STATE OF OKLAHOMA

1st Session of the 52nd Legislature (2009)

SENATE BILL 446 By: Bingman

AS INTRODUCED

An Act relating to the Oklahoma Brownfields Voluntary Redevelopment Act; amending 27A O.S. 2001, Section 2-15-101, which relates to title of act; updating statutory references; amending 27A O.S. 2001, Section 2-15-102, as amended by Section 3, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, Section 2-15-102), which relates to purpose of act; modifying reference to certain entity; amending 27A O.S. 2001, Section 2-15-103, as amended by Section 4, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, Section 2-15-103), which relates to definitions; modifying terms; defining term; amending 27A O.S. 2001, Section 2-15-104, which relates to administration of the brownfields program; stating requirements for the Department of Environmental Quality; amending 27A O.S. 2001, Section 2-15-105, as amended by Section 5, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, Section 2-15-105), which relates to certain proposals; modifying requirements to be included in proposals; amending 27A O.S. 2001, Section 2-15-106, as amended by Section 6, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, Section 2-15-106), which relates to brownfields proposals; modifying certain terms; amending 27A O.S. 2001, Section 2-15-107, which relates to land use disclosures; modifying certain terms; amending 27A O.S. 2001, Section 2-15-108, as last amended by Section 5, Chapter 381, O.S.L. 2004 (27A O.S. Supp. 2008, Section 2-15-108), which relates to administrative penalties; modifying certain terms; amending 27A O.S. 2001, Section 2-15-109, which relates to agency costs; authorizing the Department to require participants to reimburse agency for certain costs; amending 27A O.S. 2001, Section 2-15-110, which relates to removing obsolete language;

modifying terms; providing an effective date; and declaring an emergency.

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

SECTION 1. AMENDATORY 27A O.S. 2001, Section 2-15-101, is amended to read as follows:

Section 2-15-101. Sections ~~1~~ 2-15-101 through ~~10~~ 2-15-110 of this ~~act~~ title shall be known and may be cited as the "Oklahoma Brownfields Voluntary Redevelopment Act".

SECTION 2. AMENDATORY 27A O.S. 2001, Section 2-15-102, as amended by Section 3, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, 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~~ participant for environmental contamination caused by 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 pollution, to avoid compliance with state and federal laws and regulations concerning pollution or to in any manner escape responsibility for maintaining environmentally sound operations.

SECTION 3. AMENDATORY 27A O.S. 2001, Section 2-15-103, as amended by Section 4, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, 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"~~ "Participant" 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 pollution;

3. "Certificate of Completion" means a document issued by the Department of Environmental Quality pursuant to Section 2-15-106 of this title upon a determination that ~~an applicant~~ a participant has successfully completed agency-approved risk-based remediation. A Certificate of Completion is not a permit as defined in Section 2-14-103 of this title;

4. "Certificate of No Action Necessary" means a document issued by the Department of Environmental Quality pursuant to Section 2-15-106 of this title upon a determination that no remediation is deemed necessary for the expansion or redevelopment of the property for a planned use. A Certificate of No Action Necessary is not a permit as defined in Section 2-14-103 of this title;

5. "Consent order" means an order entered into by the Department of Environmental Quality and ~~an applicant~~ one or more

participants, binding ~~an applicant and the Department~~ the parties to specified authorizations, activities, duties, obligations, responsibilities and other requirements;

6. "Demonstrated pattern of uncorrected noncompliance" means a history of noncompliance by the ~~applicant~~ participant 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 2-15-107 of this title. The land use disclosure shall include those items required in Section 2-7-123 of this title;

8. “Pollution” means the same as the term is defined in Section 2-1-102 of this title;

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

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 pollution of a brownfield site; and

11. "Site characterization" means the collection of sampling and non-sampling data to adequately delineate environmental contamination on property and support the risk evaluation and decision-making by the Department of Environmental Quality.

SECTION 4. AMENDATORY 27A O.S. 2001, Section 2-15-104, is amended to read as follows:

Section 2-15-104. A. The Department of Environmental Quality may establish and implement a voluntary redevelopment program for brownfields. In administering the Oklahoma Brownfields Voluntary Redevelopment Act, the Department shall:

~~a. approve~~

1. Approve site-specific work plans for site characterization;

2. Approve site-specific remediation plans for each site as necessary, using a risk-based system~~,~~;

~~b. review~~

3. Review and inspect site ~~assessment~~ characterization and remediation activities and reports~~,~~;

~~c. use~~

4. Use risk-based remediation procedures as determined by the agency to establish cleanup levels~~, and~~;

~~d. develop~~

5. Evaluate engineering and institutional controls for function and performance;

6. Develop and implement rules and procedures for the review and processing of Brownfields Voluntary Redevelopment project applications for obtaining funds allocated to the state from the Federal Clean Water Act and other state and federal funds available for Brownfields Voluntary Redevelopment projects; and

7. Audit completed projects to ensure compliance with use restrictions.

B. Any brownfields program established pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act shall be a voluntary program.

C. No state governmental entity regulating any person or institution shall require evidence of participation in the Oklahoma Brownfields Voluntary Redevelopment Act.

D. The provisions of the Oklahoma Brownfields Voluntary Redevelopment Act shall not apply to any person who is:

1. Responsible for taking corrective action on the real property pursuant to orders or agreements issued by the federal Environmental Protection Agency;

2. Not in substantial compliance with a final agency order or any final order or judgment of a court of record secured by any state or federal agency relating to the generation, storage,

transportation, treatment, recycling or disposal of regulated substances; or

3. Has a demonstrated pattern of uncorrected noncompliance.

E. 1. The ~~Board of~~ Environmental Quality Board shall promulgate rules necessary to implement the Oklahoma Brownfields Voluntary Redevelopment Act.

2. The Department is specifically authorized to promulgate emergency rules necessary pursuant to the Administrative Procedures Act to implement the provisions of the Oklahoma Brownfields Voluntary Redevelopment Act.

3. Such rules shall include but not be limited to provision for ~~applications~~ work plans, consent orders, notice and public participation opportunities, brownfield remediation plans and no action necessary determinations issued by the Department.

SECTION 5. AMENDATORY 27A O.S. 2001, Section 2-15-105, as amended by Section 5, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, Section 2-15-105), is amended to read as follows:

Section 2-15-105. A. ~~An applicant may apply~~ One or more participants may submit a proposal 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~~ proposal 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 pollution on the brownfield or a proposal that no action is necessary to remediate the brownfield considering the present levels of 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 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 pollution at the site based upon the property's future use as proposed by the applicant~~ A site characterization, including:

a. site description and historical information about the former uses of the property, including any past environmental permits issued for the site,

b. analytical results from a laboratory certified by the Department or other data which characterize the soil, groundwater or surface water at the site,

c. information concerning the nature and extent of any contamination caused by pollution at the site and any possible impacts on areas contiguous to the site,

d. delineation of contaminants on the property and their concentrations and depths,

e. delineation of potential off-site migration of contaminants,

f. identification of pertinent environmental conditions on the site and in the region,

g. identification of groundwater, surface water, and other environmental resources and uses in the area,

h. identification of potential exposure pathways and potential receptors,

i. identification of adjacent property uses,

j. an accurate metes and bounds legal description of the property,

k. latitude and longitude of the main entrance,

l. statistically relevant background environmental media samples or peer-reviewed published background data, and

m. any data the Department believes is relevant to the reuse of the property;

2. The current and proposed uses of the property;

3. An analysis of the human and environmental pathways to exposure from pollution at the site based on the future use of the property as proposed by the participant;

4. Alternatives for cleanup, if remediation is planned;

5. Potential for redevelopment to impact the remedy;

6. A plan for any after-action monitoring or maintenance of the brownfield which is to occur after issuance of the Certificate of Completion or Certificate of No Action Necessary;

7. Any engineering or institutional controls necessary to protect the remedy over time and plans for financial assurance for the controls to remain in effect;

8. A plan for remediating any pollution on the brownfield or a proposal that no remedial action is necessary considering the

present level of contamination and the proposed future use of the property;

9. A long-term management plan for any on-site disposal facilities; and

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

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 pollution at the site, considering the following factors:

1. The proposed use of the brownfield;

2. The possibility of movement of the pollution in a form and manner which would result in exposure to humans and to the surrounding environment at levels which exceed ~~applicable standards~~ calculated site-specific cleanup levels or, if off-site, 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, as amended by Section 6, Chapter 141, O.S.L. 2004 (27A O.S. Supp. 2008, 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~~ a proposal if:

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

2. The ~~application~~ proposal is not complete and accurate; or

3. The ~~applicant~~ participant 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~~ participant for characterization and remediation of a site if the Department concludes that the remediation will:

1. Attain a degree of control of 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~~ proposal as required by the Oklahoma Brownfields Voluntary Redevelopment Act indicates the existence of 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 pollution on the property, to applicable state or federal laws and to applicable rules and standards promulgated by the ~~Board of~~ Environmental Quality Board that existed at the time of submission of the ~~application~~ proposal.

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

G. 1. If the Department determines that the ~~applicant~~ participant has successfully completed the requirements specified by the consent order, the Department shall certify the completion by issuing to the ~~applicant~~ participant a Certificate of Completion. The certificate shall list the use specified in the consent order for the site and shall comply with Section 2-7-123 of this title. The certificate shall also include provisions stating that:

a. the Department shall not pursue administrative penalties and civil actions against the ~~applicant~~ participant, lenders, lessees, and successors and assigns associated with actions taken to remediate pollution which is the subject of the consent order,

b. the ~~applicant~~ participant 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~~ participant for 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 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, Certificate of Completion and any institutional controls placed on the property.

2. If the Department determines that no remediation action is deemed necessary for the site, the Department shall issue the ~~applicant~~ participant a Certificate of No Action Necessary. The certificate shall list the use specified in the ~~application~~ proposal 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~~ participant, lenders, lessees, and successors and assigns associated with the determination that no action is necessary to remediate the pollution which is the subject of the certificate,

b. the ~~applicant~~ participant 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 pollution who has not participated in the ~~application~~ proposal 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 and any institutional controls placed on the property 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 polluted.

H. The Department shall keep and maintain a copy of the ~~application~~ proposal, 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 2-15-107, is amended to read as follows:

Section 2-15-107. A. 1. All land use disclosures shall be filed in the land records by the ~~applicant~~ participant in the office of the county clerk where the site is located.

2. Within thirty (30) days of receipt of the Certificate of Completion or the Certificate of No Action Necessary, the ~~applicant~~ participant shall submit to the Department of Environmental Quality an official copy of the land use disclosure filed with the county clerk in the county in which the site is located.

3. Failure to record the land use disclosure with the county clerk and submit the official copy to the Department as required by this section shall render the Certificate of Completion or Certificate of No Action Necessary voidable.

B. Whoever knowingly converts, develops or uses a brownfield site in violation of an authorized use as specified in the land use disclosure shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not more than One Thousand Dollars ($1,000.00), imprisonment in the county jail for not more than one (1) year, or both such fine and imprisonment. Each day such violation continues shall be considered a separate offense.

SECTION 8. AMENDATORY 27A O.S. 2001, Section 2-15-108, as last amended by Section 5, Chapter 381, O.S.L. 2004 (27A O.S. Supp. 2008, 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~~ a participant administrative penalties or pursue civil actions associated with the pollution which is the subject of the consent order or no action necessary determination if:

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

b. the ~~applicant~~ participant 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 regarding the 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~~ participant 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~~ participant 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~~ participant 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~~ participant's lenders, lessees, or successors or assigns or any other person, this state or a local political subdivision thereof or any other legal entity ~~purchasing~~ acquiring, in good faith, the property which was subject to the Oklahoma

Brownfields Voluntary Redevelopment Act shall not be subject to civil liability regarding the pollution which was the subject of the consent order or certificate if the ~~applicant~~ participant is in compliance with any post-certification conditions or requirements specified in the consent order or certificate.

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~~ participant or any other person or legal entity causing or contributing to the pollution.

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

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 pollution and consequences thereof that the ~~applicant~~ participant causes or has caused outside the scope of the consent order or the certificate issued by the Department;

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

3. Existing pollution not addressed prior to issuance of the Certificate of Completion or the Certificate of No Action Necessary; or

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

SECTION 9. AMENDATORY 27A O.S. 2001, Section 2-15-109, is amended to read as follows:

Section 2-15-109. A. The Department of Environmental Quality may require the ~~applicant~~ participant to reimburse the Department for reasonable costs ~~described in the consent order~~ for the review and oversight of any remediation, reports, field activities or other services or duties of the Department pursuant to the Oklahoma Brownfields Voluntary Redevelopment Act which are performed by the Department prior to the issuance of the Certificate of Completion or the Certificate of No Action Necessary~~, unless otherwise authorized by the consent order~~.

B. The Department may require the participant to reimburse the Department for reasonable costs for expenses incurred in auditing completed projects to ensure compliance with use restrictions in the Certificate.

SECTION 10. AMENDATORY 27A O.S. 2001, Section 2-15-110, is amended to read as follows:

Section 2-15-110. A. Except as otherwise specified by this section, any ~~application for remediation of a site submitted to the~~

~~Department of Environmental Quality prior to the effective date of this act which results in a consent order, and any~~ consent order issued by the Department of Environmental Quality prior to the effective date of this act meeting the conditions and requirements established by the Department or as otherwise determined by the Department to be in compliance for such site is hereby ratified.

B. Any person who has entered into a consent order with the Department pursuant to this section may continue to rely upon the consent order if the person has accepted the conditions of and in other respects complies with the requirements so established and with the provisions of the consent order as determined by the Department.

C. Any benefits and releases of liability from administrative penalties and from civil action as provided by the Oklahoma Brownfields Voluntary Redevelopment Act shall apply and be made part of the ~~consent order~~ Certificate of Completion or Certificate of No Action Necessary.

D. The provisions of this section shall apply only to ~~applications made and/or~~ consent orders issued after January 1, 1988.

SECTION 11. This act shall become effective July 1, 2009.

SECTION 12. 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.

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