the land records of the county in which the site is located. The notice shall contain a legal description of the affected property and shall identify all engineering controls used to ensure the effectiveness of the remediation.

C. When remediation of contaminated property to risk-based standards is performed under an order of or a remediation plan approved by the Department, the Department shall file a recordable notice of remediation taken in the land records of the county in which the property is located. The notice shall contain a legal description of the affected property and shall identify all engineering controls used to ensure the effectiveness of the remediation.

D. The notices required in subsections B and C of this section shall also contain a prohibition against engaging in any activities that could cause damage to the remediation or the engineering

controls, or could cause recontamination of the soil or groundwater. The notices shall also contain any appropriate restriction on land use or other activities that are incompatible with the cleanup level, including but not limited to, restriction against using groundwater for drinking or irrigation purposes or redeveloping the land for residential use. Any person who damages or interferes with the remediation, the engineering controls or continuing operation, maintenance or monitoring of the site shall be liable to repair the damage or remedy the interference, or for costs incurred by the Department in doing so. The Department may take administrative or civil action to recover costs or to compel compliance with this subsection.

SECTION 3. AMENDATORY 27A O.S. 2001, Section 2-15-102, is amended to read as follows:

Section 2-15-102. A. The Oklahoma Legislature hereby declares that the purpose of the Oklahoma Brownfields Voluntary Redevelopment Act is to:

1. Provide for the establishment of a voluntary program by the Department of Environmental Quality;

2. Foster the voluntary redevelopment and reuse of brownfields by limiting the liability of property owners, lenders, lessees, and successors and assigns from administrative penalties assessed by the Department and civil liability with regard to the remedial actions taken by the applicant for environmental contamination caused by ~~regulated substances~~ pollution, as required by a consent order, if the remedial action is not performed in a reckless or negligent manner; and

3. Provide for a risk-based system for all applicable sites based on the proposed use of the site.

B. The Oklahoma Brownfields Voluntary Redevelopment Act shall not be construed to authorize or encourage any person or other legal entity to cause or increase ~~environmental contamination~~ pollution, to avoid compliance with state and federal laws and regulations concerning ~~environmental contamination~~ pollution or to in any manner escape responsibility for maintaining environmentally sound operations.

SECTION 4. AMENDATORY 27A O.S. 2001, Section 2-15-103, is amended to read as follows:

Section 2-15-103. For purposes of the Oklahoma Brownfields Voluntary Redevelopment Act:

1. "Applicant" means any person who or entity which:

- a. has acquired the ownership, operation, management, or control of a site through foreclosure or under the terms of a bona fide security interest in a mortgage or lien on, or an extension of credit for, a brownfields site and which forecloses on or receives an assignment or deed in lieu of foreclosure or other

indicia of ownership and thereby becomes the owner of a brownfield,

- b. possesses a written expression of an interest to purchase a brownfield and the ability to implement a brownfield redevelopment proposal,
- c. is the legal owner in fee simple of a brownfield,
- d. is a tenant on or lessee of the brownfield site, or
- e. is undertaking the remediation of a brownfield site;

2. "Brownfield" means an abandoned, idled or underused industrial or commercial facility or other real property at which expansion or redevelopment of the real property is complicated by ~~environmental contamination caused by regulated substances~~ pollution;

3. "Certificate of Completion" means a document issued by the Department of Environmental Quality pursuant to Section ~~6~~ 2-15-106 of this ~~act~~ title upon a determination that an applicant has successfully completed agency-approved risk-based remediation;

4. "Certificate of No Action Necessary" means a document issued by the Department of Environmental Quality pursuant to Section ~~6~~ 2-15-106 of this ~~act~~ title upon a determination that no remediation is deemed necessary for the expansion or redevelopment of the property for a planned use;

5. "Consent order" means an order entered into by the Department of Environmental Quality and an applicant, binding an applicant and the Department to specified authorizations, activities, duties, obligations, responsibilities and other requirements;

6. "Demonstrated pattern of uncorrected noncompliance" means a history of noncompliance by the applicant with state or federal environmental laws or rules or regulations promulgated thereto, as evidenced by past operations clearly indicating a reckless disregard for the protection of human health and safety, or the environment;

7. "Land use disclosure" means the Certificate of Completion or the Certificate of No Action Necessary, issued by the Department of Environmental Quality, which is required to be filed in the office of the county clerk of the county wherein the site is situated pursuant to Section ~~7~~ 2-15-107 of this ~~act~~ title;

8. "Pollution" has the meaning given in Section 2-1-102 of this title;

9. "Remediation" means activities necessary to clean up, mitigate, correct, abate, minimize, eliminate, control and contain ~~environmental contamination caused by regulated substances~~ pollution in compliance with a consent order from the Department of Environmental Quality; and

~~9.~~ 10. "Risk-based remediation" means site assessment or site remediation, the timing, type, and degree of which are determined according to case-by-case consideration of actual or potential risk to human health and safety, or the environment from ~~environmental contamination caused by regulated substances~~ pollution of a brownfield site.

SECTION 5. AMENDATORY 27A O.S. 2001, Section 2-15-105, is amended to read as follows:

Section 2-15-105. A. An applicant may apply to the Department of Environmental Quality for a consent order for risk-based remediation of a brownfield site or for a no action necessary determination.

B. The application shall, as a minimum, include:

1. A description of:

- a. the brownfield which is the subject of the application pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act,
- b. the concentrations of contaminants in the soils, surface water, or groundwater at the site,
- c. the air releases which may occur during remediation of the site, and
- d. any monitoring of the brownfield which is to occur after issuance of the Certificate of Completion or Certificate of No Action Necessary;

2. A remediation plan for remediating any ~~contamination caused by regulated substances~~ pollution on the brownfield or a proposal that no action is necessary to remediate the brownfield considering the present levels of ~~regulated substances~~ pollution at the site and the proposed future use of the property;

3. The current and proposed use of groundwater on and near the site;

4. The operational history of the site and the current use of areas contiguous to the site;

5. The present and proposed uses of the site;

6. Information concerning the nature and extent of any contamination caused by ~~regulated substances and releases of regulated substances which have occurred~~ pollution at the site and any possible impacts on areas contiguous to the site;

7. Any analytical results from a laboratory certified by the Department of Environmental Quality or other data which characterizes the soil, groundwater or surface water on the site; and

8. An analysis of the human and environmental pathways to exposure from ~~contamination~~ pollution at the site based upon the property's future use as proposed by the applicant.

C. Remediation or proposal for a no action necessary determination shall be based on the potential risk to human health and safety and to the environment posed by the ~~environmental contamination caused by regulated substances~~ pollution at the site, considering the following factors:

1. The proposed use of the brownfield;
2. The possibility of movement of the ~~regulated substances~~ pollution in a form and manner which would result in exposure to humans and to the surrounding environment at levels which exceed applicable standards or which represent an unreasonable risk to human health and safety, or the environment as determined by the Department; and
3. The potential risks associated with the remediation proposal or no action necessary determination and the economic and technical feasibility and reliability of such proposal or determination.

SECTION 6. AMENDATORY 27A O.S. 2001, Section 2-15-106, is amended to read as follows:

Section 2-15-106. A. The Department of Environmental Quality is not authorized to hold any public meeting or hearing to require information, make any determination, or in any manner consider the zoning or rezoning for any proposed redevelopment of a site. The Department shall assume that any proposed redevelopment of the site meets or will meet any zoning requirements.

- B. The Department may reject or return an application if:
1. A federal requirement precludes the eligibility of the site;
 2. The application is not complete and accurate; or
 3. The applicant is ineligible under the provisions of the Oklahoma Brownfields Voluntary Redevelopment Act or any rules promulgated pursuant thereto.

C. The Department may enter into a consent order with the applicant for remediation of a site if the Department concludes that the remediation will:

1. Attain a degree of control of ~~regulated substances~~ pollution pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act, other applicable Department rules and standards, and all applicable state and federal laws as determined by the Department; and
2. For constituents not governed by paragraph 1 of this subsection, reduce concentrations such that the property does not present an unreasonable risk, as determined by the Department, to human health and safety or to the environment based upon the property's proposed use.

D. The Department may make a no action necessary determination if the application as required by the Oklahoma Brownfields Voluntary Redevelopment Act indicates the existence of ~~contamination caused by regulated substances~~ pollution which, given the proposed use of the property, does not pose an unreasonable risk to human health and safety or to the environment as determined by the Department.

E. The consent order and the no action determination apply only to conditions caused by ~~contamination~~ pollution on the property, to applicable state or federal laws and to applicable rules and standards promulgated by the Board of Environmental Quality that existed at the time of submission of the application.

F. If an application is disapproved by the Department, the Department shall promptly provide the applicant with a formal written statement of the reasons for such denial.

G. 1. If the Department determines that the applicant has successfully completed the requirements specified by the consent order, the Department shall certify the completion by issuing to the applicant a Certificate of Completion. The certificate shall list the use specified in the consent order for the site. The certificate shall also include provisions stating that:

- a. the Department shall not pursue administrative penalties and civil actions against the applicant, lenders, lessees, and successors and assigns associated with actions taken to remediate the ~~contamination caused by regulated substances~~ pollution which is the subject of the consent order,
- b. the applicant and all lenders, lessees, and successors and assigns shall not be subject to civil liability with regard to the remedial actions taken by the applicant for ~~environmental contamination caused by regulated substances~~ pollution, as required by the consent order if the remedial action is not performed in a reckless or negligent manner,
- c. no person responsible for ~~contamination caused by regulated substances~~ pollution who has not participated in the voluntary remediation process shall be released from any liability, and
- d. the Certificate of Completion shall remain effective as long as the property is in substantial compliance with the consent order.

2. If the Department determines that no remediation action is deemed necessary for the site, the Department shall issue the applicant a Certificate of No Action Necessary. The certificate shall list the use specified in the application for the site. The certificate shall also include provisions stating that:

- a. the Department shall not pursue any administrative penalties or civil actions against the applicant,

lenders, lessees, and successors and assigns associated with the determination that no action is necessary to remediate the ~~contamination caused by regulated substances~~ pollution which is the subject of the certificate,

- b. the applicant and all lenders, lessees, and successors and assigns shall not be subject to civil liability with regard to the determination that no action is necessary to remediate the site,
- c. no person responsible for ~~contamination caused by regulated substances~~ pollution who has not participated in the application process for a no action necessary determination shall be released from any liability,
- d. the Certificate of No Action Necessary shall remain effective as long as the site is in substantial compliance with the certificate as determined by the Department, and
- e. the issuance of the Certificate of No Action Necessary shall not be construed or relied upon in any manner as a determination by the Department that the brownfield has not been or is not environmentally contaminated by ~~regulated substances~~ pollution.

H. The Department shall keep and maintain a copy of the application, work plan, consent order, any other correspondence, record, authorization, and report received by the Department, and an official copy of the Certificate of Completion or the Certificate of No Action Necessary pursuant to the provisions of the Oklahoma Brownfields Voluntary Redevelopment Act relating to the site in an accessible location.

I. Chapter 10A of Title 67 of the Oklahoma Statutes shall not apply to any records or copies required to be kept and maintained pursuant to this section.

SECTION 7. AMENDATORY 27A O.S. 2001, Section 2-15-108, is amended to read as follows:

Section 2-15-108. A. 1. The Department of Environmental Quality shall not assess against an applicant administrative penalties or pursue civil actions associated with the ~~contamination~~ pollution which is the subject of the consent order or no action necessary determination if:

- a. the applicant is in compliance with the consent order during remediation or with the Certificate of No Action Necessary, and
- b. the applicant is in compliance with any post-certification conditions or requirements specified in the consent order.

2. After issuance of the Certificate of Completion or Certificate of No Action Necessary, the Department shall not assess administrative penalties or pursue civil actions associated with the ~~contamination~~ pollution which is the subject of the consent order or no action necessary determination against any lender, lessee, or successor or assign if the lender, lessee, or successor or assign is in compliance with any post-certification conditions or requirements as specified in the consent order or Certificate of No Action Necessary.

B. 1. Failure of the applicant and any lenders, lessees, or successors or assigns to materially comply with the consent order entered into pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act shall render the consent order or the Certificate of Completion or the Certificate of No Action Necessary voidable.

2. Submission of any false or materially misleading information by the applicant knowing such information to be false or misleading shall render the consent order, Certificate of Completion, or Certificate of No Action Necessary voidable.

C. 1. An applicant to whom a Certificate of Completion ~~or a Certificate of No Action Necessary~~ has been issued pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act and such applicant's lenders, lessees, or successors or assigns shall not be subject to civil liability with regard to the remedial actions taken by the applicant for ~~environmental contamination caused by regulated substances~~ pollution as required by the consent order if the remedial action is not performed in a reckless or negligent manner.

2. Except as otherwise provided in this subsection, nothing in the Oklahoma Brownfields Voluntary Redevelopment Act shall be construed to limit or negate any other rights of any person from pursuing or receiving legal or equitable relief from the applicant or any other person or legal entity causing or contributing to the ~~environmental contamination~~ pollution.

3. In those cases where an applicant conducts a voluntary remediation in conjunction with a party responsible for the ~~contamination~~ pollution, the responsible party shall also be released from liability to the same extent as the applicant.

D. The release of liability from administrative penalties and any civil actions authorized by the Oklahoma Brownfields Voluntary Redevelopment Act shall not apply to:

1. Any ~~environmental contamination~~ pollution and consequences thereof that the applicant causes or has caused outside the scope of the consent order or the certificate issued by the Department;

2. Any ~~contamination~~ pollution caused or resulting from any subsequent redevelopment of the property;

3. Existing ~~contamination caused by regulated substances~~ pollution not addressed prior to issuance of the Certificate of Completion or the Certificate of No Action Necessary; or

4. Any person responsible for ~~contamination~~ pollution who has not participated in the voluntary remediation.

SECTION 8. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the Senate the 9th day of March, 2004.

Presiding Officer of the Senate

Passed the House of Representatives the 8th day of April, 2004.

Presiding Officer of the House
of Representatives