



ALAN WILSON
ATTORNEY GENERAL

September 13, 2021

The Honorable Lee Hewitt, Member
South Carolina House of Representatives
327-D Blatt Building
Columbia, SC 29201

Dear Representative Hewitt:

We have received your letter requesting our opinion concerning the statutory, regulatory, and other legal requirements governing South Carolina's Brownfields/Voluntary Cleanup Program (the "Program" or the "VCC Act")¹ and the specific contracts that are executed by the South Carolina Department of Health and Environmental Control ("DHEC") pursuant to the Program. You have set forth the background of the Program as follows:

[A] "brownfield" is defined as a piece of real property that has been compromised by the presence of hazardous substances, pollution, or other contaminants, which have essentially disrupted the expansion, redevelopment, or reuse of the property. *See* 42 U.S.C. § 9601(39)(A). Brownfields—not only eyesores to the community—are indicative of lost economic opportunities and genuine health risks to the surrounding areas. Potential purchasers, historically, have shied away from these transactions due to fears that they will be held liable for any cleanup costs associated with a contaminated or potentially contaminated facility. Indeed, pursuant to federal and state law², these concerns are valid because private parties can realistically face liability for these hazardous materials regardless of their contributions to the release or threatened release of the same.

¹ S.C. Code Ann. §§ 44-56-710 to -760.

² *See* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675; South Carolina Hazardous Waste Management Act (HWMA), S.C. Code Ann. §§ 44-56-200 *et seq.*

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You seek our opinion regarding the various agreements DHEC may enter pursuant to the Program. See S.C. Code Ann. § 44-56-720(4) (defining the “Department” in the VCC Act as the South Carolina Department of Health and Environmental Control). Specifically, you have asked:

Is an agreement entitled a Voluntary Cleanup Oversight Contract (VCOC) that contains the provisions set forth in your letter and below in effect a voluntary cleanup contract under South Carolina law?

Based on the factual scenario presented, we believe that a South Carolina Court would likely find that a contract entered into by DHEC that meets the criteria presented in your request would qualify as a “voluntary cleanup contract” under South Carolina law, regardless of the title or name of the contract.

Law/Analysis

From the outset, we note:

As creatures of statute, regulatory bodies are possessed only of those powers which are specifically delineated. S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Comm’n, 275 S.C. 487, 272 S.E.2d 793 (1980). By necessity, however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied for it to effectively carry out the duties with which it is charged. Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm’n, 272 S.C. 81, 248 S.E.2d 924 (1978); Beard Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948).

City of Columbia v. Bd. of Health & Env’tl. Control, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987).

In addition, “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” Maybank v. BB&T Corp., 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016). It is well-established in South Carolina that a contract, like a statute, *must be read in its entirety*, and a litigant cannot point to a single sentence, clause, title, or heading to attempt to create an ambiguity. See id.; McInnis v. McInnis, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002) (explaining titles and headings do not limit plain language).

The General Assembly responded to the growing issue of brownfields throughout the State by enacting the VCC Act in 2000. See S.C. Code Ann. §§ 44-56-710 to -760. Importantly, the Program’s goal is to entice potential purchasers of brownfields to assist the State in remedying harms to the environment and to charge DHEC with the Program’s implementation. The General Assembly’s clear intent in passing the VCC Act was to:

- (1) enable the expansion, redevelopment or return to use of industrial and commercial sites whose redevelopment is complicated by real or perceived environmental contamination;
- (2) provide an incentive to conduct response actions at a site by providing nonresponsible parties a covenant not to sue, contribution protection, and third party liability protection, or by providing responsible parties with a covenant not to sue for the work done in completing the response actions specifically covered in the contract and completed in accordance with the approved work plans and reports; and
- (3) provide reimbursement to the department for oversight costs.

S.C. Code Ann. § 44-56-710 (Purpose).

The Program permits both a “responsible party” and a “nonresponsible party” to voluntarily apply for participation at certain sites. S.C. Code Ann. § 44-56-720(10) (defining a “responsible party”), -720(5) (defining a “nonresponsible party”). The VCC Act defines “voluntary cleanup contract” as “a contract entered into between [DHEC] and a responsible or nonresponsible party to conduct a voluntary cleanup.” S.C. Code Ann. § 44-56-720(13). A “voluntary cleanup” means “a response action taken under and in compliance with this article” and a “response action” means “any assessment, cleanup, inspection, or closure of a site as necessary to remedy actual or potential damage to public health, public welfare, or the environment.” S.C. Code Ann. § 44-56-720(12) & (9).

Typically, contracts that have been executed pursuant to the Program have also been labeled “Voluntary Cleanup Contracts” in deference to this definition in the VCC Act. However, you mention that the Department has been amenable to referring to certain contracts, executed by DHEC pursuant to the VCC Act, as “Voluntary Cleanup Oversight Contracts” (or “VCOCs”) in limited situations to otherwise incentivize entities to enter the Program and voluntarily engage in environmental remediation activities.

The VCC Act bestows upon DHEC the ability to enter into contracts pursuant to the terms and conditions of the VCC Act. Following a review of the pertinent statutory framework and the intent of the General Assembly in passing the VCC Act, we can find nothing that prohibits DHEC from referring to any contract that satisfies the Program criteria as a VCOC or, to that end, that mandates DHEC to use a certain name when executing these contracts pursuant to the VCC Act. An express “purpose” of the VCC Act is to “provide reimbursement to DHEC for oversight costs.” S.C. Code Ann. § 44-56-710(3). “Oversight costs” in turn is defined as “those costs, both direct and indirect, incurred by the department in implementing the Voluntary Cleanup Program.” So, the addition of the word “oversight” to the title of such agreements is consistent with the purpose of the Act and, in all events, of no moment. Irrespective of the name of the agreement, the plain language of the contract and the statute govern.

You do not specify in your request whether the party is a responsible or nonresponsible party. However, as any contracting party under the VCC Act is either one or the other, we will apply the facts set forth to the legal requirements of each.

The statutory requirements for a voluntary cleanup contract entered into by a responsible party to contain, at a minimum:

- (a) submission of a work plan, health and safety plan, and provisions for written progress reports;
- (b) a grant of access [to DHEC] to perform and oversee response actions; and
- (c) a legal description of the property.

S.C. Code Ann. § 44-56-740(A)(1)(a)-(c).

A voluntary cleanup contract entered into by a responsible party also is to stipulate that:

- (a) the contract is not a release or covenant not to sue for any claim or cause of action against a responsible party who is not a signatory to the contract;
- (b) the contract does not limit the right of the department to undertake future response actions;
- (c) the contract becomes null and void if the responsible party submits information that is false or incomplete and that is inconsistent with the intent of the contract;
- (d) the contract is not a release or covenant not to sue for claims against a responsible party for matters not expressly included in the contract; and
- (e) the contract's covenant not to sue must be revoked for a responsible party, or its successors, for conducting activities at the site that are inconsistent with the terms and conditions of the voluntary cleanup contract, and these activities constitute cause to terminate the contract.

S.C. Code Ann. § 44-56-740(A)(2)(a)-(e).

A voluntary cleanup contract entered into by a nonresponsible party is to contain, at a minimum:

- (a) an agreement to conduct the scope of work provided for in the contract and submission of a work plan prepared in accordance with the scope of work required by the department, health and safety plan, and provisions for written progress reports;
- (b) a grant of access [to DHEC] to perform and oversee response actions;
- (c) a legal description of the property;
- (d) a provision for the department to have the opportunity to inspect and to copy any and all documents or records in the nonresponsible party's custody, possession, or control which identifies or potentially identifies a responsible or potentially responsible party; and
- (e) a provision that the department has an irrevocable right of access to the property once the property is acquired by the nonresponsible party. The right of access remains until a complete remediation is accomplished for unrestricted use.

S.C. Code Ann. § 44-56-750(B)(1)(a)-(e).

A voluntary cleanup contract entered into by a nonresponsible party also is to stipulate that it:

- (a) is not a release or covenant not to sue for any claim or cause of action against a party who is not a signatory to the contract;
- (b) does not limit the right of the department to undertake future response actions;
- (c) is not a release or covenant not to sue for claims against a party for matters not expressly included in the contract;
- (d) does not release the nonresponsible party from liability for any contamination that the nonresponsible party causes or contributes to the site; and
- (e) becomes null and void if the nonresponsible party submits information that is false or incomplete and that is inconsistent with the intent of the contract.

S.C. Code Ann. § 44-56-750(B)(2)(a)-(e).

In your request, you provide a fact pattern in which a VCOC includes the following terms and provisions:

- a legal description of the property;

- detailed findings of the environmental condition on the property;
- a timeline for the submission of work plans, health and safety plans, and written progress reports to be provided to DHEC;
- a description of response actions that will be taken;
- an express acknowledgment that DHEC will notify the voluntary party of any approvals or deficiencies in the proposed response actions to remediate and control contamination;
- reimbursement to DHEC for the cost of its oversight;
- a grant of DHEC access to the property to allow its inspection of the response actions;
- a declaration of covenants and restrictions for the property;
- a description of obligations and benefits to the volunteering party in satisfaction of the requisite stipulations, including a covenant not to sue the volunteering party for work performed pursuant to the work plan approved by DHEC to remediate the environmental contamination.

These terms and provisions satisfy the plain language requirements of the VCC Act for either a responsible or nonresponsible party, and based on these, we believe a South Carolina Court would find that the “VCOC” is a “voluntary cleanup contract” under the Program.

You have also raised a question about the process for public notice and comment under the Program and when it is required. Per the statute, public notice and participation is *required* for a “nonresponsible party” voluntary cleanup contract, which follows from the VCC Act’s provision of liability protection against third parties. See S.C. Code Ann. § 44-56-750(E) & (H) For a “responsible party” VCC, public notice and participation is optional because third party liability and contribution protection may or may not be provided, and that is the determining factor in public participation per the State’s CERCLA program. See S.C. Code Ann. § 44-56-740(A)(5) & (D).

Thus, a voluntary cleanup contract may allow for liability and contribution protections against third parties, but these parties must be put on notice of these provisions to comply with due process requirements. In other words, if a voluntary cleanup contract includes contribution or liability protection against a third party, then public notice and participation is *required*. But if a voluntary cleanup contract does not include contribution or liability protection against a third party, then no public notice or participation is required. Where the only liability protection provided under a voluntary cleanup contract is against DHEC—a contracting party—for work performed pursuant to the contract and under a work plan reviewed and approved by DHEC, and where there is no liability or contribution liability protection against any third party, no public

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notice or participation is necessary, and such contract still satisfies the requirements under South Carolina law as a “voluntary cleanup contract.”

Conclusion

Following a comparison of the VCOC agreement as set forth in your request with the statutory minimum requirements for voluntary cleanup contracts, we believe that a South Carolina Court would find that a DHEC VCOC containing the provisions outlined in your request would comply with and be considered a voluntary cleanup contract under the VCC Act and South Carolina law.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert D. Cook", is written over the typed name.

Robert D. Cook
Solicitor General