Brownfields Redevelopment and Voluntary Cleanups in Oklahoma

Rita R. Kottke, Ph.D.
Barbara Rauch, Esq.
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INTRODUCTION

In 1996, the Oklahoma Legislature enacted the Oklahoma Voluntary Brownfields Redevelopment Act[1] and instructed the Oklahoma Department of Environmental Quality (DEQ) to create a new program to encourage the cleanup and redevelopment of idled or abandoned industrial properties, often referred to as brownfields. Oklahoma law defines a brownfield as "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."[2] In general, brownfields can be thought of as properties that have lost commercial value due to the perception that they might be contaminated with hazardous chemicals. Examples of brownfields include former heavy industrial properties such as smelters and refineries, as well as smaller facilities like gasoline stations and dry cleaners.

To understand brownfields, it is important to understand why they exist. Brownfields are a side effect of the environmental legislation passed in the 1970s and 1980s, especially the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[3] (CERCLA, aka Superfund). CERCLA instituted a comprehensive response program for past hazardous waste operations and imposed strict joint and several liability for certain groups of parties who were potentially responsible for releases of hazardous wastes, [4] created a trust fund for EPA to use if there were no PRPs (potentially responsible parties), [5] and gave EPA permission to perform emergency removals and remedial actions to clean up contaminated soils and groundwater.[6] PRPs have limited defenses under CERCLA, i.e. only when the PRP can establish that the release was caused

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[1] 27A O.S. §§ 2-15-101 to 110.
[2] *Id*. at § 2-15-1-103(2).
[3] 42 U.S.C.A. § 9601 et seq.
[4] *Id*. at § 9607.
[5] 26 U.S.C.A. § 9507; 42 U.S.C.A. § 9611.
[6] 42 U.S.C.A. § 9604.

solely by an act of God, an act of War or the act of a third party independent from the PRP.[7] Success in asserting these defenses is rare. PRPs who qualify as "innocent" landowners, bona fide prospective purchasers or contiguous property owners who meet particularized criteria are given conditional liability protection.[8]

EPA uses a Hazard Ranking System (HRS) to establish when it will clean up a particular site, taking into consideration whether hazardous substances have been released into the water, air or soil, what type and quantity have been released, as well as whether people would be exposed to the substances via pathways such as drinking water, human food chain, sensitive environments, lakes and rivers and streams, being exposed to soil and breathing the air.[9] Once a site ranks on the HRS, it is put on the National Priorities List (NPL) for cleanup.[10] The cleanup is governed by federal rules known as the National Contingency Plan (NCP).[11]

The federal legislation was meant to apply to those sites that pose a major threat to human health and the environment. In the rush to find the really egregious sites that threatened the public and the environment, thousands of sites were investigated throughout the United States. Few ranked on the HRS or warranted inclusion on the National Priorities List (NPL). To date in Oklahoma, of the approximately 945 sites investigated under CERCLA, only 13 have been added to the NPL.

Additionally, many states also created state superfund programs to deal with sites that did not garner federal attention. Since Oklahoma does not have a state superfund law, the DEQ relies on the state's nuisance law [12] and the Environmental Quality Code nuisance provisions [13] to compel

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[7] *Id*. at § 9607(b).
[8] 42 U.S.C.A. §§ 9601(35), (40); 42 U.S.C.A. §§ 9607(q), (r), (1).
[9] 42 U.S.C.A. §§ 9605 (a)(8)(A), (c).
[10] *Id*. at § 9506 (a)(8)(B).
[11] 42 U.S.C.A. § 9506; 40 C.F.R. § 300 et seq.
[12] 50 O.S. § 2.

responsible parties to clean up pollution [14] of air, land or waters of the state.

In 1986, Congress passed the Superfund Amendments and Reauthorization Act (SARA)[15]. SARA provided the Innocent Landowner protection from Superfund liability. If a prospective purchaser conducted all appropriate inquiry into the environmental history of real property and had no reason to believe it was contaminated, EPA might determine that they were an innocent landowner and therefore not liable for the cost of cleanup. However, Congress provided no direction as to what "all appropriate inquiry" involved or how much inquiry was necessary to satisfy CERCLA requirements.

Banks, worried about their liability if they foreclosed on contaminated property, began to require "due diligence" be performed on all property transactions. To fill a need for guidance, American Standard Testing Methods (ASTM) published an industry standard for all appropriate inquiry entitled "ASTM E1527 Phase I Environmental Assessment". However, the standard did not have EPA's blessing so people were not really sure if they had indeed conducted all appropriate inquiry or if they had protection from CERCLA.

Phase I environmental assessments were used to investigate whether a site had a history of industrial or commercial activities that might have resulted in contamination. One effective tool for determining if a site had the potential to be contaminated was the Superfund tracking database (Comprehensive Environmental Response Compensation and Liability Information Systems, i.e. CERCLIS), which listed all the sites that had ever been investigated under Superfund. A property's inclusion on CERCLIS produced an immediate red flag to lenders, buyers, and developers and could halt the sale of the property.

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[13] 27A O.S. § 2-6-105.
[14] *See* 27A O.S. § 1-1-201(8) (defines "pollution").
[15] 42 U.S.C.A. § 9601(35)(A); Pub. L. No. 99-499, 100 Stat. 1613 (1986).

CERCLIS had some unpleasant side effects; however sites did not have to be included in the list to be stigmatized. The type of facility that formerly operated at a site was sufficient to dissuade a buyer from pursuing the property. The apprehension of acquiring environmental liability with the acquisition of property created "brownfields".

Abandoned, vandalized industrial properties in the urban core attest to urban blight in many major cities. The downtowns of many small towns start resembling ghost towns. These boarded up facilities attract vagrants and criminals, are attractive nuisances for local children and present safety hazards as well as chemical hazards to trespassers. Over time the facility deteriorates leaving the community with a visible symbol of hopelessness. Other social costs associated with brownfields include the loss of employment opportunities, loss to the community's tax base, loss of future opportunities for the community's children, under-use of the infrastructure (e.g., roads and sewers) built by the community to serve the industry, costs associated with the construction of new infrastructure to the suburban locations of new industry, and the costs associated with urban sprawl.

In addition to the economic problems presented by brownfields, environmental problems may remain undiscovered. Contaminants may slowly leach into the soil, air, or water; and containers may fail, allowing their contents to spill. Brownfields are usually thought of as lightly to moderately contaminated sites, which in general do not warrant Superfund attention. However, the longer a site sits idle and the more it deteriorates, the greater threat it presents to the surrounding community.

The inability of communities to redevelop former industrial/commercial properties presents a major problem to large metropolitan areas located in the "Rust Belt", the heavily industrialized areas of the northeastern United States. Many cities in the northeast faced severe economic problems. Loss of industry was a major problem, and the inability to locate new tenants for the vacated space

compounded the problem. Often at these sites, the only impediment to the redevelopment of the industrial land was the issue of contamination and the liability that accompanied it.

In the 1990's, with the encouragement of the northeastern states, EPA began to examine what could be done within the confines of the Superfund law to ease the problem of brownfields. EPA began a campaign to clarify its policies concerning environmental liability and to provide assistance to states, tribes and cities to empower the local and state governments to build brownfields programs that would meet the needs of the local community. EPA began to encourage states to develop brownfields programs and began entering into agreements with the states that created acceptable programs. These agreements stated that EPA would not use its CERCLA authority to pursue sites cleaned up under the state's program. Oklahoma signed an agreement with EPA in 1999. [16]

Since the agreements only represented EPA's intention and had no statutory basis, they did not have the desired effect on the development community. Therefore, in 2002, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (SABRA)[17], which provided the protection the developers needed. The Act specifically barred EPA from pursuing CERCLA enforcement actions at sites cleaned up under an approved state cleanup program.[18] In response to the new amendments, EPA promulgated regulations for conducting all appropriate inquiry, [19] which became effective November 1, 2006.

OKLAHOMA VOLUNTARY CLEANUP (VCP) and BROWNFIELDS PROGRAMS

The DEQ operates two voluntary cleanup programs, which often causes confusion for

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[16] Memorandum of Agreement, April 20, 1999

[17] 42 U.S.C.A. §§ 9601 (35), (39), (40), (41); 42 U.S.C.A. § 9605 (h)(1); 42 U.S.C.A. § 9604(k); 42 U.S.C.A. § 9607(b),(q),(r); 42 U.S.C.A. § 9628(b); Pub. L. No. 107-118, 115 Stat. 2356 (2002).

[18] 42 U.S.C.A. § 9628(b).

potential participants. The DEQ and its predecessor agency, the Oklahoma State Department of Health, have operated a voluntary cleanup program (VCP) since the 1980s. The program evolved as a means to an end. Companies wanted a way to clean up contamination on their properties without having the Region VI EPA Superfund Program force the issue. The companies acknowledged that some governmental oversight was needed to satisfy the federal authorities and concerned neighbors that the cleanup was properly conducted.

The VCP allowed companies or individuals to clean up property under negotiated consent orders that give the DEQ oversight authority of the cleanup. This cleanup option is often selected by companies or individuals that do not need specific liability release under federal and state law, but simply need to document that the cleanup was conducted properly. The cleanup generates a governmental administrative record of the cleanup and ensures that the result is protective of human health and the environment. Under the VCP, cleanups are conducted via Consent Orders between the participant and the DEQ.

In June of 1996, the Oklahoma Brownfields Voluntary Redevelopment Act [20] became effective, directing the DEQ to develop a brownfields voluntary redevelopment program for the state. Today, participants have a choice between the VCP and the Brownfields Program. The major difference in the programs is that the Brownfields Program provides a process for resolving the environmental liability at a site, which improves the marketability and increases the value of the property. The Brownfields Program focuses on the future use of the property and what investigation and cleanup is necessary to ensure that the site is appropriate for the reuse. Successful completion of the program resolves state environmental liability [21] and bars EPA from pursuing enforcement

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[19] 49 C.F.R. 312.
[20] 27A O.S. § 2-15-101 et seq.
[21] 27A O.S. § 2-15-106(G), § 2-15-108.

actions under CERCLA.[22]

To enter the Brownfields Program, participants must apply through DEQ's formal permitting process for a Certificate of Completion or a Certificate of No Action. Since the Administrative Procedures Act (APA) defines license as an "agency permit, certificate, approval, registration, charter or similar form of permission required by law", the DEQ's approval for a Certificate under the brownfields law is a license or a permit under the APA[23]. Applications for permits and other authorizations issued by the DEQ are regulated by the Oklahoma Uniform Environmental Permitting Act[24] and the DEQ's Rules of Practice and Procedure.[25] Therefore, participants in the Brownfields Program are subject to the Oklahoma Brownfields Voluntary Redevelopment Act, the Oklahoma Administrative Procedures Act (APA), the Oklahoma Uniform Environmental Permitting Act (OUEPA), and attendant rules.[26]

The OUEPA requires that all DEQ licenses, permits, certificates, approvals and registrations fit into an application category, or Tier, as defined in the Act. [27] The tier categories are explained both in the OUEPA and in DEQ's Rules of Practice and Procedure.[28] Tier I is the category for those things that are basically administrative decisions which can be made by a technical supervisor with no public participation except for the landowner. The application for a Memorandum of Agreement and Consent Order (MACO) in the Brownfields Program is a Tier I application.[29] Tier II is the category for those things that have some public participation - notice to the public, the opportunity for a public meeting and public comment - and the administrative decision is made by the Division

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[22] 42 U.S.C.A. § 9628(b).
[23] 75 O.S. § 250.3(8).
[24] 27A O.S. § 2-14-101 et seq.*; See also* Barbara Rauch, *The DEQ's Permitting Process Under the Oklahoma Uniform Environmental Permitting Act*, Envtl. L. Handbook (2008).
[25] OAC 252:004.
[26] 27A O.S. § 2-14-101 et seq.; 27A O.S. § 2-15-101et seq.; 75 O.S. § 250 et seq.; OAC 252:004; OAC 252:220.
[27] 27A O.S. § 2-14-103(9)-(11); § 2-14-201.
[28] 27A O.S. § 2-14-103 (9)-(11); OAC 252:4-7-2.

Director. The application for a Certificate of No Action or a Certificate of Completion is a Tier II application.[30]

THE PROCESS

Prologue

The DEQ's Brownfield Program functions in two parts. The Oklahoma Brownfields Voluntary Redevelopment Act only covers the cleanup or no action determination. The Brownfields rules cover the site characterization portion of the process.[31] There are two phases to the process, i.e. the site characterization and the permit application..

The permit application is not a fill in the blank form. It is a written document that responds to the requirements of the law and the rules. The application summarizes the data from the site characterization, discusses and evaluates the risks posed to the future use, requests a No Action determination or puts forth options for cleanup. If cleanup is necessary, it also states which remedial option the applicant prefers. Think of the application as a written argument, with supporting data, of why the DEQ should accept the proposed cleanup option for the site. DEQ and the public's review of this application is the only part of the program that has timelines.

Applicants do not have to complete the Brownfield process prior to acquiring or selling the property being investigated or remediated. The application process can be ongoing and separate from the purchase or acquisition. Within the DEQ's legal framework are opportunities for flexibility. The DEQ can adjust to an applicant's acquisition and development needs.

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[29] OAC 252:4-7-61.
[30] OAC 252:4-7-62.
[31] 27A O.S. § 2-15; OAC 252:220

Pre-application conference

The participant may request a pre-application conference. At that conference, the participant should be prepared to provide DEQ with sufficient information to determine whether the participant and the property are eligible under the law to apply for liability protection under Brownfields.[32]

A participant must be the legal owner in fee simple, the tenant or lessee of the property, the person remediating the site, or a person who has a written expression of an interest to purchase the property and the ability to implement a redevelopment proposal OR may also be any person who acquired the ownership, operation, management, or control of the 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, the property - and foreclosed on the property or received an assignment or deed instead of foreclosure or some other indicia of ownership and thereby becomes the owner of the property. [33]

Certain exclusions apply to the participant as well,[34] i.e. (1) anyone who is responsible for taking corrective action on the property under an EPA order or agreement or (2) anyone who is not in substantial compliance with a final agency order or any final court order or judgment obtained by any state or federal agency in an action relating to the generation, storage, transportation, treatment, recycling or disposal of substances regulated by the DEQ. Also excluded are those participants who have a "demonstrated pattern of uncorrected noncompliance," defined as "a history of noncompliance with state or federal environmental laws or rules, as evidenced by past operations clearly indicating a reckless disregard for the protection of human health and safety, or the environment."[35]

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[32] 27A O.S. § 2-15-106(B)(1); 27A O.S. § 2-15-104; OAC 252:220-3-2(b).
[33] 27A O.S. § 2-15-103(1).
[34] 27A O.S. § 2-15-104(D)
[35] 27A O.S. § 2-15-103(6).

Normally, a potential participant will have already completed at least a partial site characterization prior to approaching DEQ. This data informs the process; however, it generally does not provide enough information for a Brownfields determination.

Memorandum of Agreement and Consent Order (MACO) for Site Characterization

If the DEQ decides that the participant is eligible for the program, the agency will enter into a Memorandum of Agreement and Consent Order (MACO) for site characterization. The MACO is a legal document that sets forth the authority under which the parties are entering into an agreement, the findings of fact and conclusions of law. It sets forth the rights and responsibilities of the parties and establishes oversight costs for reimbursement of the DEQ for overseeing the project[36]. The MACO is a Tier I application under the Rules of Practice and Procedure.[37] This ends the Tier I process.

Additionally, the participant must provide an affidavit to the DEQ, certifying that he is the landowner or has a current lease or easement on the property to conduct a site investigation and subsequent remediation, if needed, or that he has provided legal notice to the landowner of the investigation/remediation.[38]

Data Gathering and Preparing the Application

Brownfields applications are basically a reasoned argument, backed up with quality data, that the cleanup option (or request for a no action determination) proposed by the participant is appropriate and, in light of the proposed future use of the property, is protective of human health and the environment. The DEQ's oversight of the project ensures that the data generated is of a

[36] OAC 252:220-5-1(a).
[37] OAC 252:4-7-61.
[38] OAC 252:4-7-13.

quality that the agency can depend upon and that the samples fully represent the conditions on the property. It is best to begin working with the agency at an early stage in the project. This helps prevent unnecessary sampling and costly re-sampling.

Prior to collecting samples for the Site Characterization, the participant must submit a Sampling and Analysis Plan and a Quality Assurance Project Plan for approval as well as a Health and Safety for review before field work begins.[39] To properly characterize a site, it is important to have an understanding of the operational history of the site. A Phase I Environmental Assessment (ASTM E1527-05) is very helpful in determining who owned the site, what types of businesses operated at the location, where tanks were located, if there were documented spills on the site, if the property has a regulatory history, etc. It should be understood that the DEQ requires a title search and operational history of the site from statehood since early entrepreneurs often adversely affected the environment. This type of information helps direct the sampling plan.

Once the plans are approved, the participant can collect the environmental samples, evaluate the data, and look at the risk the environmental condition of the site poses to the future use. The DEQ has a three tiered approach to evaluating the risks posed by sites. The analytical data from the site is first compared to conservative screening levels. If the levels of contaminants detected on the property are not above the screening levels, the participant can apply for a Certificate of No Action Necessary. If the contaminants are above screening levels, conservative default cleanup levels can be calculated for the property. If the levels on site are lower than the default cleanup levels, the participant can apply for a No Action determination. If the levels are higher than the default levels, the participant can look at options to clean up the site or options to manage the contamination through engineering and institutional controls. The third tier provides the option for the participant

[39] OAC 252:220-5-1.

to conduct a scientific risk assessment of the property. Risk assessments can be expensive, and the participant would want to weigh the costs of conducting a risk assessment against the cost of cleaning up to default levels.[40] The participant should also weigh the costs of cleanup against the cost of long term management of engineering controls.

Requirements for the site characterization report include, among other things, documentation identifying all potential human and ecological receptors and potential contamination migration pathways, delineation of all sources of contamination associated with the site, and delineation of the nature and extent of the contamination.[41] A site characterization template is provided on the DEQ's website at www.deq.state.ok.us. After the characterization and risk evaluation have been completed, the participant looks at the various options for cleanup/management of the contamination and selects the option to pursue.

A Brownfields application is prepared that summarizes the site characterization, risk assessment, and cleanup option alternatives. The participant then proposes the preferred cleanup option to the DEQ and justifies why it is an appropriate determination for the DEQ to make.[42] All arguments need to be supported with hard data and logic.

Requirements for risk-based remediation

Under the Brownfields law, an application for a consent order for risk-based remediation resulting in a Certificate of Completion or for a no action determination resulting in a Certificate of No Action Necessary must contain the following information: [43]

(1) A description of the property, the concentrations of contaminants in the soils, surface water, or groundwater at the site, the air releases which may occur during remediation of the

[40] OAC 252:220-5-2.
[41] *Ibid.*
[42] OAC 252:220-5-3.

site, and any monitoring which is to occur after issuance of the Certificate;

(2) a remediation plan or a proposal for no action;

(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 and releases of contaminants which have occurred at the site and any possible impacts on areas contiguous to the site;

(7) any analytical results 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 at the site based upon the property's future use.

In general, the DEQ uses Risk Assessment Guidance for Superfund (RAGS) to evaluate risk. If the participant wishes to use another model or to conduct a site-specific risk assessment, he must get prior approval from the DEQ.[44]

The participant must also list remedial alternatives which may include a no action necessary option, submitting narrative information discussing risk-based cleanup levels, economic feasibility, technical feasibility, and reliability of each remedial alternative considered, including a discussion of institutional controls needed for each one to maintain future use of the site.[45] At this point, a participant must also identify the preferred option, setting forth the remedial action objectives, all applicable state and federal laws, rules and Applicable Relevant Appropriate Requirements

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[43] 27A O.S. § 2-15-105.
[44] OAC 252:220-5-2.
[45] OAC 252:220-5-3.

("ARARs"), methods to verify how the cleanup levels will be achieved and any required future maintenance and monitoring.[46]

The decision to remediate or not must be determined by the contamination's potential risk to human health and safety and the environment, taking into consideration the proposed future land use as well as these other critical factors:[47]

(1) the possibility of movement of the contamination that would result in exposure to humans and the environment at elevated levels exceeding applicable standards or that would present an unreasonable risk to human health and safety or the environment; and

(2) potential risks associated with the decision and the economic and technical feasibility and reliability of that decision.

If the participant is relying on long term management of the risks through the use of engineering and institutional controls, the DEQ will want to review the participant's plan for long term management including calculations of the costs and stipulations about who is responsible, who will pay, and how the funding will be provided.

Submitting the Application

Once the participant has gathered the required data and prepared the plans and reports, the application may be submitted. The application must contain all information required by the Brownfields law and rules, as described above. The application may be for a consent order for risk-based remediation or for a no action necessary determination. Three copies must be submitted to the DEQ and one copy must be placed for public review in the county of the Brownfields.[48]

DEQ is then required to file-stamp the application with the date of receipt, the Division

[46] OAC 252:220-5-4.
[47] 27A O.S. § 1-15-105(C).
[48] OAC 252:4-7-4(b).

and/or Program name and an identification number; assign the application to a specific person for review; and log this information.[49]

When the participant files the application, he is required to publish notice in one newspaper local to the proposed brownfields, identifying the place where the Brownfields application may be reviewed. [50] The DEQ's Rules of Practice and Procedure also contain requirements for legal notices, i.e. the name and address of the participant; the name, address and legal description of the proposed Brownfields; purpose of notice; type of action being sought (i.e., remediation or no action); description of activities to be undertaken; DEQ and participant contacts; and a description of public participation opportunities and time period for comment and requests. The participant must provide the DEQ with the publisher's affidavit within 20 days after the date of publication.[51]

It should be noted that the public meetings are not required at the time of filing the application but rather after the draft plan is prepared, later in the process. However, many participants choose to hold an informational Open House upon publishing notice, to familiarize the local community with planned activities and to facilitate solidarity with the community.

The DEQ's Review and Public Participation

The DEQ's review of an application is governed by the OUEPA and the DEQ's Rules of Practice and Procedure.[52]

Administrative completeness review: [53]

Within 60 calendar days of the date the application was logged in, the DEQ reviewer must decide if the application is administratively complete, that is, if it contains the required information

[49] OAC 252:4-7-6.
[50] 27A O.S. § 2-14-301.
[51] OAC 252:4-7-13.
[52] 27A O.S. § 2-14-101 et seq.; OAC 252:004.
[53] OAC 252:4-7-7.

in sufficient detail that the reviewer can begin a technical review. If the application is not administratively complete, the reviewer must notify the participant by mail, describing the inadequacies and information necessary to complete the application. The participant must then supplement the application in triplicate and update the public review file in the county. This process continues until the application contains the required information.

When the application is administratively complete, then the reviewer must notify the participant by mail and begin the technical review. If the DEQ reviewer does not notify a participant of inadequacies, technical review begins 60 days after the application was logged in.[54]

Technical review:

The technical review period for Brownfields applications and for each submittal and resubmittal is 60 days.[55] Within 60 days, the DEQ reviewer must complete the initial technical review of the application to ascertain compliance with relevant rules. If that technical review triggers questions or discrepancies in the application, then those must be clarified by supplemental information and the DEQ reviewer again has 60 days to review that information.[56] Three copies must be submitted to the DEQ and the county file must be updated each time supplementary information is required. [57]

Issuance of draft plans:

Under the OUEPA, the DEQ must issue a draft permit or a draft denial for public review.[58] For the Brownfields Program, however, the DEQ will issue a draft cleanup/remediation plan or a draft plan for a no action determination.[59] Should the DEQ decide to deny an application, it would

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[54] *Id*.
[55] OAC 252:4-7-51.
[56] OAC 252:4-7-8.
[57] OAC 252:4-7-4; *see also* 27A O.S. § 2-14-103(1) (defines "application" to include supplemental information).
[58] 27A O.S. § 2-14-302.
[59] OAC 252:220-1-3 (defines "permits" to include draft cleanup plans and final cleanup plans).

issue a draft denial for a cleanup/remediation plan or a draft denial of a no action determination.

This process occurs at the completion of the technical review.

Notice to the public:

If the draft cleanup/remediation plan or draft plan for a no action determination is approved by the DEQ, the participant must publish notice of the draft plan in one newspaper local to the brownfields site. If it is a denial, the DEQ publishes notice.[60] The notice contains the same information as notice given when the application was originally filed, except that it also provides an opportunity for public input. The participant must either (1) provide for a set time period for public comment and for the opportunity to request a formal public meeting on the draft plan or (2) must schedule a public meeting, giving a date, time and place for the meeting. The time period must be set at 30 days after the notice is published.[61] Again, the DEQ provides a format for the notice. As before, the participant must provide DEQ with the publisher's affidavit within 20 days after the date of publication. This begins the Tier II process for a Brownfields Certificate. [62]

The participant must also provide a copy of the draft plan or no action necessary determination to the public for review at a location in the county where the Brownfields is located.

If the DEQ receives a written timely request for a public meeting and decides that there is a significant degree of public interest in the draft cleanup/remediation plan or no action determination, a public meeting will be scheduled. The public will be given at least 30 days notice of the meeting. The meeting will be held in a convenient location near the proposed Brownfields within 120 days after the notice of the draft was published.[63] Rather than wait 30 days to see if someone requests a public meeting and then publish another notice and wait another 30 days before the meeting can be

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[60] 27A O.S. § 2-14-302.
[61] *Id*.
[62] OAC 252:4-15-62.

held, most participants simply give notice of the date, time and place that a public meeting will be held.[64]

Public meetings:

Some provisions for public meetings are set out in the OUEPA. [65] The meeting must be held at a convenient location near the Brownfields. The DEQ will moderate the meeting and will establish its procedure. Anyone may speak or submit written statements and data about the draft. The moderator may set reasonable limits on speakers. The participant must be available to answer questions. The public comment period may be extended at the public meeting by the moderator at his/her discretion. Since the DEQ is specifically prohibited by the Brownfields law from considering zoning or rezoning for any proposed redevelopment, these issues cannot be discussed at the public meeting.[66]

If no one requests a public meeting and if one is not held and if no comments were received, the DEQ will simply issue the final decision, i.e., enter into a Consent Order for Remediation or issue a No Action Necessary Certificate.[67]

Response to comments:

If there is public comment or if a public meeting occurred at which comments were received, the DEQ must then prepare a response to comments within 90 days after the close of the comment period. The DEQ may then issue the draft remediation plan or proposal for a no action determination as it is, amend it or make a final denial.[68]

Approval of remediation plan:

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[63] 27A O.S. § 2-14-303.
[64] 27A O.S. § 2-14-302.
[65] 27A O.S. § 2-14-303.
[66] 27A O.S. § 2-15-106.
[67] 27A O.S. § 2-14-304.
[68] *Id*.

If remediation would attain a degree of control of the pollution pursuant to applicable laws and rules or reduce concentrations of other constituents to an extent that the property does not present an unreasonable risk to human health and safety or the environment, based on the future land use, then the DEQ and the participant may enter into a consent order for remediation.[69]

DEQ Approvals and Certificates

Approval of a no action determination:

If, given the future land use of the property, the existence of pollution does not pose an unreasonable risk to human health and safety or the environment, the DEQ may decide that no action is necessary and may issue a no action determination. [70]

At that point, the DEQ will issue a Certificate of No Action Necessary to the participant.[71] Standard provisions in the Certificate include the required language found in the Brownfields law at 27A O.S. § 2-15-106. The participant must file the Certificate in the office of the county clerk where the Brownfields is located and submit a file-stamped copy to the DEQ within 30 days. [72]

Consent Order for risk-based remediation:

When the final remediation plan is issued, the DEQ and the participant will enter into a Consent Order for Remediation.[73] The participant will prepare the Work Plan, including design requirements, project and construction management plans and a schedule of remediation. Once approved, work on the Brownfields site may begin.[74]

At the end of the remediation project, the participant must submit a final report summarizing

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[69] 27A O.S. § 2-15-106.
[70] *Id*.
[71] OAC 252:220-7-1.
[72] 27A O.S. § 2-15-107.
[73] OAC 252:220-5-7.
[74] OAC 252:220-5-8.

all remedial work and verification sampling results.[75] The DEQ will perform a final inspection and, if the work is approved, the DEQ will then issue a Certificate of Completion. Standard provisions for required language are included in the Certificate.[76] As with the Certificate of No Action Necessary, the Certificate is to be filed in the county clerk's office where the Brownfields is located, with a file-stamped copy being provided to the DEQ within 30 days.

Additionally, the DEQ is required to file a notice of remediation in the county clerk's office when remediation of contaminated property to risk-based standards is performed under a consent order. The deed notice must identify appropriate engineering controls and restrictions on land use or other activities that are incompatible with the cleanup level.[77] The required deed notice language may be incorporated into the Certificate of Completion so that only one document would be filed.

CONCLUSION

In trying to determine which program, the Voluntary Cleanup Program or the Brownfields Program, would best fit your client's needs, it is critical for you to ascertain the liability threat your client faces and the potential future use of the property. One factor to consider at the outset is whether your client owns the contaminated property or whether your client is responsible for the contamination of another person's property. Other issues include whether the contamination is in the soil or the groundwater, whether there are human or ecological receptors, whether there is surface water nearby, whether the property is in a residential neighborhood or an industrial zone, whether the contamination has migrated off-site, and whether the public health and the environment are at risk from the contaminated soil or groundwater.

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[75] OAC 252:220-5-9.
[76] 27A O.S. § 2-15-106.

In cases where the contaminant of concern is only slightly elevated, it is possible that your client could work to clean up the property with the oversight of the VCP and receive a letter stating that she has fulfilled her obligations under a DEQ Order. On the other hand, if the contaminants are traveling off site or if the contaminants are at highly elevated levels, you may wish to recommend that your client seek the liability protection offered through the Brownfields program.

Either way, the DEQ's professional technical staff will work with your client and the client's environmental consultant to develop a sensible plan to clean up the contamination and move forward to develop the property for future uses.

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[77] 27A O.S. § 2-7-123.