

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL
CONTROL**

**DIVISION OF WASTE AND HAZARDOUS SUBSTANCES
Site Investigation and Restoration Section**

1375 Regulations Governing Hazardous Substance Cleanup

List of Draft Revisions, August 23, 2018 – Do Not Cite or Quote

1.2.1 The requirements of these Regulations shall apply to any facility or Certified Brownfield with a release or imminent threat of release and any person or Certified Brownfields Developer who conducts an investigation or remedial action at a facility or Certified Brownfield with a release or imminent threat of release.

1.2.2.1 Releases excluded by 7 Del.C. §91035(21) a-d; or

“ASTM” means ASTM International.

“Background level” means the concentration of substances widely present in the soil, sediment, air, surface water or groundwater in the vicinity of a facility or certified brownfield, or at a comparable reference area, due to natural causes or human activities other than releases from, or activities on, the facility or certified brownfield, as determined by the Department.

“Certified Brownfield” means a brownfield, as defined in 7 Del.C. §9103(3) and §9123(3), that the Secretary has certified upon finding that there is an actual, threatened or perceived release of hazardous substances at the real property that is the subject of the brownfield certification.

“Certified Brownfields Developer” means any person as defined in 7 Del.C. §§9123(1).

“Certified Brownfields Development Agreement” means an agreement between the Secretary and a Brownfields Developer with respect to a certified brownfield that sets forth a scope and schedule of activities to assess and respond to the actual, threatened, or perceived release of hazardous substances at the ~~facility~~ Certified Brownfield.

“Certified Brownfields Investigation” means an evaluation under the Brownfields Development Program which includes the assessment of an actual, threatened, or perceived release of a hazardous substance within the at a facility Certified Brownfield

to determine the nature, extent, and impact of the actual, threatened, or perceived release, and the evaluation of the feasibility of the proposed development plan to serve as all or a portion of the remedial action. When directed by the Department the Certified Brownfields Investigation shall include an evaluation to establish if the release has migrated off the certified brownfield.

“Conditional No Further Action” means that based on the information available following an initial investigation or a facility evaluation or equivalent, the Department determines that: (a) there has been no release or there is no imminent threat of release; (b) a release has occurred which does not pose a threat to public health or welfare or the environment above the acceptable site specific risk under current conditions; or (c) action by another authority is appropriate. The Conditional No Further Action (CNFA) Determination lists all the conditions that have to be met in order to maintain the CNFA Determination under current and future land use scenarios and should be placed in the property record.

“Consultant” means a contractor who is hired to provide professional services for remedies with regard to a facility or Certified Brownfield.

“Facility” means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, aircraft or any site or area where a hazardous substance has been generated, manufactured, refined, transported, stored, treated, handled, recycled, disposed of, released, placed or otherwise come to be located. Where there is or has been a release or threat of release on real property, a portion of the real property may be considered a facility for the purpose of performing a remedy. A facility also includes all properties real property where hazardous substances ~~may~~ have migrated to or come to be located since being released.

“Facility Evaluation” means an investigation to identify the release of a hazardous substance and to generate data to perform an initial screening and make a decision regarding future action at ~~the~~ a facility or Certified Brownfield.

“Final Plan of Remedial Action” means the Department’s written determination of the appropriate remedial action under the Act at a facility or Certified Brownfield for the current or anticipated land use to protect public health, welfare and the environment.

“HSCA Screening levels” means the concentrations of hazardous substances in the environment that are (a) the background levels established by the Department, (b) risk-based levels associated with a target cancer risk of 1E-06 or a target hazard quotient of 0.1 in an unrestricted use exposure scenario, or (c) other regulatory levels adopted under

~~the Act. or ten times lower than the cleanup levels.~~—**NOTE:** This change was inadvertently omitted in the final copy at the time of the last regulation promulgation in 2015.

“Initial screening” means the process of comparison of the maximum observed concentrations of analytes found in environmental samples to background levels and performance of a preliminary risk assessment based on the representative maximum observed concentrations found in each environmental medium from the results of a facility evaluation or equivalent investigation to determine whether a release poses a threat to human health, welfare or the environment above the acceptable site specific risk.

“Land Disturbing Activity” means activities that physically take place on the facility or Certified Brownfield and include digging, drilling, excavating, grading, clearing, earth moving, filling, or performing any subsurface work, but excludes all environmental investigation, planning, designing, or engineering work ~~related to the facility~~, as well as any physical activity performed off the facility or Certified Brownfield in preparation for, or related to, construction and development activities that will occur on the facility or Certified Brownfield.

“Proposed Plan of Remedial Action” means a written plan, issued by the Department for public comment, describing the appropriate remedial action under the Act at a facility or Certified Brownfield for the current or anticipated land use to protect public health or welfare or the environment.

“Remedial Investigation” means an evaluation of a release or imminent threat of release of a hazardous substance at a facility or Certified Brownfield to determine the nature, extent, and impact of the release and the collection of data necessary to conduct a feasibility study of remedial alternatives.

“Site” means a facility.

3.1.3 If a Certified Brownfield Developer, prospective purchaser, or a person acting on behalf of the Certified Brownfield Developer, the prospective purchaser, or the owner or operator reports a release to the SIRS in compliance with Subsections 3.1.1 and 3.1.2, this notification requirement will be satisfied.

3.4.1 In order to qualify for the Brownfields Development Program, the property must be certified as a Brownfield. To receive a Brownfields Certification, the Brownfield applicant shall submit a Brownfields Certification Application to the Department seeking Brownfield Certification for the property. The property certification request can be initiated by a Certified Brownfields Developer, the current property owner, the Department, or any public agency.

3.4.2.1.5 Reason to believe that the property may be contaminated and why such contamination may hinder the development expansion, or redevelopment, or reuse.

3.4.2.2.2 The factual basis for concluding that the expansion, redevelopment or reuse of the property may be hindered by the reasonable belief that the real property is environmentally contaminated;

~~3.4.2.2.3 The factual basis for concluding that the property is contaminated;~~

3.4.2.2.43 Certification that the Certified Brownfield Developer will comply with all applicable procedural requirements.

3.4.2.3 All items contained in the application shall be addressed by either providing the required information or stating that the item is not applicable. In the event that an item is considered not applicable, the Certified Brownfield Developer must include a written justification in the application that demonstrates to the satisfaction of the Department that the item is not applicable to the application.

3.4.3.1 The Department may certify all or part of a parcel of real property as a Certified Brownfield if the property meets the following criteria:

3.4.3.1.1 ~~All or part of the property is abandoned, vacant, or underutilized.~~ The expansion, redevelopment, or reuse of all or part of the property is hindered by the reasonably held belief that the real property may be environmentally contaminated; and

3.4.3.1.3.1 ~~The development or expansion, redevelopment or reuse of the property may be hindered by the reasonably held belief that it may be environmentally contaminated; or~~

3.4.3.1.3.2.7 ~~The land~~ A property that contains potentially contaminated material;

3.4.3.2 ~~Sites which are~~ A property that is subject to an enforcement action from any State or Federal environmental agency, and for which an administrative or judicial order is in effect or is proposed, may not be eligible for Brownfield Certification, unless the enforcement action is resolved to the satisfaction of the Secretary.

3.4.3.3 A Certified Brownfields Developer shall be required, at a minimum, to perform a ~~FE~~ facility evaluation of the Certified Brownfield ~~facility~~, as approved by DNREC, within twenty-four (24) months of entering into a BDA.

3.4.3.4 Any Brownfield Certification decision is made at the sole discretion of the

Secretary.

3.4.3.5 An inventory of Certified Brownfield ~~sites~~ properties will be made publicly available.

3.4.4.1 In order for a person to obtain the rights and protections and assume the obligations of the status of Certified Brownfields Developer, the person must submit an application to the Department for approval of Certified Brownfields Developer status. At the time of application for the Certified Brownfields Development Agreement, an applicant cannot be a potentially responsible party at the ~~facility~~ property pursuant to 7 Del.C. §9105(a)(1)-(6), and ~~is~~ cannot be affiliated with any other person that is liable for a release or imminent threat of release at the ~~facility~~ property pursuant to ~~Del.C. § 9105(e)(4)5.~~ The existence of an affiliation will be determined pursuant to the provisions of 7 Del.C. § 9105(c)(4)5.

3.4.4.2 The Secretary has the discretion to deny Certified Brownfields Developer status to an applicant if the applicant, including any employees or agents thereof, or any entity affiliated with or controlled by the applicant, has been determined to have violated any federal, state, or local environmental law.

5.0 Settlement Agreements & Certified Brownfields Development Agreements

5.1 Settlement agreements and Certified Brownfields Development Agreements shall include the following:

5.1.1 The name and address of the potentially responsible party, the prospective purchaser, or the Certified Brownfield Developer, and any other affiliated corporation, entity, or other person that will perform or pay for a remedy at the facility or Certified Brownfield;

5.1.2 The address and tax parcel number of the facility or Certified Brownfield in question;

5.1.3 The name of the current owner of record and/or operator of the facility or Certified Brownfield; and

5.1.4 For agreements that require the performance of a remedy at a facility or certified brownfield, the Department may include a description of:

5.1.4.1 The areas of the facility or Certified Brownfield where the remedy is to be conducted;

5.2.1.2 Recoverable costs from a Certified Brownfields Developer include remedial costs incurred by the Department beginning upon its receipt of the application for Brownfield certification of the site property into the brownfield program, including oversight, indirect and administrative costs, and costs associated with long-term stewardship activities as specified in the Certified Brownfields Development Agreement ~~brownfields development agreement~~, but excluding natural resource damage assessment and restoration costs not caused by the ~~Brownfield developer~~ Certified Brownfields Developer and costs incurred by the Department prior to the Certified Brownfields Developer's submission of its application for admission into the Brownfields Development Program ~~brownfield program~~.

5.2.2 Remedial costs with regard to a specific facility or Certified Brownfield are calculated to reflect the actual costs incurred by the Department. Such costs are calculated for each facility or Certified Brownfield as set forth below.

5.2.2.1 The total number of direct hours expended by each employee of the Department with regard to a specific facility or Certified Brownfield is multiplied by the employee's hourly rate of wages and then the figures derived for each employee are added together.

5.2.2.3 The figure derived from Subsection 5.2.2.2 is added to a figure derived by multiplying the number of hours worked by each employee of the Department with regard to the specific facility or Certified Brownfield by the other employee costs rate for the employee.

5.2.2.4 All payments made by the Department to its contractors, consultants or vendors for the procurement of services, supplies or equipment for the specific facility or Certified Brownfield are added to the figure derived from Subsection 5.2.2.3.

6.1.1 Investigative and remedial action work including facility evaluations, site inspections, remedial investigations, Certified Brownfields investigations, human health risk assessment, feasibility studies, oversight, and long-term stewardship.

~~**9.1.4.5** — Issue a Conditional No Further Action Determination.~~

~~**9.1.5** A Conditional No Further Action Determination pursuant to paragraph 9.1.4.5 of this subsection does not preclude the Department from requiring further action based on additional information or other circumstances as it deems appropriate.~~

9.3.3 The initial screening shall identify the maximum observed concentrations of analytes found in environmental samples and utilize representative data from each environmental media to perform a preliminary risk assessment. ~~The sample locations shall be in areas of the facility where the highest levels of contamination are likely to exist.~~

9.5.1 The Brownfield investigation, ~~which is applicable to certified Bbrownfields sites,~~ shall meet the requirements of the ~~R~~remedial investigation as specified in Section 9.4.

12.3.1 The Department may require or permit an interim action at a facility or Certified Brownfield prior to issuing the Proposed Plan of Remedial Action for the facility or Certified Brownfield where the Department determines that it is consistent with or will not interfere with potential or final remedial actions.

12.3.3 For any facility or Certified Brownfield at which an interim action has occurred, the Proposed Plan of Remedial Action shall include a description of the interim action and a determination of whether additional remedial action is needed to meet the remedial action objectives.

12.3.4 The Department may adopt an interim action as all or part of the chosen final remedial action for a facility or Certified Brownfield if it determines the interim action is protective of public health or welfare or the environment.

12.4.2 The Department, or any person who has entered into an agreement with the Department concerning a facility or Certified Brownfield, shall propose one or more remedial alternatives for the facility which meet the criteria in 12.4.4.

12.4.3 The Department will evaluate and select the proposed remedial alternatives for the facility or Certified Brownfield according to the threshold and balancing criteria.

12.5.1 The Department shall issue a Proposed Plan of Remedial Action describing the proposed remedial action prior to implementation of the remedial action for a facility or Certified Brownfield. When the Department requires or approves an interim action as described in Section 12.3 of these Regulations, the Department may issue a Proposed Plan of Remedial Action after the implementation of the interim action.

12.7.1 No person shall implement a remedial action at a facility or Certified Brownfield without concurrent oversight from the Department.

12.8.1.2 A facility or Certified Brownfield which is the subject of an application for entry into the Voluntary Cleanup Program or the Brownfields Development Program;

12.8.1.3 A facility or Certified Brownfield undergoing an interim action;

12.8.1.4 A facility or Certified Brownfield undergoing a remedial investigation or remedial action;

12.8.1.5 A facility or Certified Brownfield for which an order has been issued pursuant to 7 Del.C. §9106(b) or 7 Del.C. §9109(b); or

12.8.1.6 A facility or Certified Brownfield that has restrictions required by the Final Plan of Remedial Action.

12.8.2 No person shall perform any work or construction activities that may interfere with the remedial action at the facility or Certified Brownfield, unless authorized by the Department as part of the remedial action, without doing all of the following:

12.8.2.2 Providing copies of all plans and a description of the planned work or construction activities to be performed at the facility or Certified Brownfield;

12.8.2.4 Obtaining the Department's prior written approval for any work or construction activities to be performed at the facility or Certified Brownfield.

12.8.4 This subsection shall not apply to any work or construction activities performed ~~in~~ a facility or Certified Brownfield or areas of a facility or Certified Brownfield where any drilling, digging or excavation is carried out to collect samples in accordance with any appropriate plan approved by the Department.

13.2.1 All facilities or Certified Brownfield addressed under **7 Del.C. Ch. 91** will be eligible for facility closure. A facility or Certified Brownfield is eligible for closure when the Department determines that all requirements of the Final Plan of Remedial Action have been completed and no restrictions remain on the facility or Certified Brownfield. The Department may require additional remedial activities at the facility or Certified Brownfield after it has achieved closure if circumstances change or if any new information becomes available which shows that the completed remedial action is no longer protective of public health or welfare or the environment.

13.2.2 Facility or Certified Brownfield closure is achieved through the issuance of a facility closure determination by the Department under the following conditions:

13.2.2.1 The Final Plan of Remedial Action requires no remedial activities at the facility or Certified Brownfield;

13.2.2.2 A Certification of Completion of Remedy is issued or amended by the Department and the Department determines that the remedial action, as described in the Final Plan of Remedial Action, is completed and no restrictions remain on the facility or Certified Brownfield; or

13.2.2.3 Based on the information obtained about a facility or Certified Brownfield during an initial investigation or facility evaluation, the Department determined that no action is necessary.

14.1.3 A Certified Brownfields Developer ~~brownfield-developer~~ that does not cause or contribute to a release related to the Certified Brownfield site is not liable for natural resource damage assessment and restoration costs related to the release at the site brownfield property, and such Certified Brownfields Developer ~~brownfield-developer~~

shall not be subject to or limited by any other provision of these Regulations relating solely to natural resource damages.

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