

DER-2 / Making Changes to Selected Remedies

New York State Department of Environmental Conservation

DEC Program Policy

Issuing Authority: Val Washington

Title: Deputy Commissioner,
Office of Remediation & Materials Management

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I. Summary:

This program policy for the New York State Department of Environmental Conservation (DEC), Division of Environmental Remediation (DER), entitled “Making Changes to Selected Remedies,” defines the procedures to propose and document changes to remedies previously selected in a remedial decision document. This guidance is applicable to the Inactive Hazardous Waste Disposal Site Remedial Program (SSF), the Environmental Restoration Program (ERP), the Brownfield Cleanup Program (BCP), and the Voluntary Cleanup Program (VCP).

All changes to a remedy must be documented and all appropriate citizen participation activities must be conducted. The amount of documentation and level of citizen participation (CP) required increases proportionally with the degree of the changes from “minor” to “significant” to “fundamental.”

II. Policy:

When changes are required to selected remedies, they will be made and documented according to the procedures in this guidance document.

III. Purpose and Background:

Remedies are selected by issuance of the program-specific decision document (e.g., Record of Decision [ROD] for a SSF project) after completion of the appropriate CP activities. If, between the selection of the remedy and the completion of construction, DEC becomes aware of information¹ which substantially supports the need to change the remedy, the remedy may be changed following the procedures in this guidance.

The goals of this guidance are to promote consistency when considering and documenting changes to selected remedies and to ensure that citizens and other interested parties are provided opportunities to participate. This guidance is now expanded to include the DER remedial programs noted above, so that procedures are as consistent as possible across these programs. This guidance also helps to ensure consistency with the national contingency plan (NCP) such that cost recovery is not jeopardized.

¹ Information in the administrative record file or submitted during the public comment period may not necessarily justify a change to the remedy.

IV. Responsibility:

Responsibility for maintaining and interpreting this program policy lies with the Chief of the Training and Technical Support Section, Bureau of Technical Support (BTS), DER. Responsibility for implementing this program policy lies with DER remedial staff in both the Central and Regional Offices.

V. Procedure:

This guidance describes the procedures for DER staff to follow when considering and making changes to selected remedies. To the extent possible, changes to selected remedies will be handled similarly, regardless of the remedial program. Changes to selected remedies may be considered when significant new information comes to the attention of DER. Significant new information may come from a variety of sources, including comments of stakeholders, results of pre-design investigations, or data gathered during construction. Determining whether new information justifies a change to a selected remedy is a matter of professional judgment based on the criteria outlined below.

Three categories are considered when evaluating a change in remedy: scope, performance and cost. Significant new information relating to one or more of these categories is needed to justify a change to a remedy (e.g., cost alone can justify a change to a selected remedy). The degree of change (minor, significant, or fundamental) determines the procedures to be followed to document and approve a change to a remedy. The categories and degrees of change are defined in Table 1. Table 2 provides illustrative examples of changes.

Impact of 6 NYCRR Subpart 375-6: 6 NYCRR subpart 375-6, Remedial Program Soil Cleanup Objectives (SCOs), became effective on December 14, 2006. The promulgation of the SCOs in itself will not form the basis for a change to a selected remedy. However, a change in the site remedy may be considered if, in the context of all of the factors (inclusive of the subpart 375-6 SCOs) that constitute the basis for selecting a final remedy, additional controls and/or remediation are necessary for the final remedy to be protective of public health and the environment. Additionally, to the extent that a change to a selected remedy is based upon significant new information in one or more of the categories set forth in Table 1, the SCOs may be considered in the evaluation of appropriate changes to the selected remedy.

Table 1
Definitions of Terms

Change Categories	Scope	Scope includes factors such as physical area, depth, or volume involved, type of wastes, remedial technology, and exposure pathways.
	Performance	Performance addresses the ability to achieve remedial goals, discharge limits, short-term and long-term impacts/effectiveness, and overall protectiveness.
	Cost	Typically, cost takes into account the present worth of both capital and site management costs.
Degree of Change	Minor	Minor changes have little or no impact.
	Significant	Significant changes have an impact on an essential part of the remedy.
	Fundamental	Fundamental changes involve a new approach to the remedy or may add/subtract significant components of the remedy.

**Table 2
Types and Examples of Changes**

	Minor	Significant	Fundamental
Scope	Investigation during remedial design or a change in the applicable standards, criteria and guidance (SCG) values shows that 75,000 yd ³ of soil require treatment rather than the 60,000 yd ³ estimated in the ROD.	A ROD called for two nearby landfill cells to be combined into a single cell before installing the final cover. It was later found that the volume of waste was much greater than estimated. A decision is made that the cells should be closed separately.	During construction of a soil removal remedy, significant contamination under a building was discovered. The only feasible solution for the newly discovered contamination is determined to be in-situ soil vapor extraction using horizontal wells.
Performance	Excavation of soil contaminated with volatile organic compounds resulted in higher levels of emissions than expected. Since site perimeter action levels were not exceeded, higher on-site action levels are allowed along with increased engineering controls.	A soil vapor extraction system successfully remediated shallow soils, but, despite several years of operation and several modifications, it has been unable to achieve cleanup goals in deeper soils. Upon review, it was concluded that the remaining contamination would not present a significant threat and the site is protective of human health and the environment.	Investigation during remedial design or a change in the applicable SCGs shows that the in-situ chemical oxidation remedy selected in the ROD cannot meet the cleanup criteria. A decision is made to apply enhanced biological destruction, resulting in a longer active remediation period.
Cost	±1% to 20%	± 15% to 50%	± 25% to >50%
<p>Note: Examples are for illustration purposes only. Site-specific conditions can result in different conclusions for similar types of changes.</p>			

Minor Change

Minor changes are made to a remedy by documenting the basis for the change in the project file. Formal amendment of the decision document is not needed. Minor changes are proposed by the DER project manager (PM) based on the new information. The PM generates a memorandum through the corresponding supervisor to the Bureau Director (BD) that defines the change(s) and the basis for the change(s). The BD initials approval and the memo is placed into the project file. It is not necessary to issue a fact sheet for minor changes. Based upon public interest in the site, however, a fact sheet may be distributed to the site mailing list.

Significant Change

If the change is significant but not fundamental, DEC will issue an Explanation of Significant Difference (ESD), which is a notice that a change to the remedy has been made. Formal amendment of the decision document is not necessary because DEC is not reconsidering the overall remedy. The ESD

is placed in the document repository and a fact sheet is issued to the site mailing list. DEC may continue with the design, construction, or operation and maintenance of the remedy while the ESD is being prepared. A formal comment period or public meeting is not required. However, if there is significant public interest, a public meeting and comment period or availability session may be conducted. A boilerplate ESD format is available to staff.

Draft ESDs are prepared by the DER PM and routed through their supervisor and Bureau Director to the DER Division Director. The Division Director must approve all ESDs before they are released to the public. A concurrence letter from the New York State Department of Health (NYSDOH) is required before an ESD can be approved.

Fundamental Change

Fundamental changes to remedies require PMs to follow the same process and level of effort, in terms of citizen participation, documentation, and approvals, as the development of the original remedy.

DEC may consider amending a ROD if it receives significant new information which is not in the administrative record and which could not have been submitted during the public comment period. In the case of a fundamental change to a ROD, a ROD amendment, which is similar to a proposed remedial action plan (PRAP) and which discusses the proposed changes to the selected remedy, must be prepared and provided to the public for review and comment. Citizen participation activities relative to the ROD amendment are conducted in accordance with 6 NYCRR 375-2.10. A boilerplate amendment format is available to staff.

For sites that use a decision document other than a ROD, the ROD amendment format (modified to reflect the program-specific decision process) should be used to communicate information about the change to the public. If a public meeting was required in conjunction with the original remedy selection, a public meeting should be held for the amendment. Otherwise, a public meeting is not required and the text regarding the public meeting should be deleted. A responsiveness summary and revised decision document will be issued.

VI. Related References:

- “Documenting Post-ROD Changes: Minor Changes, Explanations of Significant Difference, and ROD Amendments”, (July 1999) EPA 540/R-98/031, OSWER 9200.1- 3P
- Commissioner's Organization and Delegation Memorandum 95-24; “Delegation: Administration of the Inactive Hazardous Waste Disposal Site Remediation Program,” dated September 12, 1995 (to be revised as a Delegation of Authority)
- National Contingency Plan; 40 CFR Parts 300.435 and 300.825; 55 FR 8666 - 8865, March 8, 1990; and Preamble pages 8771 - 8773
- CERCLA §117 [42 U.S.C. §9617]
- Site Priority Classifications - DEC Website, Environmental Site Database Search web page; <http://www.dec.ny.gov/chemical/8663.html>