

SB 1167

THE STATE SENATE
Tuesday, February 10, 2004

Senate Bill No. 1167
As Amended

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.

1 B. If the property to be entered has been identified on the
2 federal National Priority List as a Superfund site or otherwise
3 identified for an action under the federal Comprehensive
4 Environmental Response, Compensation and Liability Act (CERCLA, 42
5 U.S.C. 9601 et seq.), any duly authorized representative of the
6 Department shall have the power, in addition to the powers listed in
7 subsection A of this section, to enter for purposes of conducting
8 CERCLA activities or to prevent unreasonable interference with such
9 activities or remedies. **The Department may seek administrative or**
10 **judicial remedies for any person's refusal to allow or interference**
11 **with entry for these purposes.**

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

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

1 of the district court may be punished by the district court as a
2 contempt of court.

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

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

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

21 B. The Department shall file a recordable notice of remediation
22 or related action taken pursuant to the federal Comprehensive
23 Environmental Response, Compensation, and Liability Act in the land

1 records of the county in which the site is located. The notice
2 shall contain a legal description of the affected property and shall
3 identify all engineering controls used to ensure the effectiveness
4 of the remediation.

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

13 D. The notices required in subsections B and C of this section
14 shall also contain a prohibition against engaging in any activities
15 that could cause damage to the remediation or the engineering
16 controls, or could cause recontamination of the soil or groundwater.
17 The notices shall also contain any appropriate restriction on land
18 use or other activities that are incompatible with the cleanup
19 level, including but not limited to, restriction against using
20 groundwater for drinking or irrigation purposes or redeveloping the
21 land for residential use. Any person who damages or interferes with
22 the remediation, the engineering controls or continuing operation,
23 maintenance or monitoring of the site shall be liable to repair the

1 damage or remedy the interference, or for costs incurred by the
2 Department in doing so. The Department may take administrative or
3 civil action to recover costs or to compel compliance with this
4 subsection.

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

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

- 10 1. Provide for the establishment of a voluntary program by the
11 Department of Environmental Quality;
- 12 2. Foster the voluntary redevelopment and reuse of brownfields
13 by limiting the liability of property owners, lenders, lessees, and
14 successors and assigns from administrative penalties assessed by the
15 Department and civil liability with regard to the remedial actions
16 taken by the applicant for environmental contamination caused by
17 ~~regulated substances~~ pollution, as required by a consent order, if
18 the remedial action is not performed in a reckless or negligent
19 manner; and
- 20 3. Provide for a risk-based system for all applicable sites
21 based on the proposed use of the site.

22 B. The Oklahoma Brownfields Voluntary Redevelopment Act shall
23 not be construed to authorize or encourage any person or other legal

1 entity to cause or increase ~~environmental contamination~~ pollution,
2 to avoid compliance with state and federal laws and regulations
3 concerning ~~environmental contamination~~ pollution or to in any manner
4 escape responsibility for maintaining environmentally sound
5 operations.

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

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

- 10 1. "Applicant" means any person who or entity which:
- 11 a. has acquired the ownership, operation, management, or
12 control of a site through foreclosure or under the
13 terms of a bona fide security interest in a mortgage
14 or lien on, or an extension of credit for, a
15 brownfields site and which forecloses on or receives
16 an assignment or deed in lieu of foreclosure or other
17 indicia of ownership and thereby becomes the owner of
18 a brownfield,
 - 19 b. possesses a written expression of an interest to
20 purchase a brownfield and the ability to implement a
21 brownfield redevelopment proposal,
 - 22 c. is the legal owner in fee simple of a brownfield,
 - 23 d. is a tenant on or lessee of the brownfield site, or

1 e. is undertaking the remediation of a brownfield site;

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

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

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

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

21 6. "Demonstrated pattern of uncorrected noncompliance" means a
22 history of noncompliance by the applicant with state or federal
23 environmental laws or rules or regulations promulgated thereto, as

1 evidenced by past operations clearly indicating a reckless disregard
2 for the protection of human health and safety, or the environment;

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

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

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

15 ~~9.~~ 10. "Risk-based remediation" means site assessment or site
16 remediation, the timing, type, and degree of which are determined
17 according to case-by-case consideration of actual or potential risk
18 to human health and safety, or the environment from ~~environmental~~
19 ~~contamination caused by regulated substances~~ pollution of a
20 brownfield site.

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

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

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

6 1. A description of:

7 a. the brownfield which is the subject of the application
8 pursuant to the Oklahoma Brownfields Voluntary
9 Redevelopment Act,

10 b. the concentrations of contaminants in the soils,
11 surface water, or groundwater at the site,

12 c. the air releases which may occur during remediation of
13 the site, and

14 d. any monitoring of the brownfield which is to occur
15 after issuance of the Certificate of Completion or
16 Certificate of No Action Necessary;

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

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

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

3 5. The present and proposed uses of the site;

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

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

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

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

20 1. The proposed use of the brownfield;

21 2. The possibility of movement of the ~~regulated substances~~
22 pollution in a form and manner which would result in exposure to
23 humans and to the surrounding environment at levels which exceed

1 applicable standards or which represent an unreasonable risk to
2 human health and safety, or the environment as determined by the
3 Department; and

4 3. The potential risks associated with the remediation proposal
5 or no action necessary determination and the economic and technical
6 feasibility and reliability of such proposal or determination.

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

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

15 B. The Department may reject or return an application if:

16 1. A federal requirement precludes the eligibility of the site;

17 2. The application is not complete and accurate; or

18 3. The applicant is ineligible under the provisions of the
19 Oklahoma Brownfields Voluntary Redevelopment Act or any rules
20 promulgated pursuant thereto.

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

1 1. Attain a degree of control of ~~regulated substances~~ pollution
2 pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act,
3 other applicable Department rules and standards, and all applicable
4 state and federal laws as determined by the Department; and

5 2. For constituents not governed by paragraph 1 of this
6 subsection, reduce concentrations such that the property does not
7 present an unreasonable risk, as determined by the Department, to
8 human health and safety or to the environment based upon the
9 property's proposed use.

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

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

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

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

7 a. the Department shall not pursue administrative
8 penalties and civil actions against the applicant,
9 lenders, lessees, and successors and assigns
10 associated with actions taken to remediate the
11 ~~contamination caused by regulated substances~~ pollution
12 which is the subject of the consent order,

13 b. the applicant and all lenders, lessees, and successors
14 and assigns shall not be subject to civil liability
15 with regard to the remedial actions taken by the
16 applicant for ~~environmental contamination caused by~~
17 ~~regulated substances~~ pollution, as required by the
18 consent order if the remedial action is not performed
19 in a reckless or negligent manner,

20 c. no person responsible for ~~contamination caused by~~
21 ~~regulated substances~~ pollution who has not
22 participated in the voluntary remediation process
23 shall be released from any liability, and

1 d. the Certificate of Completion shall remain effective
2 as long as the property is in substantial compliance
3 with the consent order.

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

9 a. the Department shall not pursue any administrative
10 penalties or civil actions against the applicant,
11 lenders, lessees, and successors and assigns
12 associated with the determination that no action is
13 necessary to remediate the ~~contamination caused by~~
14 ~~regulated substances~~ pollution which is the subject of
15 the certificate,

16 b. the applicant and all lenders, lessees, and successors
17 and assigns shall not be subject to civil liability
18 with regard to the determination that no action is
19 necessary to remediate the site,

20 c. no person responsible for ~~contamination caused by~~
21 ~~regulated substances~~ pollution who has not
22 participated in the application process for a no

1 action necessary determination shall be released from
2 any liability,
3 d. the Certificate of No Action Necessary shall remain
4 effective as long as the site is in substantial
5 compliance with the certificate as determined by the
6 Department, and
7 e. the issuance of the Certificate of No Action Necessary
8 shall not be construed or relied upon in any manner as
9 a determination by the Department that the brownfield
10 has not been or is not environmentally contaminated by
11 ~~regulated substances~~ pollution.

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

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

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

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

6 a. the applicant is in compliance with the consent order
7 during remediation or with the Certificate of No
8 Action Necessary, and

9 b. the applicant is in compliance with any post-
10 certification conditions or requirements specified in
11 the consent order.

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

21 B. 1. Failure of the applicant and any lenders, lessees, or
22 successors or assigns to materially comply with the consent order
23 entered into pursuant to the Oklahoma Brownfields Voluntary

1 Redevelopment Act shall render the consent order or the Certificate
2 of Completion or the Certificate of No Action Necessary voidable.

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

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

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

21 3. In those cases where an applicant conducts a voluntary
22 remediation in conjunction with a party responsible for the

1 ~~contamination~~ pollution, the responsible party shall also be
2 released from liability to the same extent as the applicant.

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

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

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

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

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

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

20 COMMITTEE REPORT BY: COMMITTEE ON ENERGY, ENVIRONMENT &
21 COMMUNICATIONS, dated 2-5-04 - DO PASS, As Amended.