

Errata Sheet

NDEP Recommended Changes to Proposed Regulation R189-08

Based on public comment and review by the regulated community, the NDEP has identified minor language changes that would improve the clarity and understanding of the proposed cleanup regulations. The NDEP asks that these changes be considered as errata by the State Environmental Commission during review of the proposed regulation.

- Recommendation #1
Section 8(2)(b)

Original language: “Rely upon methods of field sampling and analytical methods used in laboratories, if any, that are specified by the Division; and”

Recommended language: “Rely upon methods of field sampling and analytical methods used in laboratories, if any, that are [~~specified by~~] *acceptable to* the Division; and”

Reason for recommendation: The proposed regulation avoids language that would create a *de facto* requirement to involve the Division in planning efforts for initial assessments, which would slow down the process and limit a facility owner’s ability to quickly respond to releases. For this reason, we have avoided the use of terms such as “approved by” in this context, which could be interpreted as a requirement to seek written or verbal approval prior to the use of any field sampling or analytical method and therefore prior to conducting any initial assessment.

The original language of the proposed regulation uses the term “specified by the Division” to convey the intention of the Division to communicate, either through formal correspondence to the facility owner or by posting or endorsing publicly available data quality assurance guidelines, what methods are acceptable to the Division. These endorsed methods could then be relied upon by a facility owner conducting an initial assessment without seeking prior written or verbal approval. However, concerns were raised during public comment that in the absence of “specified” methods, a facility owner would still need to seek prior approval of the Division.

The recommended language preserves the Division’s ability to set forth acceptable methods in correspondence and guidelines, but also allows a facility owner to proceed with an assessment in the absence of specified methods with the understanding that the Division will still make consideration of the data collection methods during evaluation of the submitted assessment. The Division has always had the authority to base their review of assessments and cleanups on the latest scientific understanding of field and analytical methods, so the addition of this provision in the regulations does not create a new authority; it is an attempt to create the most efficient application of an existing authority. We believe the recommended change would accomplish this.

- Recommendation #2
Section 8.3

Original language: “The Division shall not require an owner or operator to conduct an assessment pursuant to subsection 1 if documentation is submitted to and approved by the Division or if any follow-up reporting is sufficient to demonstrate that:”

Recommended language: “The Division shall not require an owner or operator to conduct an assessment pursuant to subsection 1 if documentation is submitted to and approved by the Division or if any follow-up reporting is sufficient to demonstrate [~~that~~] *one or more of the following*.”

Reason for recommendation: During public comment, several commentators expressed confusion about whether a facility owner was required to demonstrate all of the conditions listed in the subsequent subsections or whether it was sufficient to demonstrate just one of the conditions. While the construction of the section and subsections follows the drafting conventions for the creation of “and” versus “or” lists and accurately reflects the Division’s intention, we agree that additional language helps clarify requirements in the presence of multiple levels of subsections.

- Recommendation #3
Section 8(3)(a)

Original language: “The level of contamination of the soil does not exceed the action level established for that soil pursuant to NAC 445A.2272 because of any actions taken by the owner or operator of the facility pursuant to NAC 445A.22695;”

Recommended language: “The level of contamination of the soil [~~does not~~] *no longer* exceeds the action level established for that soil pursuant to NAC 445A.2272 because of any actions taken by the owner or operator of the facility pursuant to NAC 445A.22695;”

Reason for recommendation: The language change is intended to eliminate an ambiguity in the proposed regulation that seemingly allows a facility owner to avoid assessment and corrective action if it is shown that the contamination in question was not the result of abatement actions (NAC 445A.22695).

- Recommendation #4
Section 9(1)(b)

Original language: “Conducting a visual inspection of any aboveground release or exposed underground release of the hazardous substance, hazardous waste or regulated substance and the prevention of any additional migration of the hazardous substance, hazardous waste or regulated substance into any surrounding soil or groundwater;”

Recommended language: "Conducting a visual inspection of any aboveground release or exposed underground release of the hazardous substance, hazardous waste or regulated substance and the prevention of any additional migration of the hazardous substance, hazardous waste or regulated substance into any surrounding soil, ~~[or]~~ groundwater *or surface water*;"

Reason for recommendation: The original language of the proposed regulation appears to eliminate threats to surface water from consideration when taking abatement actions. While the Division may rely on other authorities in other sections of Nevada Revised Statutes and Nevada Administrative Code to ensure that surface water is protected from a release, we believe that it is most efficient to explicitly require and allow consideration of surface water in the abatement sections of these corrective action regulations.

- Recommendation #5
Section 9(2)(a)

Original language: "Has an actual or imminent effect on groundwater; or"
Recommended language: "Has an actual or imminent effect on groundwater *or surface water*; or"

Reason for recommendation: Same as for Recommendation #4 above.

- Recommendation #6
Section 13(2)

Original language: "Except as otherwise provided in this subsection, if more than one action level for soil may be established using the criteria set forth in subsection 1, the most restrictive action level must be used. In no case may the action level be more restrictive than the background concentration of the hazardous substance, hazardous waste or regulated substance."

Recommended language: "Except as otherwise provided in this subsection, if more than one action level for soil may be established using the criteria set forth in subsection 1 *(b)*, the most restrictive action level must be used. In no case may the action level be more restrictive than the background concentration of the hazardous substance, hazardous waste or regulated substance."

Reason for recommendation: Eliminates an apparent ambiguity that would not allow an action level to be set that is less restrictive than the background concentration of a hazardous substance, hazardous waste or regulated substance.

- Recommendation #7
Section 14(2)(c)(2)

Original language: "A legal restriction or institutional control is in effect concerning the use of the groundwater based upon the depth of the groundwater, the presence

of a municipal system or the use of an environmental covenant accepted by the Division.”

Recommended language: “A legal restriction or institutional control is in effect concerning the use of the groundwater based upon the depth of the groundwater, the presence of a municipal system, ~~[or]~~ the use of an environmental covenant *or other controls* accepted by the Division.”

Reason for recommendation: The Division did not intend to limit consideration only to the three legal restriction or institutional controls expressly listed in this subsection. The listed restrictions and controls are just the most commonly identified restrictions that may be relied upon to satisfy the requirement in this subsection to demonstrate that a durable, effective control of groundwater use is in place.

- Recommendation #8
Section 15(1)

Original language: “After any corrective action required by NAC 445A.22725 involving the treatment of groundwater is begun, the owner or operator may terminate remediation of the release after submitting written documentation and receiving written concurrence from the Division if, in the following order of preference:”

Recommended language: “After any corrective action required by NAC 445A.22725 involving the treatment of groundwater is begun, the owner or operator may terminate remediation of the release after submitting written documentation and receiving written concurrence from the Division if~~[, in the following order of preference]~~:”

Reason for recommendation: The Division’s order of preference for the termination of a remediation system is 1) concentrations consistently meets action levels, 2) data matches the asymptotic portions of a concentration curve, and 3) another condition set forth in an approved plan of corrective action. The order of Subsections 15(1)(b) and 15(1)(c) were switched during drafting; however, the Division does not have concerns about the order of the conditions as listed, since the language of the subsections creates a natural hierarchy. To clarify that the order of the list does not dictate preference, we recommend striking that phrase.