

**Preliminary Draft Negotiated Rule (Draft No. 1), Docket No. 58-0118-2101**

**Dated April 7, 2021**

This rule has been drafted in accordance with [Executive Order No. 2020-01, Zero-Based Regulation](#).

**Written comment deadline for this draft – May 11, 2021**

**58.01.18 – IDAHO LAND REMEDIATION RULES**

**000. LEGAL AUTHORITY.**

Pursuant to the provisions of Sections 39-105, 39-107, 39-4405, 39-7210, Idaho Code, the Department of Environmental Quality has the authority to promulgate and adopt rules to carry out the purposes of the Idaho Land Remediation Act, Sections 39-7201 to 39-7210, Idaho Code.

**001. TITLE AND SCOPE.**

**01. Title and Scope.** These rules are titled IDAPA 58.01.18, “Idaho Land Remediation Rules,” and are applicable to persons who wish to enter into a voluntary remediation agreement (agreement) with the state to minimize risk of harm, or perceived risk of harm, to public health and the environment and to restore the economic viability of contaminated real property.

**02. Intent.** The Idaho Land Remediation rules have been adopted for the intent and purpose of Section 39-7210, Idaho Code.

**003. ADMINISTRATIVE APPEALS.**

Persons may be entitled to appeal agency actions authorized under these rules pursuant to IDAPA 58.01.23, “Rules of Administrative Procedure Before the Board of Environmental Quality.”

**004. -- 009. (RESERVED)**

**010. DEFINITIONS AND ABBREVIATIONS.**

The term “director” has the meaning provided in [Section 39-103, Idaho Code](#). The terms “board,” “department,” “hazardous substance,” “person,” “petroleum,” “release,” “remediation,” and “site” have the meaning provided for those terms in [Section 39-7203, Idaho Code](#).

**01. Act.** Idaho Land Remediation Act, Title 39, Chapter 72, Idaho Code.

**02. Applicant.** A person who submits an application to participate in the voluntary remediation program under the Act.

**03. Natural Background Level.** The level of any constituent in the affected media within a specified area as determined by representative measurements of the quality of that media unaffected by human activities.

**011. -- 019. (RESERVED)**

**020. APPLICATION TO PARTICIPATE.**

**01. Application.** In order to participate in the voluntary remediation program as established by the Act and these rules, a person must submit an application to the Department.

**02. Contents.** The application must be on a form provided by the Department and include the information in Section 39-7204(2), Idaho Code, and the following:

- a. Identification of the applicant's relationship to the site;
- b. Identification of the owner or operator of the site if different than Subsection 020.02.a.;
- c. Demonstration of permission for site access from the current property owner for the Department and applicant; and

**03. Fees.**

Application Fee	\$250.00
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**04. Processing Procedure.** The Department will review the application consistent with Section 39-7204, Idaho Code.

**021. VOLUNTARY REMEDIATION AGREEMENTS.**

**01. Negotiation of Agreement.** If the Department accepts an application pursuant to Section 39-7204, Idaho Code, the applicant may enter into an agreement with the Department. The Department will not evaluate a voluntary remediation work plan (work plan) until the agreement is signed by the applicant and the Director.

**02. Contents.** The agreement must include the information in Section 39-7205, Idaho Code, and the following:

- a. A mechanism and schedule for the payment of all actual reasonable costs incurred by the Department in the review and oversight of the work plan; and
- b. A provision that the applicant must comply with any applicable zoning authorities or other local, state, or federal law, in implementing the work plan.

**03. Reimbursement of Costs Included in Agreement.**

a. The agreement will include a provision for the payment and accounting of reasonable oversight costs incurred by the Department in connection with the person's application and participation in the voluntary remediation program.

b. Costs incurred by the Department for oversight of voluntary remediation actions will be reimbursed in the following manner, which is specified in the agreement.

i. The applicant must deposit two thousand five hundred dollars (\$2,500) with the Department.

ii. The unused portion of the deposit will be returned to the applicant within sixty (60) days of Department issuance of a certificate of completion.

iii. If funding is required for costs incurred in excess of the initial two thousand five hundred dollars (\$2,500) deposit, the Department will, in advance, notify the applicant of necessary successive deposits in the amount of two thousand five hundred dollars (\$2,500).

**04. Oversight Costs.** Oversight costs will include the following:

- a. The review, processing and negotiation of the agreement;
- b. The review, processing and negotiation of the work plan;
- c. Conducting public hearing and dissemination of public notices;
- d. Oversight of work performed in accordance with the work plan;
- e. Issuance of the certificate of completion;
- f. Issuance of a covenant not to sue; and
- g. Administrative expenses associated with cost recovery activities.

**05. Enforceability.** Upon signing of the agreement by the Department and the applicant, the agreement will constitute a contract between the Department and the applicant enforceable in accordance with its terms, subject to:

a. The Department's right to rescind the agreement as provided in Section 39-7208, Idaho Code; and

b. The applicant's right to terminate the agreement under Subsection 021.06.

**06. Termination of Agreement.**

a. An applicant may terminate the agreement for any of the following reasons:

i. The applicant decides to terminate the agreement rather than submit additional or corrected information to the Department as provided in Section 39-7206(2)(b), Idaho Code; or

ii. The work plan is modified or rejected as provided in Section 39-7206(5), Idaho Code.

b. The termination of an agreement as provided in Section 39-7206, Idaho Code, does not relieve the applicant from the obligation to comply with any applicable authorities regarding the contamination at the site, and the Department may initiate administrative or judicial action under applicable authorities.

**022. VOLUNTARY REMEDIATION WORK PLAN.**

**01. Submittal of Proposed Work Plan.** An applicant whose application has been accepted by the Department may submit a proposed work plan to the Department. The Department will evaluate the work plan according to the terms and conditions of an agreement signed by the Department and the applicant.

**02. Contents.** The work plan must include:

a. The current and reasonably anticipated future use of the site, including on-site groundwater and surface water and uses of immediately adjacent properties;

b. If a risk-based concentration is proposed as a remediation standard, the work plan will include an estimate of the human and environmental risk from releases or threatened releases of hazardous substances or petroleum at the site based upon the current use of the site and adjacent properties and reasonably anticipated future uses of the site;

c. Proposed remediation standards developed in accordance with Section 023;

d. A proposed statement of work; and

e. A schedule to accomplish the proposed statement of work.

**03. Supporting Information.** Sufficient information to support the work plan must be submitted and may include:

a. Site assessment information including:

- i. A legal description of the site and a map identifying the location and size of facilities and relevant features, such as property boundaries, surface topography, surface and subsurface structures, and utility lines;
  - ii. The physical characteristics of site facilities and contiguous areas, including the location of any surface water bodies and groundwater aquifers;
  - iii. The location of any wells located on the site or on areas within one-half mile radius of the site and a description of the use of those wells;
  - iv. The operational history of the facility, including ownership, and the current use of the facility;
  - v. Information on the methods and results of investigations concerning the nature and extent of any releases or threatened releases of hazardous substances or petroleum that have occurred at the site and a map showing general areas of concentrations of these hazardous substances or petroleum;
  - vi. A site investigation sampling and analysis plan, and quality assurance project plan;
  - vii. Any sampling results or other data that characterizes the soil, air, groundwater, surface water, or sediments on the site; and
  - viii. Available information on the environmental regulatory and compliance history of the site, including all applicable environmental permits; and
- b.** Risk evaluation information including:
- i. An evaluation of the data collected during the site investigation including identification of chemicals of potential concern;
  - ii. An exposure assessment of all potential pathways of exposure;
  - iii. A toxicity assessment estimating the toxicity of both carcinogens and non-carcinogens;
  - iv. Identification of site conditions which may affect or limit migration of the contamination; and
  - v. A risk characterization that evaluates the uncertainties associated with the site investigation, the likelihood of exposures, and the toxicity of the contaminants.

**04. Review and Evaluation.** The Department will review and evaluate the work plan,

provide public notice, accept public comments and may make the determination whether to hold public hearings in accordance with Section 39-7206, Idaho Code, and the agreement.

**05. Modification to an Approved Work Plan -- Additional Public Notice and Comment.** After the close of the public comment period and the Department's approval of the work plan, situations may arise that result in modification of the work plan. Depending upon the significance of the modification, another opportunity for public notice and comment may be appropriate.

a. The Department need not provide for an additional public notice and comment period if the proposed modifications to the work plan are limited to minor changes. A minor change to the work plan is a change that does not fundamentally alter the overall remedial approach.

b. The Department will provide for an additional public notice and comment period if the proposed modifications to the work plan are fundamental. A fundamental change is a change that requires reconsideration of the remediation proposed in the approved work plan.

## **023. REMEDIATION STANDARDS.**

**01. Voluntary Remediation Work Plan -- Health-Based and Environmental Remediation Standards.** All hazardous substance or petroleum concentrations in media which exceed the health-based and environmental remediation standards must be addressed through appropriate remediation and in accordance with the appropriate technical standards based upon the following:

- a. Site characteristics;
- b. Hazardous substances or petroleum; and
- c. Technical guidance approved by the Department.

**02. Establishment of Remediation Standards.** The remediation standards utilized in these rules are no more stringent than applicable or relevant and appropriate federal and state standards and are consistent with 42 U.S.C. 9621, taking into consideration site specific conditions.

a. An applicant who submits a work plan for approval by the Department must select and attain compliance with one (1) or more of the following remediation standards when implementing a work plan.

i. Attainment of a natural background level demonstrated by the collection and analysis of representative samples from environmental media of concern where contamination occurs. Evaluation of representative samples must be conducted through the application of

statistical tests specified in a work plan.

ii. An established state or federal generic numerical health standard which achieves an appropriate health-based level so that any substantial present or probable future risk to human health or the environment is eliminated or reduced to protective levels based upon present and reasonably anticipated future uses of the site.

iii. Risk-based concentrations calculated for the hazardous substance or petroleum using site-specific risk assessment procedures.

b. An applicant may use a combination of standards listed in Subsection 023.02.a. to implement a work plan.

#### **024. IMPLEMENTATION OF VOLUNTARY REMEDIATION WORK PLAN.**

**01. Implementation.** An approved work plan must be fully implemented by the applicant according to the terms and conditions of the agreement, these rules and the Act.

**02. Progress Reports.** An applicant implementing a work plan must submit periodic progress reports to the Department according to the terms and conditions of the agreement.

**03. Completion Report.** When the applicant believes the work plan objectives were achieved and successfully implemented, the applicant must submit to the Department a work plan completion report together with a request that the Department issue a certificate of completion.

a. The completion report must contain information sufficient for the Department to determine whether the work plan objectives were achieved.

b. The Department will, within thirty (30) days of the receipt of a work plan completion report and a request for a certificate of completion, notify the applicant whether the work plan objectives were achieved.

c. If the Department notifies the applicant that the work plan objectives were not achieved, the applicant must:

i. Implement the work plan to the satisfaction of the Department; and

ii. Resubmit the work plan completion report.

d. If a work plan completion report demonstrates that the work plan objectives were achieved, the Department will certify such facts by issuing a certificate of completion. The applicant must record the certificate of completion with the deed for the site on which the remediation took place.

e. The Department may provide a certificate of completion conditioned upon continued monitoring, recordation or maintenance of institutional or engineering controls, or other continuing actions by the applicant.

f. Decisions by the Department regarding compliance with work plan completion report provisions in Subsection 024.03 are considered final agency actions.

## **025. COVENANT NOT TO SUE.**

**01. Negotiation and Provision of Covenant.** Within thirty (30) days of receipt of the Department's certificate of completion, the applicant may request the Department negotiate and provide a covenant not to sue as provided in Section 39-7207, Idaho Code. Any such covenant not to sue may be conditioned upon continuing monitoring, recordation or maintenance of institutional or engineering controls, or other continuing actions required of the applicant pursuant to an approved work plan.

**02. Rescission of Covenant.** The Department may rescind a covenant not to sue in accordance with Section 39-7208, Idaho Code. If the Department rescinds a covenant not to sue, it may initiate administrative or judicial action as provided in Sections 39-7207 and 39-7208, Idaho Code.

## **026. INSTITUTIONAL CONTROLS.**

### **01. Purpose.**

a. Institutional controls may be proposed by the applicant or the Department as an element of the work plan. Institutional controls are measures undertaken to limit or prohibit activities that may interfere with the integrity of a cleanup action or result in exposure to hazardous substances or petroleum at a site. Such measures may be used to assure both the continued protection of human health and the environment and the integrity of a cleanup action in at least the following circumstances:

i. Where a cleanup action results in residual concentrations of hazardous substances or petroleum which exceed risk-based health standards; or

ii. When the Department determines such controls are necessary to ensure the continued protection of human health and the environment or the integrity of the cleanup action.

b. Institutional controls may not be used as a substitute for cleanup actions that may otherwise be technically possible.

### **02. Activity and Use Limitations.** Institutional controls may include:



a. Physical measures, such as operation and maintenance plan, fences, or signs, to limit activities that may interfere with the cleanup action or result in exposure to hazardous substances at the site; and

b. Legal controls, such as restrictive covenants, easements, or equitable servitudes used to ensure such measures are maintained.

**03. Use Restrictions.** Institutional controls may be described in an environmental covenant pursuant to the Uniform Environmental Covenants Act, Chapter 30, Title 55, Idaho Code. The use of such restrictions may be addressed in the agreement, the certificate of completion, or the covenant not to sue.

**04. Compliance with Other Laws.** It is the applicant's responsibility to comply with any applicable zoning authorities or other local, state, or federal law, in implementing the work plan.

**05. Financial Assurances.** The Department may require the applicant to provide financial assurances, through a trust fund or other appropriate financial mechanism approved by the Department sufficient to cover all costs for ensuring the effectiveness of institutional controls or of operation and maintenance, including compliance monitoring and undertaking appropriate measures to ensure the integrity of institutional controls.

**027. -- 999. (RESERVED)**