



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Fort Smith Property/Cold Storage Warehouse: Arkansas Department of Energy and Environment - Division of Environmental Quality and Arkansas Refrigerated Services, Inc. Enter into Elective Site Cleanup Agreement

10/10/2024

The Arkansas of Energy and Environment – Division of Environmental Quality (“DEQ”) and Arkansas Refrigerated Services, Inc. (“ARS”) entered into an October 2nd Elective Site Cleanup Agreement (“ESCA”). See LIS No. 24-146.

The ESCA addresses a property located in Fort Smith, Arkansas.

The ESCA in describing the property notes in part:

...from the late 1800s to at least 1950, the site property has been described as partially occupied by a manufactured gas plant. From the late 1800s to through the 1960s, the site had been previously been in operation as an ice, cooler, and coal company.

The site is currently in operation as a cold storage warehouse since 1990.

DEQ describes an ESCA as a means to address historic contamination on a site without penalty and with known objectives.

Various federal and state programs (including ESCA and others in Arkansas) use risk-based corrective action remediation standards to tailor cleanup levels according to site-specific factors. Such programs often take into account criteria such as to what extent the site is characterized and/or future land use. Typically superimposed upon these various procedures are site-specific analyses and a requirement that the standards be protective of human health and the environment.

Agencies may be willing in some circumstances to provide blessing (subject to certain caveats) of a site’s conditions if they deem contaminants adequately delineated and/or isolated from potential exposure. The approval of site conditions will likely be based on a combination of acceptability under applicable screening levels and/or whether the property uses are compatible with these conditions. The incorporation of enforceable institutional controls (i.e., deed restrictions, restrictive covenants, or easements) or controls such as barriers (pavement in a certain area, etc.) might be used to ensure continued adherence to the restrictions by the current and future real property owners.

The ARS ESCA states that BBG Assessments, LLC conducted an Environmental Site Assessment (“ESA”) at the property on May 6th, 2020. A limited sub-surface investigation was recommended to be conducted to determine if historical or current on-site operations had impacted the property.

A second ESA is stated to have been conducted in 2023 by Arcadis. The soil borings are stated to have not produced water and therefore five groundwater monitoring wells were installed to the maximum depth of forty feet. Groundwater results are stated to have indicated the presence of TPH-DRO in exceedance of DEQ screening criteria in three groundwater wells.

The ESCA provides sequential tasks for ARS to undertake which include:

- Submission within 30 calendar days of the effective date of the ESCA a Sampling and Analysis Plan (“SAP”) to DEQ designed to determine if any hazardous substances or pollutants is present in the environment within the area identified in the Findings of Fact (Paragraph 1).
- Implement the SAP upon receipt of written approval from DEQ.
- If DEQ notifies that the SAP fails to accomplish an adequate determination of the extent, type, or concentration of released hazardous substances or pollutants in or from the areas investigated, then amend the SAP to provide an additional SAP and submit to DEQ within 30 calendar days of written notification.
- Submit progress and findings reports as agreed in the SAP schedule.
- If it is determined that contamination of the environment has occurred, within 30 calendar days of the notification by DEQ, submit a Remedial Action Plan (“RAP”) to control or remediate such contamination to the extent necessary to protect human health and the environment using a risk-based approach.
- If the RAP implementation fails to accomplish remediation sufficient to protect human health and the environment, upon notification from DEQ, conduct additional remedial activities necessary to protect human health and the environment.
- Within 30 calendar days of written notification by DEQ, submit for review a deed restriction for the site if necessary and as described in ESCA.
- Within 45 calendar days of written approval by DEQ, file such restriction on the deed and submit a file marked copy to DEQ.
- Upon approval of the Completion Report, and receipt of deed restrictions if required, DEQ will issue a No Further Action determination subject to certain conditions.
- The ESCA shall be reviewed by DEQ on its fifth anniversary if remedial activities have not been completed subject to potential extension.

The ESCA requires that ARS take all steps necessary to prevent aggravating and/or contributing to the contamination of the air, land, or water including downward migration of contamination from any contamination on the site. Further, nothing in the ESCA shall be construed as a waiver of DEQ’s enforcement authority over current or future alleged violations not specifically addressed in that document.

A copy of the ESCA can be downloaded [here](#).