

Environmental and Land Use ADVISORY

May 6, 2009

The Georgia Voluntary Remediation Program Act of 2009 Signed into Law

I. Introduction

On May 5, 2009, Governor Perdue signed into law House Bill 248, the Georgia Voluntary Remediation Program Act. The new Voluntary Remediation Program (VRP) becomes effective on June 1, 2009, and promises a streamlined and privatized path for voluntarily remediating sites through the use of registered environmental professionals. The VRP incorporates up-to-date risk based corrective action (RBCA) principles that should decrease site remediation costs while still being protective of human health and the environment, all at no out-of-pocket cost to the state. Many different types of contaminated properties can be enrolled, including, but not limited to, those listed on the Georgia Hazardous Sites Inventory (HSI).

This advisory provides an abbreviated guide to the new VRP, a program that is designed to effectively accelerate cleanups of contaminated sites in Georgia, which will provide long-term benefits to property owners, tenants and developers, as well as to the business, industrial and other communities of the state.

II. The VRP Basics – What, Who and How?

A. *What properties may be enrolled in the VRP?*

A wide variety of properties are eligible for enrollment in the VRP. In order to be considered a “qualifying property,” a property must be listed on the HSI, meet the criteria of a qualifying brownfields property under Georgia’s Hazardous Sites Reuse and Redevelopment Act, O.C.G.A. § 12-8-205 (“Brownfields Act”), or otherwise have a release of regulated substances into the environment. O.C.G.A. § 12-8-105(1). The terms “release” and “regulated substances” are broadly defined under Georgia environmental laws, covering just about any property that is contaminated with hazardous substances, wastes or constituents. A few examples of the types of properties that would be eligible for the VRP are sites where there have been releases from chemical manufacturing, drycleaners, agricultural chemical blending, solvent recycling, manufactured gas plants, metals recycling, rail yards, vehicle repair and maintenance, landfills and dumps, and, of course, abandoned brownfields.

However, sites that are listed on the federal National Priorities List or properties that are currently undergoing response activities required by an order of the United States Environmental Protection Agency (USEPA) are not eligible for enrollment in the VRP. See *id.* § 12-8-105(2)(A), (B). Further,

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properties for which a Georgia hazardous waste facility permit is required may not be enrolled. See *id.* § 12-8-105(2)(C). Properties where there are petroleum-only impacts, including underground storage tank sites, would not appear to be eligible for the VRP, although they can qualify under the Georgia Brownfields Act.

B. Who may participate?

Several types of participants are eligible for the VRP. Unlike the Georgia Brownfields Act, which only covers prospective purchasers, the VRP is open to current property owners, making it a useful tool for owners of sites that are currently undergoing investigation or cleanup or that otherwise have known contamination. Also, any other person can be a VRP participant, provided that there is “express permission to enter another’s property to perform corrective action . . . pursuant to written lease, license, order, or indenture.” O.C.G.A. § 12-8-106(1). As an example, if a tenant is responsible under the terms of a particular lease to clean up any hazardous material spills or contamination that it causes to the premises, the tenant can be an eligible participant in the VRP. Another example is a party that enters into a license access agreement to enter a neighboring property for the purpose of performing corrective action.

However, eligible VRP participants do not include parties that are in violation of Georgia environmental laws—specifically, any order, judgment, statute, rule or regulation subject to the enforcement authority of the director of the Georgia Environmental Protection Division (EPD). *Id.* § 12-8-106(2).

C. How do you enroll?

To enroll properties in the VRP, an applicant must submit a voluntary remediation plan to EPD, along with a \$5,000 application fee. O.C.G.A. § 12-8-107(a). The precise content of a “voluntary remediation plan” is not specified by the VRP, but there are at least two requirements. First, the plan must be prepared by a licensed and registered professional engineer or professional geologist. *Id.* The engineer or geologist must have “experience in responsible charge of the investigation and remediation of such releases.” *Id.*

Second, the voluntary remediation plan must be in such “streamlined form” as prescribed by the EPD director, and shall, at minimum, enumerate and describe those actions planned to bring the qualifying property into compliance with the applicable cleanup standards, with one or more registered professionals to be retained by the applicant at its sole cost to oversee the investigation and remediation described in the plan, all in accordance with the voluntary remediation program. *Id.*

Based on the above two requirements for a voluntary remediation plan, it appears that many corrective action plans prepared pursuant to the Hazardous Sites Response Act (HSRA) probably would not immediately qualify, as they likely would neither be “streamlined” nor prepared “in accordance with” the VRP, although the information contained in a HSRA CAP should be adaptable to a voluntary remediation plan. Once the EPD director approves the voluntary remediation plan, the subject property is deemed enrolled and the applicant a participant in the VRP. *Id.* § 12-8-107(b).

D. What is the remediation process?

Once the property is enrolled in the VRP, the participant’s registered professional is in charge of implementing the voluntary remediation plan. O.C.G.A. § 12-8-107(b). The registered professional must submit at least semi-annual status reports to EPD describing implementation of the plan during the preceding period. *Id.*

Upon completion of corrective action at the property pursuant to the plan, the participant must prepare and submit to EPD a compliance status report (CSR) confirming the consistency of the corrective action with the VRP, and certifying the compliance with the applicable cleanup standards in effect at that time. *Id.* § 12-8-107(e).

In connection with submitting the CSR, the participant is required to comply with certain public participation requirements, including public notifications and an open notice and comment period. *Id.* § 12-8-107(f). Also, the VRP allows the EPD director to order a participant to submit proof of financial assurance for continuing actions or engineering or institutional controls that are being relied upon for purposes of corrective action and the CSR. Participants relying on such controls at a VRP property must impose appropriate restrictions in conformance with the existing Georgia Uniform Environmental Covenants Act, O.C.G.A. §§ 44-16-1 *et seq.*

The VRP requires that, once the CSR and compliance certification are submitted to EPD, the director must issue a decision of concurrence on evidence satisfactory to her that the CSR is consistent with the provisions, purposes, standards and policies of the VRP. O.C.G.A. § 12-8-107(f). The director's decision regarding the CSR, as well as any decision to deny a VRP application, would appear to be subject to immediate legal appeal. See *id.* § 12-8-107(g)(3). The VRP expressly provides that the limitations on a private party's appeal rights under HSRA do not apply to the director's decisions and actions under the VRP.

E. Can enrollment be terminated?

The participant may freely terminate enrollment under the VRP at any time. O.C.G.A. § 12-8-107(d). The EPD director also may terminate enrollment if the participant fails to implement the voluntary remediation plan in accordance with the VRP or the continued enrollment of the property "would result in a condition which poses an imminent or substantial danger to human health and the environment." *Id.* § 12-8-107(d)(1), (2). In any event, the director can only remove a property from the VRP prior to the time that her concurrence with the CSR has been issued. Again, the director's decisions and actions under the VRP are subject to appeal.

F. Technical Risk-Based Corrective Action Concepts.

One of the critically important aspects of the VRP is the incorporation of modern RBCA principles that have not been practically available for most hazardous sites in Georgia. These principles can be found in Section 108 of the VRP and include, but are not limited to:

- Site Delineation - the VRP does not require delineation to background concentrations. Unlike HSRA, delineation may be to default, residential cleanup standards;
- Exposure - the VRP sets standards for determining when an exposure pathway is considered complete or incomplete, for representative concentrations across exposure domains, and for the point of exposure;
- Type 5 Risk Reduction Standard – the VRP allows a wider use of the Type 5 standard and engineering and institutional controls than under HSRA;
- Modeling – the VRP incorporates USEPA-recognized fate and transport modeling for purposes of demonstrating compliance with cleanup standards.

Generally, the VRP contains an exception from any requirement for site delineation and remediation “beyond the point of technical impracticability,” provided that the site does not otherwise pose an imminent or substantial danger. O.C.G.A. § 12-8-108(9). The term, “technical impracticability,” is defined as the “inability to fully delineate or remediate contamination without incremental expenditures disproportionate to the incremental benefit.” *Id.* § 12-8-102(17).

G. Special provisions for HSI-listed properties.

The VRP requires that a property be removed from the HSI if the participant is able to demonstrate to the EPD director at the time of VRP enrollment “that a release exceeding a reportable quantity did not exist at the voluntary remediation property, unless the director issues a decision that such release poses an imminent or substantial danger to human health and the environment.” O.C.G.A. § 12-8-107(g)(1).

Also, if the property was originally listed on the HSI as a result of a release to soil, but not for groundwater, and the participant demonstrates that, at the time of enrollment, a release exceeding a reportable quantity for groundwater does not exist at the property, then the participant is exempt from performing corrective action or certifying compliance for groundwater. *Id.* § 12-8-107(g)(2). A property so removed from the HSI may be required to perform annual groundwater monitoring for up to five years, unless the EPD director determines that further groundwater monitoring is necessary to protect human health and the environment. *Id.*

III. In Conclusion

In 2009, a bipartisan group of state legislators and industry representatives spearheaded the passage of a new program in Georgia that encourages private parties to voluntarily remediate contaminated sites under the supervision of qualified and experienced environmental professionals through the implementation of risk-based corrective action principles. The VRP is designed as a no-cost program to the state, allowing EPD to focus its resources upon abandoned, trust fund and other priority contaminated sites. The VRP presents a “win-win” opportunity for contaminated sites in Georgia to be cleaned up faster and more cost-effectively, without expenditure of state funds, provided that the purposes, standards and policies of the VRP are fully embraced and implemented. As indicated above, the VRP goes into effect on June 1, 2009, and it is anticipated that dozens of properties may seek to be enrolled in the first year.

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For additional information on the VRP, please contact your Alston & Bird attorney or any of the following:

Doug Cloud

doug.cloud@alston.com
404.881.7894

Meaghan Boyd

meaghan.boyd@alston.com
404.881.7245

Bob Mowrey

bob.mowrey@alston.com
404.881.7242

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

Suite 600
3201 Beechleaf Court
Raleigh, NC 27604-1062
919.862.2200

SILICON VALLEY

Two Palo Alto Square
Suite 400
3000 El Camino Real
Palo Alto, CA 94306-2112
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.756.3300

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