

**BUREAU OF ENVIRONMENTAL REMEDIATION/REMEDIAL SECTION
POLICY
GUIDELINES FOR CATEGORY 1 PROPERTIES IN THE ENVIRONMENTAL
USE CONTROL PROGRAM**

BER POLICY # BER-RS-051

DATE: 2010

PAGES: 2

RS Section Chief:



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Date: 6-30-2010

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Date: 6-30-2010

ORIGINATOR

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Date: 6-16-2010

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PURPOSE

This policy has been developed to establish a consistent approach in determining the criteria and funding requirements for Category 1 properties in the Environmental Use Control (EUC) Program. KDHE has promulgated statutes to define the requirements for categorizing properties within the EUC Program. As defined by Kansas Statutes Annotated K.S.A. 65-1,226(a), funding requirements will be determined individually based on a category designation determined by the department, which is further dependent on the characteristics of the property. A category designation is defined by the size of the property to which the environmental use control applies, the toxicity and mobility of the contaminants to which the environmental use control applies, the frequency of site inspections, and the anticipated inspection costs.

Category 1 Properties: The EUC Program has defined a Category 1 property with the following characteristics:

- Property size is less than or equal to five acres in size,
- Residual contamination is characterized by low toxicity and mobility,
- Minimal anticipated maintenance of protective structures, and
- Anticipated inspection frequency is once every five years.

The EUC Program has also determined that Class I VCPRP Sites where groundwater contamination is emanating onto the property from another property will be designated as Category 1 properties within the EUC Program. See attached legal opinion (Attachment 1).

The funding for the EUC is determined by calculating the costs over a 30-year period for each individual property. The EUC Program has determined through cost calculation analysis that inspection and administrative costs generally exceed the not to exceed funding fee of \$2000 as defined in statute (KSA 65-1, 226(c)(1)). Based on this determination, the funding fee for all Category 1 properties (including Class I VCPRP Sites) will be \$2000, unless a cost calculation analysis for an individual property may be less than \$2000 as determined by the EUC Program.

ATTACHMENT 1

Kansas Department of Health and Environment

Memorandum

Date: November 12, 2009
From: Shari Feist Albrecht
To: Gary Blackburn, Director, BER
Rick Bean, Chief, Remedial Section
Subject: Legal Authorities – VCPRP and EUC

Issue

Whether the owner of property adjoining contaminated property and onto whose property the contamination could migrate through the groundwater should be eligible for a “no further action” determination under the Voluntary Cleanup and Property Redevelopment Program when an institutional control (environmental use control) could be put in place for his property to prevent the contamination from migrating?

Law

Voluntary Cleanup and Property Redevelopment Program

The Kansas legislature enacted the Voluntary Cleanup and Property Redevelopment Act in 1997 to encourage cleanup and redevelopment of contaminated properties. For properties where investigation and remediation may be necessary to protect human health or the environment based on the current or proposed future use of the property, an application for participation in the voluntary cleanup program may be made to KDHE. KSA 65-34,165. To be eligible, the property is required to contain an actual, threatened, or suspected release of a contaminant or be impacted or threatened by contaminants from an off-property source. KAR 28-71-3. If KDHE approves the application, the applicant and KDHE execute a voluntary agreement under which the investigation and remediation proceed. KSA 65-34,165; KAR 28-71-6. If after review of reports and any environmental assessments and investigations submitted by the applicant KDHE determines that no further investigation or remediation is required, KDHE may issue a “no further action” determination under KSA 65-34,169. KSA 65-34,166; KAR 28-71-10.

In making the “no further action” determination KDHE considers the following factors:

- The present and proposed future uses of the property and surrounding properties;
- The ability of contaminants to move in a way to expose humans and the surrounding environment to contaminants that exceed applicable state standards; and
- The potential risks associated with proposed cleanup alternatives and the reliability and economic and technical feasibility of the alternatives. KSA 65-34, 167.

The “no further action” determination applies only to conditions identified on the property and is based on applicable laws in existence at the time the requirements are completed. KSA 65-34, 169.

KAR 28-71-10 limits “no further action” determinations to properties where either:

- Contamination was detected but contamination levels present no significant risk to human health and the environment and the levels are below applicable federal and state standards; or
- The property has been remediated as approved by KDHE in a cleanup plan and as confirmed with verification sampling.

KDHE may condition a “no further action” determination on long-term monitoring of contamination and/or a provision for further action if the approved cleanup levels are exceeded at property boundaries.

KAR 28-71-10 further allows a contaminated adjacent property to seek a “no further action” determination if the property that is the source of the contamination has applied and been accepted into the VCPRP. To qualify for the determination, the following conditions must be met:

- The adjacent property owner and/or operator shall submit a VCPRP application;
- KDHE shall determine that the contamination on the property resulted from an off-property source;
- KDHE shall determine there is no on-site source of contamination, including soil contamination;
- KDHE shall determine that the likely source of contamination is so located that the contamination may migrate onto the adjacent property;
- The adjacent property owner and/or operator documents that the past and current use of the property would not have contributed to the contamination of soils, surface water or groundwater; and
- The adjacent property owner and/or operator agrees to fully cooperate and allow reasonable access for the investigation and cleanup of the contamination for the source property.

To the degree necessary to ensure protection of human health and the environment, all remedial alternatives performed under the VCPRP shall attain cleanup and/or control of the contamination. KAR 28-71-11. The voluntary party may select one of three approaches to determine cleanup levels, but the responsibility for the final selection rests with KDHE and shall be based on the

present and proposed future uses of the property and surrounding properties. *Id.*, subsection (d). In determining cleanup levels multiple media, exposure pathways, and contaminants shall be taken into account as shall existing applicable federal and state standards. *Id.*, subsections (e) and (f). KDHE may require institutional controls that legally restrict access to or use of the property or warn of a hazard through a restrictive covenant that is approved by KDHE, executed by the property owner, and recorded with the register of deeds for the county in which the property is located. *Id.*, subsection (g).

As to groundwater, KAR 28-71-11(n) requires KDHE to approve cleanup levels that prevent additional degradation of the groundwater caused by contaminated migration and that encourage remedial actions, i.e., institutional controls, to restore contaminated groundwater to its most beneficial use.

Environmental Use Controls

Enacted in 2003, the Environmental Use Control Act provides “a voluntary mechanism to assist existing state programs to address environmental contamination.” KSA 2008 Supp. 65-1,221. An “environmental use control” is “an institutional or administrative control, a restriction, prohibition or control of one or more uses of, or activities on, a specific property, as requested by the property owner at the time of issuance, to ensure future protection of public health and the environment when environmental contamination which exceeds department standards for unrestricted use remains on the property following the appropriate assessment and/or remedial activities as directed by the department pursuant to the secretary’s authority.” KSA 2008 Supp. 65-1,222.

The act allows a property owner to voluntarily apply to KDHE for an environmental use control (EUC) to restrict the use of the owner’s property to mitigate the risk posed to human health and the environment. KSA 2008 Supp. 65-1,224. Upon KDHE’s approval of the EUC application, the property owner is required to register the EUC with the register of deeds in the county where the property is located. KSA 2008 Supp. 65-1,225. The EUC acts as a legal notification to protect the public from exposures to contaminants that remain at the property. KSA 2008 Supp. 65-1,228.

Analysis

In order to be eligible for participation in the VCPRP the subject property, as defined by the facts in issue, is required to be impacted or threatened by contaminants from an off-property source. KAR 28-71-3. In this case, the owner of property adjacent to the property that is the source of the contamination made application to participate in the VCPRP under KAR 28-71-4 and entered into a voluntary agreement with KDHE under KAR 28-71-6. The property at issue was determined to be a Class I contaminated property under KAR 28-71-5.

Upon acceptance into the VCPRP, KDHE undertakes review of the property to determine whether to develop and implement a work plan for investigation and possible remediation under KAR 28-71-9 or whether “no further action” is necessary under KAR 28-71-10. When, as in this case, the property that is the source of the contamination has applied and been accepted into the VCPRP, KDHE may determine that no further action is warranted under subsection (f) of KAR 28-71-10 as long as the listed conditions are met. One of the conditions listed is that KDHE determines that the likely source of contamination is nearby and its location may allow contamination to migrate onto the subject property. KAR 28-71-10(f)(4).

The decision whether to issue a “no further action” determination under subsection (f) is a discretionary decision. Under KAR 28-71-9, KDHE could instead determine that further action is necessary to prevent migration of the contaminant plume onto the adjacent property, using the remedial standards established in KAR 28-71-11. Institutional controls could be imposed under KAR 28-71-11(g). In cases where potential for migration is an issue, KDHE’s decision whether to proceed under KAR 28-71-9 or 28-71-10 would appear to turn on the significance of the potential for migration. See KAR 28-71-11(n).

Conclusion

Although an EUC is synonymous with institutional control under the definition in KSA 2008 Supp. 65-1,222, the EUC Act establishes a voluntary mechanism for property owners to restrict the use of their properties. In acting on VCPRP applications over which KDHE has considerable oversight, a carefully drafted decision as to the need for remedial action/no further action would clearly identify the specific regulation under which KDHE is proceeding to avoid the potential for confusion between the VCPRP and EUC programs.

Cc: John Mitchell
Yvonne Anderson