

Agency 28
Department of Health and Environment
Article 73.—Environmental Use Controls Program

28-73-1. Definitions.

(a) "Act" means K.S.A. 65-1,221 et seq. and amendments thereto.

(b) "Applicant" means the owner, as defined in K.S.A. 65-1,222 (c) and amendments thereto, of an eligible property who submits to the secretary an application for approval of environmental use controls for the eligible property.

(c) "Eligible property" means real property that exhibits environmental contamination exceeding department standards for unrestricted use and that is being or has been investigated or remediated, or both, as a result of participating in a department-approved program.

(d) "Environmental contamination" means "pollution" or "contamination," as those terms are used in the following acts and statutes, as well as any regulations adopted under the authority of those statutes, unless this act or any of the following acts specifically exclude or exempt certain forms of pollution or contamination from the provisions of this act:

(1) K.S.A. 65-3452a through K.S.A. 65-3457a, and amendments thereto, concerning hazardous substances;

(2) the voluntary cleanup and property redevelopment act, K.S.A. 65-34,161 through K.S.A. 65-34,174, and amendments thereto;

(3) the Kansas drycleaner environmental response act, K.S.A. 65-34,141 through K.S.A. 65-34,155, and amendments thereto;

(4) K.S.A. 65-3430 through K.S.A. 65-3447, and amendments thereto, concerning hazardous waste;

(5) K.S.A. 65-161 through K.S.A. 65-171y, and amendments thereto, concerning the waters of the state;

(6) the Kansas storage tank act, K.S.A. 65-34,100 through K.S.A. 65-34,130, and amendments thereto;

and

(7) K.S.A. 65-3401 through K.S.A. 65-3427, and amendments thereto, concerning solid waste.

(e) "Environmental use control agreement" means a legal document specifically defining the environmental use controls and other related requirements for an eligible property according to K.A.R. 28-73-3. The agreement shall be issued by the secretary and shall be signed by the applicant. The signatures of the secretary and applicant shall be notarized, and as required by K.S.A. 65-1,225 and amendments thereto, the agreement shall be recorded by the register of deeds in the county where the eligible property is located.

(f) "Financial assurance" means any method of guaranteeing or ensuring adequate financial capability that is approved by the secretary as part of a long-term care agreement. One or more of the following methods of financial assurance may be required by the secretary as a part of a long-term care agreement:

(1) An environmental insurance policy;

(2) a financial guarantee;

(3) a surety bond guaranteeing payment or performance or a similar performance bond;

(4) an irrevocable letter of credit;

(5) documentation of the applicant's qualification as self-insurer; and

(6) other methods the secretary determines are adequate to ensure the protection of public health and safety and the environment.

Federal and state governmental entities that qualify as applicants under these regulations shall not be required to provide financial assurance.

(g) "Legal description" means identification of the land boundaries of an eligible property that is subject to an environmental use control agreement. The identification of land boundaries shall be provided by one or more of the following methods:

(1) A definite and unequivocal identification of lines and boundaries that contains dimensions to enable the description to be plotted and retraced and that describes the legal surveys by county and by at least one of the following additional identifiers:

(A) Government lot;

(B) aliquot parts; or

- (C) quarter section, section, township, and range;
 - (2) a metes and bounds legal survey commencing with a corner marked and established in the U.S. public land survey system; or
 - (3) the identifying number or other description of the subject lot, block, or subdivision if the land is located in a recorded subdivision or recorded addition to the subdivision.
- (h) "Legal survey" means a boundary survey or land survey that is performed by a land surveyor licensed in the state of Kansas and that is conducted for both of the following purposes:
- (1) Describing, documenting, and locating the boundary lines of an eligible property, a portion of an eligible property, or both; and
 - (2) plotting a parcel of land that includes the eligible property.
- (i) "Long-term care agreement" means a legally binding document that is entered into as provided in K.A.R. 28-73-4 by an applicant and the secretary and that describes the responsibilities and financial obligations of the applicant to fund the department's inspection and maintenance activities at a category 3 property, as described in K.S.A. 65-1,226 and amendments thereto.
- (j) "Residual contamination" means environmental contamination remaining at a property that prohibits the unrestricted use of that property.
- (k) "Unrestricted use" means that there are no limits or conditions placed on the use of a property, including use for residential purposes. (Authorized by K.S.A. 2007 Supp. 65-1,232; implementing K.S.A. 2007 Supp. 65-1,224 and 65-1,228; effective April 7, 2006; amended Jan. 30, 2009.)

28-73-2. Application.

- (a) Each applicant shall submit an application to the secretary, as provided by the act and these regulations.
- (b) If an application is determined by the secretary to be incomplete, written notification shall be provided to the applicant by the secretary identifying the documentation, data, or other information that is needed to complete the application, and the application shall be returned to the applicant. The applicant may then submit a revised application package, provide the additional information as required by the secretary, or withdraw the application.
- (c) If the applicant is a person or entity that does not own the eligible property, but is the landowner's authorized representative, the applicant shall provide a notarized statement from the landowner or landowners specifically authorizing the applicant to act on the landowner's behalf or a judicial decree assigning this authority to the applicant.
- (d) If the owner of the eligible property is a local, state, or federal governmental entity, the signature of an authorized governmental official shall be considered as a sufficient basis for executing and submitting the application. (Authorized by K.S.A. 2004 Supp. 65-1,232; implementing K.S.A. 2004 Supp. 65-1,221, 65-1,222, and 65-1,224; effective April 7, 2006.)

28-73-3. Environmental use control agreements.

- (a) If the secretary approves an application for environmental use controls, an environmental use control agreement for the eligible property shall be issued by the secretary in a standardized format that contains all of the following components, as applicable to that eligible property:
 - (1) A description of the control, restriction, prohibition, or limitation that constitutes each of the environmental use controls proposed by the applicant in the application package and approved by the secretary;
 - (2) a legal description of the eligible property;
 - (3) authorization for the department and the department's contractors to have access to the eligible property as required by the act;
 - (4) a statement of the funding requirements established by the secretary as specified in the act or, for category 3 property, a reference incorporating the long-term care agreement required by K.S.A. 65-1,226 and amendments thereto and K.A.R. 28-73-4;
 - (5) for category 3 property, a statement indicating whether financial assurance is required, as specified in K.S.A. 65-1,224, and amendments thereto, K.A.R. 28-73-1, and K.A.R. 28-73-5;

- (6) the length of time during which the environmental use control agreement is to be in effect;
- (7) a description of any monitoring, inspection, or maintenance requirements;
- (8) a description of the specific terms and conditions that are to be applied as part of the environmental use controls for the eligible property;
- (9) a description of the enforcement provisions that are authorized by K.S.A. 65-1,229, and amendments thereto;
- (10) a list of any local, state, or federal government restrictions, prohibitions, or zoning requirements that pertain to the eligible property;
- (11) an acknowledgment of the environmental use control agreement that is to be endorsed with the seal of the register of deeds in and for the county where the eligible property is located, pursuant to K.S.A. 19-1206, and amendments thereto; and
- (12) a description of any other requirements established for the eligible property by the secretary to ensure the protection of public health and safety and the environment.

(b) Upon approval of an application, the following documents shall be sent to the applicant by the secretary:

- (1) A letter approving the application; and
- (2) the environmental use control agreement with the notarized signature of the secretary.

(c) In order for the environmental use control agreement to be effective, upon receipt of the agreement the applicant shall return to the secretary the environmental use control agreement with the notarized signature of the applicant and the seal of the register of deeds indicating that the agreement has been recorded as required by K.S.A. 65-1,225, and amendments thereto. The applicant shall submit with the agreement any payment necessary to fulfill the funding requirements established by the environmental use control agreement.

(d) The recorded copy of the environmental use control agreement shall be tracked by the department as specified in K.S.A. 65-1,230, and amendments thereto. (Authorized by K.S.A. 2004 Supp. 65-1,232; implementing K.S.A. 2004 Supp. 65-1,224, 65-1,225, 65-1,226, and 65-1,228; effective April 7, 2006.)

28-73-4. Long-term care agreements for category 3 property.

(a) As provided in K.S.A. 65-1,226, and amendments thereto, a long-term care agreement between the secretary and the applicant shall be required for each category 3 property.

(b) Each long-term care agreement for a category 3 property entered into by an applicant and the secretary as provided by K.S.A. 65-1,226, and amendments thereto, shall include a provision for a funding requirement in an amount that will reimburse the department for all direct and indirect costs incurred by the department in implementing and administering the environmental use control agreement and performing long-term care at the property, including costs for the following departmental activities conducted for the purpose of inspecting, monitoring, investigating, and evaluating environmental use controls and remedial progress at the property:

- (1) Reviewing documents related to the site, including the following:
 - (A) Inspection, monitoring, and progress reports;
 - (B) operation and maintenance records;
 - (C) reports related to spills of contaminants at the site;
 - (D) reports related to permits issued for the eligible property; and
 - (E) pertinent historical documents;

(2) monitoring and inspecting remediation activities and monitoring wells, protective structures, remedial systems, and any other features directly related to or associated with an environmental use control on the eligible property;

(3) searching and reviewing records and files related to the eligible property, including historical files, county tax records, county property records, and zoning records;

(4) collecting environmental samples, including quality assurance and quality control samples; and

(5) performing laboratory analyses on environmental samples collected to monitor and evaluate remedial progress at the eligible property.

(c)

(1) If the applicant is required to provide financial assurance for a category 3 property, the long-term care agreement shall identify the initial amount of financial assurance required and one or more of the financial assurance methods established by the secretary in accordance with K.A.R. 28-73-5, which the applicant shall maintain for the period of time the long-term care agreement is in effect.

(2) The long-term care agreement shall state that, as the amount of the financial assurance or the financial assurance method is revised in subsequent years as provided in K.A.R. 28-73-5, the most recent revised amount or method approved by the secretary shall be deemed to be incorporated into the long-term care agreement and shall supersede any prior amount or method.

(d) The long-term care agreement shall clearly define the requirements that apply to the secretary and the applicant and their respective responsibilities. (Authorized by K.S.A. 2004 Supp. 65-1,232; implementing K.S.A. 2004 Supp. 65-1,224, 65-1,226, and 65-1,230; effective April 7, 2006.)

28-73-5. Financial assurance.

(a) Any applicant requesting approval of an environmental use control for a category 3 property may be required by the secretary to provide and maintain financial assurance in an amount equal to or greater than one or both of the following:

(1) The estimated amount of the funding requirement set out in the long-term care agreement as provided by K.A.R. 28-73-4; and

(2) the estimated amount of the funding necessary to implement contingent remedies that will be used to protect public health and safety and the environment if the proposed remedial activity fails.

(b) Each applicant required by the secretary to provide and maintain financial assurance shall submit a detailed written estimate to the secretary, in current dollars, of the estimated amount of financial assurance required as specified in subsection (a) and shall propose one or more methods of financial assurance. The written estimate and the proposed method or methods of financial assurance shall be reviewed by the secretary and either approved or, if the secretary determines that either the written estimate or the proposed financial assurance method is inadequate, disapproved. If the secretary disapproves the written estimate or the proposed financial assurance method, or both, a written notice shall be provided by the secretary to the applicant explaining the basis for the disapproval. The applicant may correct the identified inadequacies and submit a revised written estimate and proposed financial assurance method to the secretary for further review.

(c) Once approved by the secretary, the initial amount and method of financial assurance shall be documented in the long-term care agreement for the eligible property.

(d) Each applicant required to provide and maintain financial assurance shall submit proof of the initial, approved financial assurance to the secretary before the environmental use control agreement is issued.

(e) On or before March 31 of each calendar year, each owner, as defined by the act, who entered into a long-term care agreement that establishes a financial assurance requirement shall submit to the secretary a revised written estimate, in current dollars, of the amount of financial assurance required in subsection (a).

(f) The revised written estimate shall be reviewed by the secretary. Written notice that the revised written estimate has been approved or that additional adjustments are required to the revised written estimate or method of financial assurance shall be provided by the secretary. Adjustments to the amount of the required financial assurance or the financial assurance method, or both, may be required for any of the following reasons:

(1) Changes in the estimated costs of the funding requirement for the eligible property as specified in paragraph (a)(1);

(2) changes in the estimated costs of implementing contingent remedies that will be used to protect public health and safety and the environment if the proposed remedial activity fails as specified in paragraph (a)(2);

(3) changes in the risks to public health and safety and the environment posed by a potential release from the eligible property;

(4) documented changes in the financial viability of an owner or the provider of a financial assurance method; or

(5) changes in estimated costs based on inflation.

(g) Each owner required by the secretary to maintain financial assurance shall submit an updated proof of financial assurance within 45 days of receipt of the secretary's written notice in subsection (f). The proof shall be based on the approved amount and method of financial assurance described in the notice.

(h) Each applicant who enters into an environmental use control agreement for a category 3 property that includes a financial assurance requirement shall comply with the following conditions:

(1) Provide and continuously maintain financial assurance in an amount equal to or greater than the latest approved written cost estimate throughout the period the environmental use control agreement is in effect; and

(2) comply with the provisions of the document titled, "procedure for demonstrating financial assurance at property with environmental use controls" as published by the department on August 31, 2005, and hereby adopted by reference. (Authorized by K.S.A. 2004 Supp. 65-1,232; implementing K.S.A. 2004 Supp. 65-1,224 and 65-1,226; effective April 7, 2006.)

28-73-6. Duration of environmental use controls.

(a) Each environmental use control shall remain in effect in perpetuity, unless the secretary approves, in writing, the removal of an environmental use control or, by its own terms, the environmental use control agreement expires.

(b) Any applicant may submit with the application a written request for approval of a provision in the environmental use control agreement specifying the number of years the environmental use control is to remain in effect. The request shall be reviewed by the secretary, and the applicant shall be notified by the secretary of the secretary's approval or denial of the request.

(c) If an approved environmental use control agreement will expire after a stated term of years or the owner seeks to terminate an environmental use control agreement, the owner shall submit a detailed work plan to the secretary that outlines the proposed methods of sampling and evaluating the residual contaminant levels on the eligible property. The owner shall submit the work plan before the expiration or termination of the environmental use control agreement. After consideration and approval of the work plan by the secretary, all of the following shall occur:

(1) The owner shall execute the approved work plan.

(2) The owner shall document and submit the results of the sampling to the secretary in a report and include recommendations for future actions to protect public health and safety and the environment at the eligible property.

(3) Following the secretary's review of the report and recommendations for future actions, the report and recommendations shall be approved, approved with conditions, or disapproved by the secretary. (Authorized by K.S.A. 2004 Supp. 65-1,232; implementing K.S.A. 2004 Supp. 65-1,227; effective April 7, 2006.)

28-73-7. Restrictions, prohibitions, and zoning requirements.

(a) Restrictions, prohibitions, and zoning requirements placed on an eligible property by a local, state, or federal government may be approved by the secretary in lieu of or in addition to one or more environmental use controls if the restriction, prohibition, or zoning requirement meets the following conditions:

(1) Has been legally established;

(2) is enforceable by a governmental entity; and

(3) is determined by the secretary to be in effect and applicable to the environmental contamination for which a particular environmental use control is otherwise considered to be a necessary component of an environmental use control agreement for the eligible property.

(b) Use of these restrictions, prohibitions, or zoning requirements in lieu of or in addition to an environmental use control may be considered in either of the following cases:

(1) For contamination that is contained exclusively within the boundaries of an eligible property;

or

(2) for contamination that is both contained within and extends beyond the boundaries of an eligible property if the local, state, or federal governmental restriction, prohibition, or zoning requirement is in effect and applies to all of the following areas:

(A) All of those contaminated areas that are beyond the boundary of the eligible property;
and

(B) All of those areas surrounding or extending beyond the contaminated areas for a distance that is determined by the secretary to be necessary to ensure the protection of public health and safety and the environment.

(c) Each applicant submitting an application for an environmental use control agreement shall submit to the secretary a copy of any existing local, state, or federal governmental restrictions, prohibitions, or zoning requirements that are proposed for inclusion in the environmental use control agreement in lieu of or in addition to one or more of the proposed environmental use controls. Each applicant shall submit for the secretary's review documentation sufficient to demonstrate the applicant's compliance with each restriction, prohibition, or zoning requirement that is enforceable by a local, state, or federal governmental entity.

(d) If the secretary approves the inclusion of governmental restrictions, prohibitions, or zoning requirements in the environmental use control agreement, the agreement shall reference the appropriate local, state, or federal restriction, prohibition, or zoning requirement and shall identify the governmental unit establishing these requirements.

(e) Each owner who enters into an environmental use control agreement that incorporates local, state, or federal governmental restrictions, prohibitions, or zoning requirements in lieu of or in addition to one or more environmental use controls shall remain subject to all other applicable requirements of the act and these regulations.

(f) An environmental use control agreement that incorporates local, state, or federal governmental restrictions, prohibitions, or zoning requirements shall be considered not to be effectively implemented and shall be subject to appropriate enforcement action in accordance with K.S.A. 65-1,229, and amendments thereto, if the secretary determines that both of the following conditions exist:

(1) The local, state, or federal governmental restrictions, prohibitions, or zoning requirements have been modified by the governmental entity after the environmental use control agreement was approved by the secretary.

(2) These modifications reduce the effectiveness of the environmental use control agreement to the extent that public health and safety and the environment are not protected adequately. (Authorized by K.S.A. 2005 Supp. 65-1,232; implementing K.S.A. 2005 Supp. 65-1,228; effective April 7, 2006.)