ESOS 2019: Brownfield Updates and Roundtable

Overview of Recent BVA Revisions

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Section II (Requirements), Subsection C. Financial Requirement

Applicable fees and financial requirements must be timely paid by the applicable Voluntary Party to remain in the Voluntary Cleanup Oversight and Assistance Program and to receive a letter of no further action under Section G of this Agreement. For the purpose of this Agreement, timely payment means the Department receiving payment from the Voluntary Party within 60 days of the first billing of a financial requirement or according to a payment plan agreed in writing between Voluntary Party and the Department.
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Section II (Requirements), Subsection C. Financial Requirement

Notwithstanding the foregoing, any and all cost recovery assessments arising from actions to comply with a recorded Notice of Land Use Restrictions imposed pursuant to and recorded on the Site under the terms of this Agreement, shall be due from and payable only from the particular Voluntary Party or Successor Party submitting the report to be reviewed and/or requesting the related oversight action by TDEC that gives rise to the associated fees.
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Section II (Requirements), Subsection D. Identification and Documentation of Matters Addressed

Based on the information submitted to the Department by or on behalf of the Voluntary Party, and the Department’s own review of this information, the Parties hereto agree that the following environmental conditions identified in the reports referred to below and any reports generated pursuant to this Agreement, or in the Summary, including the environmental conditions described below are to be addressed under this Agreement (collectively referred to as the "Matters Addressed in this Agreement"): 
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Section II (Requirements), Subsection E. Agreed Liability Relief

[Prospective Buyer/Voluntary Party has no current interest in the Site. However, it is anticipated that it may acquire title to the Site pursuant to an agreement or option to purchase the Site. While Prospective Buyer/Voluntary Party is a party to this Agreement, any obligation, responsibility, duty or benefit accruing to Prospective Buyer/Voluntary Party as a party to this Agreement is contingent upon its acquisition of title to all or any part of the Site or its status as a Successor Party.]
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Section II (Requirements), Subsection F. Administrative Settlement Third Party Liability

The Voluntary Party has demonstrated to the Department that constructive notice was accomplished by publishing a summary of this Agreement in the ________ [newspaper of general circulation within the geographical area of the Site] at least thirty (30) days prior to the Effective Date of this Agreement. The Voluntary Party has demonstrated to the Department that actual notice was accomplished by providing copies of certified letters summarizing this AGREEMENT that were sent to adjacent landowners and governments having jurisdiction over the property.
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Section II (Requirements), Subsection G. Agreed Actions to Be Taken

The Department has determined that the actions in this Agreement constitute “reasonable steps” with respect to Matters Addressed in This Agreement.
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Section II (Requirements), Subsection I. Site Access

During the effective period of this Agreement, and until the Department’s issuance of a No Further Action Letter upon the Voluntary Party’s completion of all activities under this Agreement, the Voluntary Party, and any Successor Party shall, to the extent it is in control of the Site, provide the Department and its representatives or designees access during normal business hours to the Site to the extent that the Voluntary Party has the power and authority to grant such access.
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Section II (Requirements), Subsection J. Submission of information; Reports, or Studies

The Department may deny submission or approval of any reports, or studies performed by or on behalf of the Voluntary Party and submitted under the terms of this Agreement that do not contain the following statement:

“I certify under penalty of law, including but not limited to penalties for perjury, that this document and all attachments were prepared by me, or under my direction or supervision. The submitted information contained in this document and on any attachment is true, accurate and complete to the best of my knowledge, information, and belief. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for intentional violation. As specified in Tennessee Code Annotated § 39-16-702(a)(4), this declaration is made under penalty of perjury.”
Any Voluntary Party or any of their Successor Parties may terminate this Agreement as it pertains to them at any time upon written notice to the Department during the time period that they own the Site and/or conduct operations at the Site. Upon such termination, the Voluntary Party shall have no further obligations hereunder other than payment of outstanding oversight costs, if any, accrued to the date of notice of termination and adherence to any notice of land use controls filed under Tennessee Code Annotated § 68-212-225; provided, that both Parties shall have and retain all authority, rights, and defenses as if this Agreement had never existed.
The Department reserves the right to terminate this AGREEMENT if the Voluntary Party fails to timely pay fees and other financial requirements specified in Section C Financial Requirements or to comply with any material requirement of this AGREEMENT. Prior to exercising any right to terminate this AGREEMENT, the Department shall provide written notice to Voluntary Party or Successor Party of the specific failure to comply and afford Voluntary Party or Successor Party a reasonable opportunity to cure any such failure. Voluntary Party or Successor Party shall commence to cure such failure within sixty (60) days following receipt of written notice. For the purpose of this AGREEMENT, timely payment means the Department receiving payment from the Voluntary Party within 60 days of the first billing of a financial requirement or according to a payment plan agreed in writing between Voluntary Party and the Department.
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Section II (Requirements), Subsection K. Reservation of Rights, paragraph 6

In the event a Voluntary Party or Successor Party does not fulfill all the requirements established in this Agreement, the Commissioner may seek to enforce the Agreement through any legal remedy.