



PROPOSED RULE

Arkansas Pollution Control & Ecology Commission
Brownfields Development

February 22, 2002

Proposed Brownfields Development Regulation

DEPARTMENT: Environmental Quality, Hazardous Waste Division

ACTION: Proposed Rule

SUMMARY: The Arkansas Pollution Control and Ecology Commission is today proposing amendments to Regulation No. 29 (Brownfields Redevelopment). This rulemaking incorporates revisions made by Act 164 of 2001 to revise the eligibility requirements for persons participating in the Arkansas Brownfields Voluntary Cleanup Act and defines the term “implementing agreement” to remove any perceived stigma from entrance into a consent administrative order or other enforcement-related action.

DATE: A public hearing shall be conducted the week of March 25, 2002, or the week of April 1, 2002, at the Department offices in Little Rock. The Department’s Public Affairs Office will determine the exact date, time, and location of the public hearing.

Copies of the proposed revision are available for public inspection at the Department office, 8001 National Drive, Little Rock, or at Department information depositories located in public libraries in Arkadelphia, Batesville, Blytheville, Camden, Clinton, Crossett, El Dorado, Fayetteville, Forrest City, Fort Smith, Harrison, Helena, Hope, Hot Springs, Jonesboro, Little Rock, Magnolia, Mena, Monticello, Mountain Home, Pocahontas, Russellville, Searcy, Stuttgart, Texarkana, and West Memphis; in campus libraries at the University of Central Arkansas at Conway and the University of Arkansas at Pine Bluff, and in the Arkansas State Library located on the State Capitol grounds in Little Rock. In addition to the above named libraries, this document and supporting background information is available on the Department’s web site at <http://www.adeq.state.ar.us>.

Written and oral comments will be accepted at the public hearing, but for accuracy of the record, written comments are preferred. Comments must be received by ADEQ not later than 4:30 p.m., on the 10th working day after the date of the hearing, at the Department offices. Comments should be addressed to:

David F. Kern
Arkansas Department of Environmental Quality
8001 National Drive / P.O. Box 8913
Little Rock, Arkansas 72219-8913

Comments via electronic mail should be addressed to: reg-comment@adeq.state.ar.us. ADEQ requests persons commenting via electronic mail to include a mailing address to receive a response from ADEQ regarding the comments.

FOR FURTHER INFORMATION, CONTACT: For general information, contact the Department offices at (501) 682-0744. For information on the proposed regulation, contact Jim Franks, Hazardous Waste Division, (501) 682-0854. For information on providing comments or attending the public hearing, contact David Kern at (501) 682-0916.

THE PURPOSE OF THIS PROPOSED RULE IS TO:

- Revise eligibility requirements for participants in the Arkansas Voluntary Cleanup Program;
- Define “Implementing Agreement”; and
- Editorial corrections.

How Can I Influence ADEQ's Thinking on This Proposed Rule?

In developing this proposal, we tried to address the concerns of all our stakeholders. Your comments will help us improve this regulation. We invite you to provide different views on options we propose, new approaches we may have not considered, new data, how this proposed rule may affect you, or any other relevant information. We welcome your views on all aspects of this proposed rule, but request comments on specific issues throughout this notice. Your comments will be most effective if you follow the suggestions below:

- Explain your views and reasoning as clearly as possible;
- Provide solid technical and cost data to support your views;
- If you estimate potential costs, explain how you arrived at the estimate;
- Tell us which parts you support, as well as those with which you disagree;
- Provide specific examples to illustrate your concerns;
- Offer specific alternatives;
- Refer your comments to specific sections of the proposal, such as the units or page numbers of the proposal, or the regulatory sections.

STATEMENT OF BASIS AND PURPOSE

Regulation No. 29 sets forth a regulatory structure for implementing the State's voluntary clean-up and Brownfields programs in concert with Federal initiatives to streamline these types of remedial actions while providing some type of relief from future liability from existing state and federal cleanup laws.

What do these cleanup programs really do?

Arkansas's Brownfields Program has three basic goals:

- To make contaminated sites safe;
- To return these sites to productive use; and
- To preserve farmland and greenspace.

The Arkansas Brownfields Program promotes partnerships among local businesses, government, financial institutions and ADEQ to effectively restore contaminated sites to safe and productive uses. While making these sites safe for communities and workers, these programs also

seek to promote the creation of jobs and to add economic stimulus to distressed communities.

The Brownfields Program forms part of a progressive environmental philosophy which focuses on producing the desired environmental result – cleanups – while providing significant economic benefits to communities.

Previously existing policies (the Arkansas Hazardous Waste Management Act, the Arkansas Remedial Action Trust Fund Act and their associated regulations, and the Federal CERCLA and RCRA statutes and their implementing regulations) required contaminated sites be restored to “pristine” conditions – a standard so rigorous that compliance may be prohibitively expensive and practically unattainable for many facilities. These policies make redevelopment, with any associated remediation and cleanup, both unattractive and impractical; and have contributed to the abandonment of hundred of industrial sites scattered throughout Arkansas.

CERCLA and the Remedial Action Trust Fund Act also hold current property owners responsible for cleaning any existing contamination, even though the contamination may have been caused by previous owners or operators. This unlimited liability often made it preferable for a company to locate at an undeveloped “Greenfield” site rather than to restore an existing site to a pristine condition. This leads to the existence of what have come to be known as “Brownfields” – abandoned, potentially contaminated or under-utilized industrial sites – and has made it easier for businesses to initiate new development in “green fields” – pristine, previously undeveloped properties.

How does the Brownfields Program work?

The Brownfields Program identifies risk-based standards for cleanup, simplifies the approval process, and limits future liability when cleanup standards are achieved. In addition, it may provide low-cost revolving loans for specific categories of sites to help finance environmental assessments and site cleanups.

These cleanup standards may apply to sites voluntarily cleaned up or those remediated under the following Arkansas Statutes:

- Water and Air Pollution Control Act
- Hazardous Waste Management Act
- Remedial Action Trust Fund Act
- Solid Waste Management Act
- Regulated Substance Storage Tank Act

What kinds of sites are covered by these programs?

Many industrial sites have environmental contamination from past practices. Not to be confused with the federal Superfund program, whose sites have high levels of hazardous wastes, the Brownfields Program covers most contaminated sites in Arkansas.

Many sites, abandoned as companies ceased operations, have redevelopment potential today as industrial parks or for a single company. In many cases, a municipality, authority, or company is interested in restoring these sites to a usable condition. By setting standards and limiting liability, the Brownfields Program will promote redevelopment of these sites.

Several specific categories of sites may be precluded from consideration under the Brownfields program. To understand the "Participation Eligibility" in the Arkansas Brownfields Program one must first look to A.C.A. § 8-7-1104. Paragraph (a) of that section set forth the criteria that must be satisfied before participation in the process is accepted. Simply stated these criteria are:

1. The person must be a Prospective Purchaser [A.C.A. § 8-7-1104(a)(1)(A)];
2. The site must meet the definition of an "abandoned site" (A.C.A. § 8-7-1102);
3. The person *cannot* be a liable party (PRP) [A.C.A. § 8-7-512 (a)(2)-(4)] for the site, and
4. The project must promote economic growth [A.C.A. § 8-7-1104 (a)(1)(C)].

If *any* of these criteria are not satisfied, the project could not qualify under the Brownfields Law. Please note that failure for a project to qualify for participation under the Brownfields Law would not prohibit the ADEQ from entering into a Voluntary Cleanup Agreement with the party. However the scope of liability relief will be substantially different.

Obviously, only *persons* (not property) may enter into an agreement. The statute (and guidance) describes the type of person and other conditions that must be met in order to cross the threshold for participation in the program. That threshold is the status of the *person* as a prospective purchaser. The guidance does attempt to describe the circumstance in which a piece of property that was formerly subject to other statutory programs (e.g., RCRA) might be allowed to be the focus of a Brownfields project.

It is ADEQ's position that *current owners* of a site are not eligible to participate in the Arkansas Brownfields Program. The Brownfields Program will not release current owners or any other responsible party from any liability for

past contamination under the Remedial Action Trust Fund Act or any other applicable State law. However, it should be noted that current owners as well as other potentially responsible parties may enter into an agreement with ADEQ to address environmental conditions at a site in a cooperative manner. Although this type of agreement cannot result in an exclusion of liability to the same extent as a Brownfields agreement, it does provide the parties with more comfort that actions that are taken at the site are environmentally protective and are acceptable to ADEQ.

What are the changes in today's proposal?

There were two major changes to the revised Regulation No. 29. First it incorporates the declaration of policy found in the statute that recognized property transactions at times necessitate title acquisition prior to completion of a comprehensive site assessment contemplated at A.C.A. § 8-7-1104 (b)-(d) by persons not previous owners. Therefore, these persons, at the discretion of the director, may submit a letter of intent that will set forth the persons' desire to purchase the site and retain their eligibility for participation in the voluntary cleanup program.

The second major provision defined the term "Implementing Agreement" to remove any perceived stigma from entrance into a consent administrative order or other enforcement-related action. Editorial changes were included in Section 4 to reflect more accurately the content of the section.

STATEMENT OF FINANCIAL IMPACT

This regulation does not propose any standard which is more stringent than any existing Federal requirement; and this proposed rulemaking does not trigger the requirements of APC&EC Regulation No. 8, § 3.5.2(a).

Cost and savings figures are currently unavailable for estimation of the financial savings to regulated industry through implementation of this regulation. Use of streamlined investigation, remedy selection, design, and implementation in concert with newly streamlined provisions of the Commission's Regulation No. 23 (e.g., remedial action plans, alternative land disposal restriction standards for contaminated media and remediation wastes, and use of risk management techniques) will result in significantly reduced costs for businesses seeking to address contamination under the Brownfields Program.

Intangible benefits of these programs for all Arkansans will include:

- Cleaning up polluted industrial sites directly protects human health and mitigates potential releases and migration of contaminants into the environment.

- Arkansas's environment will thus be cleaner and safer.
- Vacant sites would be restored and become productive, helping our cities and towns to grow economically.
- Cleanup is voluntary and privately funded, not at the expense of taxpayers.
- Farmers with undeveloped land need not face difficult choices if contamination is found on their farms.
- Farmland and green space are saved from development.
- Changing our development practices now will sharply reduce the number of new abandoned sites in the future.

SEVERABILITY

If any provision of this Rulemaking or the application thereof is held invalid, such invalidity shall not affect other provisions of this Regulation and Rulemaking which can be given effect without the invalid provision or application and to this end the provisions of this Rulemaking and Regulation are declared to be severable.

TEXT OF THE PROPOSED RULE:

Regulation No. 29 (Brownfields Redevelopment) is hereby revised to read as follows:

ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

REGULATION No. 29

BROWNFIELDS REDEVELOPMENT

Section 1. Title and Purpose.

29.101 The following rules and regulations of the Arkansas Pollution Control and Ecology Commission, adopted pursuant to the provisions of the Arkansas Hazardous Waste Management Act of 1979 (Act 406 of 1979, as amended, Arkansas Code Annotated (A.C.A.) § 8-7-201 *et seq.*), the Arkansas Remedial Action Trust Fund Act of 1985 (Act 479 of 1985, as amended, A.C.A. § 8-7-501 *et seq.*), and the Arkansas Voluntary Clean-Up Act (Act 1042 of 1997,

as amended, A.C.A. § 8-7-1101 *et seq.*) shall be known as APC&EC Regulation No. 29, (Brownfields Redevelopment).

29.102 It is the purpose of this Regulation and it is hereby declared to be the policy of this Commission:

(A) To encourage and facilitate the redevelopment of abandoned industrial, commercial, or agricultural sites as a sound land use management policy to prevent the needless development of prime farmland, open spaces, and natural and recreation areas and to prevent urban sprawl;

(B) To encourage and facilitate the redevelopment of abandoned sites so that these sites can be safely returned to useful, tax producing properties to protect existing jobs and provide new job opportunities;

(C) To provide persons interested in redeveloping abandoned sites with a method of determining what their legal liabilities and clean-up responsibilities will be as they plan the reuse of abandoned sites;

(D) To establish incentives to encourage prospective purchasers to voluntarily develop and implement clean-up plans of abandoned sites without the need for adversarial enforcement actions by the Arkansas Department of Environmental Quality;

(E) To determine, through permitting policies, administrative orders, or memoranda of agreement as appropriate, **that when** contamination will and will not pose unacceptable risks to public health or the environment, and that equivalent concepts are used in establishing clean-up policies for abandoned sites;

(F) To ensure that parties and persons responsible under law for pollution at abandoned sites perform remedial responses which are fully consistent with existing requirements; and

(G) As an incentive to promote the redevelopment of abandoned industrial sites, persons not responsible for preexisting pollution at or contamination on industrial sites should meet alternative clean-up requirements if they acquire title after the nature of conditions at the site have been disclosed and declare and commit to investigate, remediate as necessary, and limit the property to a specified future land use of the subject site.

(H) Property transactions at times necessitate title acquisition prior to completion of the actions contemplated at A.C.A. § 8-7-1104(b)-(d) by persons not previously involved with the site or otherwise considered responsible parties for environmental conditions at a site. These persons should not be foreclosed from participation under the procedure enacted under the Voluntary Clean-Up Act. Therefore, these persons, at the discretion of the Director, may

submit a letter of intent that will set forth that persons' desire to purchase the site and retain their eligibility for participation in the voluntary cleanup program established by this regulation.

Section 2. Authority.

29.201 This regulation is promulgated pursuant to the Arkansas Voluntary Clean-Up Act (Act 1042 of 1997, as amended, A.C.A. § 8-7-1101 *et seq.*)

Section 3. Definitions

29.301 As used in this Regulation, unless the context otherwise requires:

(A) “*Abandoned site*” means a site on which industrial, commercial or agricultural activity occurred and for which no responsible person can reasonably be pursued for a remedial response to clean up the site or when the department determines it is in the best interest of the citizens of Arkansas to promote redevelopment under this subchapter while continuing to pursue the responsible party or parties;

(B) “*Department*” or “*ADEQ*” means the Arkansas Department of Environmental Quality.

(C) “*Implementing agreement*” means a plan, order, memorandum of agreement, or other enforceable document issued by the Arkansas Department of Environmental Quality under provisions of the Arkansas Hazardous Waste Management Act (A.C.A. § 8-7-201 *et seq.*), or the Arkansas Remedial Action Trust Fund Act (A.C.A. § 8-7-501 *et seq.*) or the Arkansas Voluntary Clean-Up Act (A.C.A. § 8-7-1101 *et seq.*), to implement the voluntary cleanup process described in § 8-7-1104;

(D) (E) “*Industrial, commercial, or agricultural activity*” means commercial, manufacturing, agricultural or any other activity done to further either the development, manufacturing, or distribution of goods and services, as well as soil cultivation, crop or livestock production, including, but not limited to, research and development, warehousing, shipping, transport, remanufacturing, repair, and maintenance of commercial machinery and equipment;

(E) (E) “*Property*” means property and improvements, including:

- (1) A “facility” as defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980. 42 U.S.C. § 9601(9); and
- (2) A “site” as defined in the Arkansas Hazardous Waste Management Act of 1979, Arkansas Code of 1987, Annotated § 8-7-203(+5) (11);

(F) (D) “*Prospective purchaser*” means a person who expresses a willingness to acquire an abandoned site and is not responsible for any preexisting pollution at or contamination on the site;

(G) (E) “*Remedy*” means the selected actions necessary to effect permanent control, abatement, prevention, treatment, and/or containment of contaminants of concern at a site; including the removal of hazardous substances from the environment as necessary to protect public health and the environment and to attain the agreed clean-up levels specified in the enforceable agreement with the prospective purchaser.

(H) (F) “*Site assessment*” means the site assessment to establish the baseline level of existing contamination on a site.

- (1) ~~The aforementioned~~ The assessment shall identify, at a minimum, identify the location and extent of contamination, the quantity or level of contamination, the type of contamination, the probable source of contamination, and the risk or threat associated with the contamination as described in Arkansas Code of 1987, Annotated § 8-7-1104.
- (2) The assessment also shall also include a description of the intended land use of the site.

29.302 Any other terms of this Regulation not expressly defined shall have the same definitions as provided in the Arkansas Code of 1987, Annotated §§ 8-7-203, 8-7-304, 8-7-403, 8-7-503, or the Commission’s Regulation No. 23 (Hazardous Waste Management) unless manifestly inconsistent with the provisions and remedial intent of this Regulation.

Section 4. Applicability Eligibility

29.401 (A) This Regulation applies to a person who:

- (A) (1) Is a prospective purchaser of an abandoned industrial, commercial, or agricultural property with known or suspected contamination;
- (B) (2) Did not, by act or omission, cause or contribute to any release or threatened release of a hazardous substance on or from the identified abandoned site or is otherwise considered to be a responsible party pursuant to Arkansas Code of 1987, Annotated (A.C.A.) § 8-7-512(a)(+)(2)-(4); and

~~(E)~~ (3) Will reuse or redevelop the property for industrial, commercial, or agricultural activities which will sustain or create employment opportunities or otherwise augment the local and/or state economy and tax base, or both.

(B) This Regulation may apply to a person who:

- (1) Is not a responsible party pursuant to A.C.A. § 8-7-512(a)(2)-(4);**
- (2) Submits a Letter of Intent to Participate as provided for under Section 29.604 of this regulation; and**
- (3) Subsequently acquires title to an abandoned site prior to completion of an implementing agreement as set forth in A.C.A. § 8-7-1104(d).**

(C) This Regulation shall not apply to a person who:

- (1) Is a current owner or operator; or**
- (2) Is a responsible party under A.C.A. § 8-7-512(a)(2)-(4); or**
- (3) Has demonstrated a pattern of uncorrected noncompliance.**

29.402 The following types of sites shall **not** be eligible for participation in the Brownfields Redevelopment process:

(A) Sites identified on the federal National Priorities List (NPL);

(B) Sites that have been submitted by ADEQ to the U.S. Environmental Protection Agency to be ranked for consideration of placement on the NPL;

(C) Sites that are covered by a hazardous waste management (RCRA) permit;

(D) Sites that operate under Interim Status authority pursuant to APC&EC Regulation No. 23 (Hazardous Waste Management); and

(E) Sites subject to a Federal order under CERCLA or RCRA.

Section 5 Public Participation

29.501 The public shall be provided notice of the proposed remedy at a Brownfields site and given the opportunity to comment and request a public hearing prior to the ADEQ making a final remedy determination.

29.502 ADEQ shall follow APC&EC Regulation No. 8 Section 2.1 in providing for public participation and input on the remedy selection.

Section 6 Process

29.601 The Department shall follow the process set forth in Arkansas Code, Annotated, A.C.A. § 8-7-1104 in evaluating and assisting the redevelopment of sites under the Voluntary Cleanup Act.

29.602 In evaluating and approving plans and remedial designs under this Regulation, the Department shall have use of all its powers and authorities as assigned under the provisions of the Arkansas Hazardous Waste Management Act of 1979 (Act 406 of 1979, as amended, A.C.A. § 8-7-201 *et seq.*), the Arkansas Remedial Action Trust Fund Act of 1985 (Act 479 of 1985, as amended, A.C.A. § 8-7-501 *et seq.*), and APC&EC Regulation No. 23 (Hazardous Waste Management).

29.603 In using these authorities, the Department shall strive to simplify and streamline redevelopment of the property while ensuring that contamination and associated remediation wastes are managed and/or disposed of in a manner that is protective of human health and the environment.

29.604. Property transactions at times necessitate title acquisition prior to completion of the actions contemplated at A.C.A. § 8-7-1104(b)-(d) by persons not previously involved with the site or otherwise considered responsible parties for environmental conditions at a site. These persons, at the discretion of the Director, may submit a letter of intent that will set forth that persons' desire to purchase the site and retain their eligibility for participation in the voluntary cleanup program established by this regulation.

Section 7. Severability

29.701 If any provision of this Regulation or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications hereof which can be given effect without the invalid provision or application, and to this end, provisions of this Regulation are declared to be separate and severable.

Section 8. Effective Date

29.801 This Regulation shall be in full force and effect ten (10) days after it is filed with the Secretary of State.