

CHAPTER 56.

SOUTH CAROLINA HAZARDOUS WASTE MANAGEMENT ACT

ARTICLE 7.

BROWNFIELDS/VOLUNTARY CLEANUP PROGRAM

SECTION 44-56-710. Purpose.

The purpose of the voluntary cleanup program is to:

- (1) return to use industrial and commercial facilities whose redevelopment is complicated by real or perceived environmental contamination;
- (2) provide an incentive to conduct response actions at a site by providing nonresponsible parties State CERCLA liability protection or by providing responsible parties with a covenant not to sue; and
- (3) provide reimbursement to the department for oversight costs.

SECTION 44-56-720. Definitions.

As used in this article:

- (1) "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act and its amendments, 42 U.S.C. 9601, et seq.
- (2) "Contaminant" includes, but is not limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions, including malfunctions in reproduction, or physical deformations, in organisms or their offspring; "contaminant" does not include petroleum, including crude oil or any fraction of crude oil, which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) of CERCLA, Section 101, 42 U.S.C. Section 9601, et seq. and does not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality or mixtures of natural gas and such synthetic gas.
- (3) "Department" means the South Carolina Department of Health and Environmental Control.
- (4) "Nonresponsible party" means any party which is neither:
 - (i) a responsible party at the time the voluntary cleanup contract is signed, including lenders, economic development agencies, fiduciaries, trustees, executors, administrators, custodians, subsequent holders of a security interest; nor
 - (ii) a parent, subsidiary of, or successor to a responsible party.
- (5) "Oversight costs" means those costs, both direct and indirect, incurred by the department in implementing the Voluntary Cleanup Program.
- (6) "Property" means that portion of the site which is subject to the ownership, prospective ownership, or possessory or contractual interest of a responsible party or a nonresponsible party.
- (7) "Response action" means any assessment, cleanup, inspection, or closure of a site as necessary to remedy actual or potential damage to public health, public welfare, or the environment.
- (8) "Responsible party" means:
 - (a) the owner and operator of a vessel, as defined in CERCLA Section 101 (28), or a facility;
 - (b) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
 - (c) any person who by contract, settlement, or otherwise arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and

(d) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels, as defined in CERCLA Section 101 (38), or sites selected by such person, from which there is a release or a threatened release which causes the incurrence of response costs of a hazardous substance.

(9) "Site" means all areas where a contaminant has been released, deposited, stored, disposed of, or placed or otherwise comes to be located; "site" does not include any consumer product in consumer use or any vessel, as defined in CERCLA Section 101 (28).

(10) "Voluntary cleanup" means a response action taken under and in compliance with this article.

(11) "Voluntary cleanup contract" means a contract entered into between the department and a responsible or nonresponsible party to conduct a voluntary cleanup.

SECTION 44-56-730. Site and participant eligibility.

(A) A site known or perceived to be impacted by a contaminant is eligible for participation in the voluntary cleanup program unless the site is listed or proposed to be listed on the National Priorities List pursuant to CERCLA Section 105.

(B) A responsible party who is not subject to a department order or permit for assessment and remediation is eligible to participate in the voluntary cleanup program for that site.

(C) All nonresponsible parties who demonstrate financial viability to meet their obligations under the contract are eligible to participate in the voluntary cleanup program.

SECTION 44-56-740. Requirements for contracts entered into by or on behalf of responsible parties.

(A)(1) A voluntary cleanup contract entered into by or on behalf of a responsible party shall contain at a minimum:

(a) submission of a work plan, health and safety plan, and provisions from written progress reports;

(b) a grant of access to perform and oversee response actions; and

(c) a legal description of the property.

(2) A voluntary cleanup contract shall stipulate that it:

(a) is not a release of covenant not to sue for any claim or cause of action against a responsible party who is a nonsignatory to the contract;

(b) does not limit the right of the department to undertake future response actions; and

(c) is not a release or covenant not to sue for claims against a responsible party for matters not expressly included in the contract.

(3) After signing a voluntary cleanup contract, the responsible party shall prepare and submit the appropriate work plans and reports to the department. The department shall review and evaluate the work plans and reports for accuracy, quality, and completeness. If a work plan or report is not approved, the department shall notify the party concerning additional information or commitments needed to obtain approval.

(4) A voluntary cleanup contract executed on behalf of a responsible party inures to the benefit of the responsible party's signatories, parents, successors, assigns, and subsidiaries.

(5) A voluntary cleanup contract must give the responsible party the department's covenant not to sue for the work done in completing the response actions specifically covered in the contract and completed in accordance with the approved work plans and reports. The covenant not to sue must be contingent upon the department's determination that the responsible party successfully and completely complied with the contract.

(B)(1) Upon completion of the contract, the responsible party must submit a request to the department for a certificate of completion. If the department determines that a responsible party has successfully and completely complied with the contract and has successfully completed the voluntary cleanup approved under this article, the department shall certify that the action has been completed by issuing the party a certificate of completion. The certificate of completion shall:

(a) provide a covenant not to sue for the benefit of the responsible party, its signatories, parents, successors, and subsidiaries;

(b) indicate the proposed future land use and if a restrictive covenant is necessary for protection of health, safety, and welfare of the public, include a copy of the restrictive covenant entered into between the department and the responsible party and filed with the Register of Deeds or Mesne Conveyances in the appropriate county. A restrictive covenant remains in effect until a complete remediation is accomplished for unrestricted use; and

- (c) include a legal description of the site and the name of the site's owner.
- (2) If the department determines that the responsible party has not completed the contract satisfactorily, the department shall notify in writing the responsible party and the current owner of the site, if different from the responsible party who signed the contract, that the contract has not been satisfied and shall identify any deficiencies.
- (3) The covenant not to sue is revoked for a party or successor who changes the land use from the use specified in the certificate of completion to one which requires a more comprehensive cleanup.
- (C) The department shall charge for and retain all monies collected as oversight costs. The South Carolina Hazardous Waste Contingency Fund must be reimbursed for any funds expended from this fund pursuant to Section 44-56-200.
- (D) Public participation procedures for a voluntary cleanup contract entered into by a responsible party shall follow the same guidelines for public participation as those for the State CERCLA program and not inconsistent with the National Contingency Plan.
- (E)(1) The department or the responsible party may terminate a voluntary cleanup contract by giving thirty days advanced written notice to the other. The department may not terminate the contract without cause.
- (2) The covenant not to sue must be revoked for a party or its successors, or both, for conducting activities at the site that are inconsistent with the terms and conditions of the voluntary cleanup contract.
- (3) If, after receiving notice that costs are due and owing, the responsible party does not pay the department oversight costs associated with the voluntary cleanup in a timely manner, the department may bring an action to recover the amount owed and all costs incurred by the department in bringing the action including, but not limited to, attorney's fees, department personnel costs, witness costs, court costs, and deposition costs.
- (4) Termination of the contract does not affect any right the department has under any law to require additional response actions or recover costs.
- (F) The department's decision to enter or not to enter into a contract is final and is not a contested case within the meaning of the South Carolina Administrative Procedures Act, Section 1-23-10, et seq.

SECTION 44-56-750. Prerequisites to and provisions of contract entered into by or on behalf of nonresponsible party.

- (A)(1) Before entering into a voluntary cleanup contract, the nonresponsible party must:
 - (a) submit to the department its proposed scope of work;
 - (b) identify a contact person, whose name, address, and telephone number must be updated throughout the term of the contract;
 - (c) provide a legal description of the property; and
 - (d) identify the business activities planned to be carried out on the property.
- (2) Before entering into a voluntary cleanup contract, the nonresponsible party must certify to the department that:
 - (a) it is not a responsible party at the site;
 - (b) it is not a parent, successor, or subsidiary of a responsible party at the site;
 - (c) its activities will not aggravate or contribute to existing contamination on the site or pose significant human health or environmental risks; and
 - (d) it is financially viable to meet the obligations under the contract.
- (B)(1) A voluntary cleanup contract entered into by or on behalf of a nonresponsible party shall contain at a minimum:
 - (a) submission of a work plan, health and safety plan, and provisions for written progress reports;
 - (b) a grant of access to perform and oversee response actions;
 - (c) a legal description of the property;
 - (d) a provision for the department to have the opportunity to inspect and to copy any and all documents or records in the nonresponsible party's custody, possession, or control which identifies or potentially identifies a responsible or potentially responsible party; and
 - (e) a provision that the department has an irrevocable right of access to the property once the property is acquired by the nonresponsible party. The right of access remains until a complete remediation is accomplished for unrestricted use.
- (2) A voluntary cleanup contract shall stipulate that it:
 - (a) is not a release or covenant not to sue for any claim or cause of action against a responsible party who is a nonsignatory to the contract;
 - (b) does not limit the right of the department to undertake future response actions;

(c) is not a release or covenant not to sue for claims against a responsible party for matters not expressly included in the contract;

(d) does not release the nonresponsible party from liability for any contamination that the nonresponsible party causes or contributes to the site; and

(e) becomes null and void if the nonresponsible party submits information that is false or incomplete and that is inconsistent with the intent of the contract.

(3) After signing a voluntary cleanup contract, the nonresponsible party shall prepare and submit the appropriate work plans and reports to the department. The department shall review and evaluate the work plans and reports for accuracy, quality, and completeness. If a work plan or report is not approved, the department shall notify the party concerning additional information or commitments needed to obtain approval.

(4) A voluntary cleanup contract executed on behalf of a nonresponsible party must, in the department's sole discretion, provide a measurable benefit to the State, the community, or the department.

(5) After considering existing and future use or uses of the site, the department may approve submitted work plans or reports that do not require removal or remedy of all discharges, releases, and threatened releases at a site as long as the response action:

(a) is consistent and compatible with the proposed future use of the site;

(b) will not contribute to or exacerbate discharges, releases, or threatened releases;

(c) will not interfere with or substantially increase the cost of response actions to address the remaining discharges, releases, or threatened releases; and

(d) requires deed notices or restrictions, or both, determined appropriate by the department, to be placed on the property after completion of the work plan.

(6) A voluntary cleanup contract executed on behalf of a nonresponsible party inures to the benefit of the nonresponsible party's lenders, signatories, parents, subsidiaries, and successors. A voluntary cleanup contract executed on behalf of a nonresponsible party does not inure to the benefit of a responsible party.

(7) The voluntary cleanup contract may provide the nonresponsible party protection from claims for contribution under CERCLA Section 113, 42 U.S.C. Section 9613 and Section 44-56-200, et seq. of the 1976 Code regarding environmental conditions at the site before the signing of the contract. This protection may be granted at the conclusion of the period allowed for comment from the site's potentially responsible parties as identified through a reasonable search.

(C)(1) Upon completion of the contract, the nonresponsible party must submit a request to the department for a certificate of completion. If the department determines that a nonresponsible party has successfully and completely complied with the contract and has completed the voluntary cleanup approved under this article, the department shall certify that the action has been completed by issuing the party a certificate of completion. The certificate of completion shall:

(a) provide the department's covenant not to sue the nonresponsible party for State CERCLA liability, except for releases and consequences that the nonresponsible party causes. This liability protection must not be granted or must be revoked if a contract or letter of completion is acquired by fraud, misrepresentation, knowing failure to disclose material information, or failure to satisfactorily complete the approved work plan;

(b) indicate the proposed future land use and if a restrictive covenant is required, include a copy of the restrictive covenant to be entered into between the department and the nonresponsible party and record the restrictive covenant with the Register of Deeds or Mesne Conveyances in the appropriate county. A restrictive covenant remains in effect until a complete remediation is accomplished for unrestricted use; and

(c) include a legal description of the property and the name of the property's owner.

(2) If the department determines that the nonresponsible party has not completed the contract satisfactorily, the department shall notify in writing the nonresponsible party and the current owner of the site, if different from the nonresponsible party who signed the contract, that the contract has not been satisfied and shall identify any deficiencies.

(3) The State CERCLA liability protection is revoked if for a party or successor who changes the land use from the use specified in the certificate of completion to one which requires a more comprehensive cleanup.

(D) The department shall charge for and retain all monies collected as oversight costs. The South Carolina Hazardous Waste Contingency Fund must be reimbursed for any funds expended from the fund pursuant to Section 44-56-200.

(E)(1) Upon signature of a voluntary cleanup contract by a nonresponsible party, the department shall provide notice and opportunity for public participation. Notification of the proposed contract must be placed in a newspaper in general circulation within the affected community. A comment period must be provided for thirty days from the date of

newspaper publication. The public notice period must precede the department's scheduled date for execution of the contract. A public meeting must be conducted upon request to the department's Bureau of Land and Waste Management by twelve residents of South Carolina or an organization representing twelve or more residents of South Carolina. Under any other circumstances, a public meeting may be conducted at the department's discretion.

(2) Beginning with the thirty-day notice period and continuing through completion of the terms of the contract, the nonresponsible party must post a sign, in clear view from the main entrance to the site, stating the name, address, and telephone number of a contact person for information describing the site's response actions and reuse.

(F)(1) The department or nonresponsible party may terminate a voluntary cleanup contract by giving thirty days' advance written notice to the other. The department may not terminate the contract without cause.

(2) The State CERCLA liability protection and contribution protection must be revoked for a party, or its successors, for conducting activities at the site that are inconsistent with the terms and conditions of the voluntary cleanup contract.

(3) If, after receiving notice that costs are due and owing, the nonresponsible party does not pay to the department oversight costs associated with the voluntary cleanup contract in a timely manner, the department may bring an action to recover the amount owed and all costs incurred by the department in bringing the action including, but not limited to, attorney's fees, department personnel costs, witness costs, court costs, and deposition costs.

(4) Termination of the contract does not affect any right the department has under any law to require additional response actions or recover costs.

(G) The department's decision to enter or not to enter into a contract is final and is not a contested case within the meaning of the South Carolina Administrative Procedures Act, Section 1-23-10, et seq.

SECTION 44-56-760. Review of program.

Beginning in the year 2010, the department shall review the voluntary cleanup program established pursuant to this article and report to the General Assembly on the activities of the program and, where applicable, make recommendations for any needed changes or improvements.