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IDAPA 58
TITLE 01
Chapter 18

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. (3-13-97)

001. TITLE AND SCOPE.

01. Title and Scope. These rules shall be cited as Rules of the Idaho Department of Environmental Quality, IDAPA 58.01.18, "Idaho Land Remediation Rules," and shall be applicable to eligible persons who wish to enter into a voluntary remediation agreement with the state to minimize risk of harm to public health and the environment and to restore the economic viability of contaminated real property. (3-13-97)

02. Intent. The Idaho Land Remediation rules have been adopted with the purpose of fostering the remediation, transfer, reuse, or redevelopment of sites or groups of sites based on risk to human health and the environment where releases or threatened release of hazardous substances or petroleum exists. It is also the intent of these rules to establish a voluntary program for the remediation of hazardous substance or petroleum contaminated sites that will encourage innovation and cooperation between the state, local communities, and interested persons and will promote the economic revitalization of property. It is intended that this program will provide for an expedited remediation process by eliminating the need for many adversarial enforcement actions and delays in response action plan approvals. (3-13-97)

002. WRITTEN INTERPRETATIONS.

As described in Section 67-5201(19)(b)(iv), Idaho Code, the Department of Environmental Quality may have written statements which pertain to the interpretation of the rules of this chapter. If available, such written statements can be inspected and copied at cost at the Department of Environmental Quality, 1410 N. Hilton, Boise, Idaho 83706-1255. (3-13-97)

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". (3-15-02)

004. -- 009. (RESERVED).

010. DEFINITIONS AND ABBREVIATIONS.

For the purpose of the rules contained in IDAPA 58.01.18, the following definitions and abbreviations apply. (3-13-97)

01. Act. Idaho Land Remediation Act, Title 39, Chapter 72, Idaho Code. (3-13-97)

02. Applicant. A person who submits an application to participate in the voluntary remediation program under the Idaho Land Remediation Act, Title 39, Chapter 72, Idaho Code. (3-13-97)

03. Board. The Idaho Board of Environmental Quality. (3-13-97)

04. Department. The Idaho Department of Environmental Quality. (3-13-97)

05. Director. The Director of Idaho Department of Environmental Quality or his authorized agent. (3-13-97)

06. Hazardous Substance. Has the meaning set forth in Section 101(14) of the Comprehensive Environmental, Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601 (14), as amended. (3-13-97)

07. 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. (3-13-97)

08. Person. Any individual, association, partnership, firm, joint stock company, trust, estate, political subdivision, public or private corporation, state or federal governmental department, agency or instrumentality, or any other legal entity which is recognized by law as the subject of rights and duties. (3-13-97)

09. Petroleum. Includes petroleum asphalt and crude oil or any part of petroleum asphalt or crude oil that is liquid at standard conditions of temperature and pressure (sixty (60) degrees Fahrenheit and fourteen and seven-tenths (14.7) pounds per square inch absolute). (3-13-97)

10. Release. Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including the abandonment or discarding of barrels, containers, or other closed receptacles containing any hazardous substance or petroleum. (3-13-97)

11. Remediation. Remediation means any of the following: (3-13-97)

a. Actions necessary to prevent, minimize, or mitigate damages to the public health or welfare or to the environment, which may otherwise result from a release or threat of a release; or (3-13-97)

b. Actions consistent with a permanent remedy taken instead of, or in addition to, removal actions in the event of a release or threatened release of a hazardous substance or petroleum into the environment to eliminate the release of hazardous substances or petroleum so that the hazardous substances or petroleum do not migrate to cause substantial danger to present or future public health or welfare or the environment; or (3-13-97)

c. The cleanup or removal of released hazardous substances or petroleum from the environment. (3-13-97)

12. Site. A parcel of real estate for which an application has been submitted under Section 39-7204, Idaho Code. (3-13-97)

011. -- 019. (RESERVED).

020. APPLICATION TO PARTICIPATE.

01. Application Required. In order to participate in the voluntary remediation program as established by the Idaho Land Remediation Act and these rules, a person shall submit an application to the Department. (3-13-97)

02. Contents of Application. The application shall be on a form provided by the Department. The application shall include, or be accompanied by, the following: (3-13-97)

a. Identification of the applicant and the applicant's relationship to the site; (3-13-97)

b. Identification of the owner or operator of the site, if different than Subsection 020.02.a. of these rules; (3-13-97)

c. General information pertaining to the site, including the assessors's parcel number(s), site name, and location; (3-13-97)

d. An environmental assessment that conforms to ASTM Standard Practice E 1527, Environmental Site Assessments: Phase I Environmental Site Assessment Process, as amended, or equivalent; (3-13-97)

e. An application fee in the amount of two hundred and fifty dollars ($250); and (3-13-97)

f. Other background information as requested on the application form provided by the Department as necessary to determine eligibility to participate in the voluntary remediation program. (3-13-97)

03. Application Processing Procedure. (3-13-97)

a. Not more than thirty (30) days after receiving an application the Department shall determine if the applicant is eligible to participate in the voluntary remediation program and notify the applicant of the Department's decision. If the Department fails to comply with this subsection, the applicant shall be considered eligible for the purposes of these rules. (3-13-97)

b. As specifically set forth in the Department's application form, an application may be rejected for the reasons set forth in Section 39-7204(4), Idaho Code. (3-13-97)

c. Rejection of an application for any of the reasons set forth in Section 39-7204(4)(a), Idaho Code, or Section 39-7204(4)(b), Idaho Code, is a final agency action. (3-13-97)

021. VOLUNTARY REMEDIATION AGREEMENTS.

01. Negotiation Of Voluntary Remediation Agreement. If the Department accepts an application pursuant to Section 39-7204, Idaho Code, the applicant may enter into a voluntary remediation agreement with the Department. The Department shall not evaluate a voluntary remediation work plan until the voluntary remediation agreement is signed by the applicant and the Director. (3-13-97)

02. Contents Of Agreement. The voluntary remediation agreement shall include the following: (3-13-97)

a. A provision for the Department's oversight including access to site and pertinent site records; (3-13-97)

b. A timetable for the Department to do the following: (3-13-97)

i. Reasonably review and evaluate the adequacy of the work plan; (3-13-97)

ii. Make a determination concerning the approval or rejection of the work plan; (3-13-97)

iii. Identify, to the extent possible, permits or approvals required to initiate and complete a voluntary remediation work plan. (3-13-97)

c. A provision to modify the voluntary remediation agreement and voluntary remediation work plan based upon unanticipated site conditions; (3-13-97)

d. An estimation of costs the Department may incur associated with performing all of the tasks, duties and services related to the relevant application or voluntary remediation program activities, as specified in Subsection 021.04 of these rules; (3-13-97)

e. 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; (3-13-97)

f. A requirement that the applicant shall comply with any applicable zoning authorities or other local, state, or federal law, in implementing the voluntary remediation work plan; (3-13-97)

g. Any other conditions considered necessary by the Department or the applicant concerning the effective and efficient implementation of these rules. (3-13-97)

03. Reimbursement Of Costs Included In Agreement. (3-13-97)

a. The voluntary remediation agreement shall 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. (3-13-97)

b. Costs incurred by the Department for oversight of voluntary remediation actions will be reimbursed in the following manner, which shall be specified in the voluntary remediation agreement. (3-13-97)

i. The applicant shall deposit two thousand five hundred dollars ($2,500) with the Department. (3-13-97)

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. (3-13-97)

iii. Should funding be 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 required successive deposits in the amount of two thousand five hundred dollars ($2,500). (3-13-97)

04. Oversight Costs. Oversight costs shall include the following: (3-13-97)

a. The review, processing and negotiation of the voluntary remediation agreement; (3-13-97)

b. The review, processing and negotiation of the voluntary remediation work plan; (3-13-97)

c. Conducting public hearing and dissemination of public notices; (3-13-97)

d. Oversight of work performed in accordance with the voluntary remediation work plan; (3-13-97)

e. Issuance of the certificate of completion; (3-13-97)

f. Issuance of a covenant not to sue; (3-13-97)

g. Administrative expenses associated with cost recovery activities. (3-13-97)

05. Enforceability Of Agreement. Upon signing of the voluntary remediation agreement by the Department and the applicant, the voluntary remediation agreement shall constitute a contract between the Department and the applicant enforceable in accordance with its terms, subject to: (3-13-97)

a. The Department's right to rescind the voluntary remediation agreement as provided in Section 39-7208, Idaho Code; and (3-13-97)

b. The applicant's right to terminate the voluntary remediation agreement under Subsection 021.06 of these rules. (3-13-97)

06. Reasons For Which A Person May Terminate A Voluntary Remediation Agreement. An applicant may terminate the voluntary remediation agreement for any of the following reasons: (3-13-97)

a. The applicant decides to terminate the voluntary remediation agreement rather than submit additional or corrected information to the Department as provided in Section 39-7206(2)(b), Idaho Code; or (3-13-97)

b. The voluntary remediation work plan is modified or rejected as provided in Section 39-7206(5), Idaho Code. (3-13-97)

07. Effect Of Termination Of Agreement. The termination of a voluntary remediation agreement as provided in Section 39-7206, Idaho Code, shall 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. (3-13-97)

022. VOLUNTARY REMEDIATION WORK PLAN.

01. Submittal Of Proposed Voluntary Remediation Work Plan. An applicant whose application has been accepted by the Department may submit a proposed voluntary remediation work plan to the Department. The Department will evaluate the work plan according to the terms and conditions of a voluntary remediation agreement signed by the Department and the applicant. (3-13-97)

02. Contents Of Voluntary Remediation Work Plan. The voluntary remediation work plan shall include the following: (3-13-97)

a. The current and reasonably anticipated future use of on-site ground and surface water; (3-13-97)

b. The current and reasonably anticipated future uses of the site and immediately adjacent properties; (3-13-97)

c. If a risk-based concentration is proposed as a remediation standard, the voluntary remediation work plan shall 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; (3-13-97)

d. Proposed remediation standards developed in accordance with Section 023 of these rules; (3-13-97)

e. A proposed statement of work; (3-13-97)

f. A schedule to accomplish the proposed statement of work. (3-13-97)

03. Information Supporting The Voluntary Remediation Work Plan. Sufficient information to support the voluntary remediation work plan shall be submitted and may include the following: (3-13-97)

a. Site assessment information including: (3-13-97)

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; (3-13-97)

ii. The physical characteristics of site facilities and contiguous areas, including the location of any surface water bodies and ground water aquifers; (3-13-97)

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; (3-13-97)

iv. The operational history of the facility, including ownership, and the current use of the facility; (3-13-97)

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; (3-13-97)

vi. A site investigation sampling and analysis plan, and quality assurance project plan; (3-13-97)

vii. Any sampling results or other data that characterizes the soil, air, ground water, surface water, or sediments on the site; and (3-13-97)

viii. Available information on the environmental regulatory and compliance history of the site, including all applicable environmental permits. (3-13-97)

b. Risk evaluation information including: (3-13-97)

i. An evaluation of the data collected during the site investigation including identification of chemicals of potential concern; (3-13-97)

ii. An exposure assessment of all potential pathways of exposure; (3-13-97)

iii. A toxicity assessment estimating the toxicity of both carcinogens and non-carcinogens; (3-13-97)

iv. Identify site conditions which may affect or limit migration of the contamination; and (3-13-97)

v. A risk characterization that evaluates the uncertainties associated with the site investigation, the likelihood of exposures, and the toxicity of the contaminants. (3-13-97)

04. Review And Evaluation Of Work Plan. The Department shall review and evaluate the voluntary remediation 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 voluntary remediation agreement. (3-13-97)

a. For purposes of determining whether to hold a public hearing in accordance with Section 39-7206, Idaho Code, the Department will consider the following a significant number of requests for a public hearing: (3-13-97)

i. Twenty-five (25) written requests from potentially affected persons; or (3-13-97)

ii. One (1) or more written requests from an organization representing twenty-five (25) or more potentially affected members. (3-13-97)

b. The Department shall provide for a public comment period of at least thirty (30) days following publication of a public notice under Section 39-7206(3)(d), Idaho Code. (3-13-97)

c. Pursuant to Section 39-7206, Idaho Code, the Department may approve, modify and approve, or reject a voluntary remediation work plan. (3-13-97)

d. The Department may reject or approve with modification any voluntary remediation work plan that does not achieve the remediation standards developed and approved by the Department pursuant to Section 023 of these rules. (3-13-97)

e. If the Department rejects a voluntary remediation work plan, the Department shall: (3-13-97)

i. Notify the applicant and specify the reasons for rejection; (3-13-97)

ii. Provide the applicant an opportunity according to the schedule in the voluntary remediation agreement to amend the work plan; and (3-13-97)

iii. The applicant may appeal the Department's decision to reject the work plan as provided in Section 39-7206, Idaho Code. (3-13-97)

f. If an applicant determines not to amend a rejected work plan to the satisfaction of the Department, the voluntary remediation agreement shall be terminated as provided in Subsection 021.06 of these rules. (3-13-97)

05. Modification To An Approved Voluntary Remediation Work Plan That Requires Additional Public Notice And Comment. After the close of the public comment period and the Department's approval of the voluntary remediation work plan, situations may arise that result in modification of an approved voluntary remediation work plan. Depending upon the significance of the modification, another opportunity for public notice and comment may be appropriate. (3-13-97)

a. The Department need not provide for an additional public notice and comment period if the proposed modifications to the voluntary remediation work plan are limited to minor changes. A minor change to the voluntary remediation work plan is a change that does not fundamentally alter the overall remedial approach. (3-13-97)

b. The Department shall provide for an additional public notice and comment period if the proposed modifications to the voluntary remediation work plan are fundamental. A fundamental change is a change that requires reconsideration of the remediation proposed in the approved voluntary remediation work plan. (3-13-97)

023. REMEDIATION STANDARDS.

01. Voluntary Remediation Work Plan Must Achieve Health-Based And Environmental Remediation Standards. All hazardous substance or petroleum concentrations in media which exceed the health-based and environmental remediation standards shall be addressed through appropriate remediation and in accordance with the appropriate technical standards based upon the following: (3-13-97)

a. Site characteristics; (3-13-97)

b. Hazardous substances or petroleum; and (3-13-97)

c. Technical guidance approved by the Department. (3-13-97)

02. Establishment Of Remediation Standards. The remediation standards utilized in these rules shall be 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. An applicant who submits a voluntary remediation work plan for approval by the Department shall select and attain compliance with one (1) or more of the following remediation standards when implementing a voluntary remediation work plan: (3-13-97)

a. 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 shall be conducted through the application of statistical tests specified in a voluntary remediation work plan. (3-13-97)

b. 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. (3-13-97)

c. Risk-based concentrations calculated for the hazardous substance or petroleum using site-specific risk assessment procedures. (3-13-97)

d. An applicant may use a combination of standards from Subsections 023.02.a. through 023.02.c. to implement a voluntary remediation work plan. (3-13-97)

024. IMPLEMENTATION OF VOLUNTARY REMEDIATION WORK PLAN.

01. Implementation. An approved voluntary remediation work plan shall be fully implemented by the applicant according to the terms and conditions of the voluntary remediation agreement, these rules and the Idaho Land Remediation Act. (3-13-97)

02. Permits Or Approvals Necessary For Implementation. The Department shall assist in the timely issuance of Department permits or approvals required to initiate and complete a voluntary remediation work plan. (3-13-97)

03. Progress Reports. An applicant implementing a voluntary remediation work plan shall submit periodic progress reports to the Department according to the terms and conditions of the voluntary remediation agreement. (3-13-97)

04. Voluntary Remediation Work Plan Completion Report. When the applicant believes the objectives of the voluntary remediation work plan have been achieved and successfully implemented, the applicant shall submit to the Department a voluntary remediation work plan completion report together with a request that the Department issue a certificate of completion. (3-13-97)

a. The voluntary remediation work plan completion report shall contain information sufficient for the Department to determine whether the voluntary remediation work plan objectives were achieved and the voluntary remediation work plan was successfully implemented. (3-13-97)

b. The Department shall, within thirty (30) days of the receipt of a voluntary remediation work plan completion report and a request for a certificate of completion, notify the applicant whether the voluntary remediation work plan has been successfully implemented. (3-13-97)

c. If the Department notifies the applicant that the voluntary remediation work plan has not been successfully implemented, the applicant shall do the following: (3-13-97)

i. Implement the voluntary remediation work plan to the satisfaction of the Department; and (3-13-97)

ii. Resubmit the voluntary remediation work plan completion report. (3-13-97)

d. If a voluntary remediation work plan completion report demonstrates that the voluntary remediation work plan has been successfully implemented, the Department shall certify such facts by issuing the applicant a certificate of completion. The applicant shall record the certificate of completion with the deed for the site on which the remediation took place. (3-13-97)

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. (3-13-97)

f. Decisions by the Department involving the voluntary remediation work plan completion reports required under this section are considered final agency actions. (3-13-97)

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 voluntary remediation work plan. (3-13-97)

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. The Department shall also notify the county in which the site exists of rescission of the covenant not to sue for purposes of determining ad valorem exemptions provided under Section 63-105II, Idaho Code. (3-13-97)

03. Continuing Compliance. During the implementation of an approved voluntary remediation work plan, the Department shall not bring an action, including an administrative or judicial action for any liability for remediation relating to the release or threatened release of a hazardous substance or petroleum that is the subject of the voluntary remediation work plan, against a person who entered into a voluntary remediation agreement and who is implementing the voluntary remediation work plan in accordance with such agreement implementing the voluntary remediation work plan. (3-13-97)

026. LENDER LIABILITY.

01. General Statement. Pursuant to Section 39-7209, Idaho Code, a person who maintains indicia of ownership primarily to protect a security interest in a site, as defined in Subsection 010.12 of these rules, and who does not participate in the management of the site, shall not be considered an owner or operator of that site, nor liable under any pollution control or other environmental protection law, rule or regulation, or otherwise responsible for any environmental contamination or response activity costs consistent with United States environmental protection agency policy, 60 Federal Register 63517, dated December 11, 1995, as amended. This Section 026 sets out the rules of the Board regarding lender liability pursuant to Sections 39-7209 and 39-7210(6), Idaho Code. (3-13-97)

02. Definitions And Operative Provisions. (3-13-97)

a. "Indicia of ownership" means evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title or deed to real or personal property acquired through or incident to foreclosure or its equivalents. Evidence of such interests include, but are not limited to, mortgages, deeds of trust, liens, surety bonds and guaranties of obligations, title held pursuant to a lease financing transaction in which the lessor does not select initially the leased property (hereinafter "lease financing transaction"), legal or equitable title obtained pursuant to foreclosure, and their equivalents. Evidence of such interests also includes assignments, pledges or other rights to or other forms of encumbrance against property that are held primarily to protect a security interest. A person is not required to hold title or a security interest in order to maintain indicia of ownership. (3-13-97)

i. A "holder" is a person who maintains indicia of ownership primarily to protect a security interest in a site. A holder includes the initial holder (such as a loan originator); any subsequent holder (such as a successor-in- interest or subsequent purchaser of the security interest on the secondary market); a guarantor of an obligation, surety, or any person who holds ownership indicia primarily to protect a security interest; or a receiver or other person who acts on behalf or for the benefit of a holder. (3-13-97)

ii. A "borrower," "debtor," or "obligor" is a person who owns, leases, occupies or operates a site encumbered by a security interest. (3-13-97)

b. "Primarily to protect a security interest" means that the holder's indicia of ownership are held primarily for the purpose of securing payment or performance of an obligation. (3-13-97)

i. "Security interest" means an interest in a site, created or established for the purpose of securing a loan or other obligation. Security interests include, but are not limited to, mortgages, deeds of trust, liens, security interests under Article 9 of the Uniform Commercial Code, and title pursuant to lease financing transactions. (3-13-97)

ii. "Primarily to protect a security interest" does not include indicia of ownership held primarily for investment purposes, nor ownership indicia held primarily for purposes other than as protection for a security interest. A holder may have other, secondary reasons for maintaining indicia of ownership, but the primary reason why any ownership indicia are held must be as protection for a security interest. (3-13-97)

c. Participation in management defined. The term "participating in the management of a site" means that the holder is engaging in acts of site management, as defined herein. (3-13-97)

i. Actions that are participation in management. Participating in the management of a site means actual participation by the holder in the management or operational affairs of the site by the holder, and does not include the mere capacity or ability to influence, or the unexercised right to control, site operations. A holder is participating in management, while the borrower is still in possession of the site encumbered by the security interest, only if the holder either: (3-13-97)

(1) Exercises decision making control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance or petroleum handling or disposal practices; or (3-13-97)

(2) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise with respect to (1) environmental compliance or (2) all, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. (3-13-97)

ii. Actions that are not participation in management. (3-13-97)

(1) Actions at the inception of the loan or other transaction. No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management. A prospective holder who undertakes or requires an environmental inspection of the site or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the site's management. Neither Section 39-7209, Idaho Code, or these rules require a holder to conduct or require an inspection to qualify for the exemption, and the liability of a holder cannot be based on or affected by the holder not conducting or not requiring an inspection. (3-13-97)

(2) Loan policing and workout. Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and workout activities cover and include all activities up to foreclosure and its equivalents. (3-13-97)

(a) Policing the security interest or loan. A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not by such actions participate in the management of the site. Such actions include, but are not limited to, requiring the borrower to clean up the site during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state and local environmental and other laws, rules and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the site (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations or promises from the borrower). (3-13-97)

(b) Policing activities also include any activities taken by the holder to require a borrower to comply with a voluntary remediation work plan, or by agreement with the Department, to complete a voluntary remediation work plan, provided that the holder does not otherwise participate in the management of the site. (3-13-97)

(c) Loan workout. A holder who engages in workout activities prior to foreclosure and its equivalents will remain within the exemption provided that the holder does not by such action participate in the management of the site. For purposes of this rule, "workout" refers to those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure or mitigate a default by the borrower or obligor, or to preserve, or prevent the diminution of, the value of the security. (3-13-97)

d. Foreclosure on a site and post-foreclosure activities. (3-13-97)

i. Foreclosure. Indicia of ownership that are held primarily to protect a security interest include legal or equitable title or deed to real or personal property acquired through or incident to foreclosure and its equivalents. "Foreclosure and its equivalents" includes purchase at foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a lease or other repossession; acquisition to a right to title or possession; an agreement in satisfaction of the obligation; or any other formal or informal manner (whether pursuant to law or under warranties, covenants, conditions, representations or promises from the borrower) by which the holder acquires title to or possession of the secured property. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest, provided that the holder undertakes to sell, re-lease or otherwise divest itself of the site, in a reasonably expeditious manner, using whatever commercially-reasonable means are relevant or appropriate with respect to the site, taking all facts and circumstances into consideration, and provided that the holder did not participate in management prior to foreclosure. (3-13-97)

ii. Holding foreclosed property for disposition and liquidation. A holder, who did not participate in management prior to foreclosure and its equivalents, may sell, re-lease, liquidate, maintain business activities, wind up operations, undertake any response action under federal, state or local environmental laws, rules or regulations, undertake completion of an approved voluntary remediation work plan by agreement with the Department, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition, without voiding the exemption provided by Section 39-7209, Idaho Code, and these rules. (3-13-97)

027. INSTITUTIONAL CONTROLS.

01. Purpose. (3-13-97)

a. Institutional controls may be proposed by the applicant or the Department as an element of the voluntary remediation 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: (3-13-97)

b. Where a cleanup action results in residual concentrations of hazardous substances or petroleum which exceed risk-based health standards; or (3-13-97)

c. When the Department determines such controls are required to assure the continued protection of human health and the environment or the integrity of the cleanup action. (3-13-97)

02. Prohibition Of Use. Institutional controls should not be used as a substitute for cleanup actions that would otherwise be technically possible. (3-13-97)

03. Institutional Controls. For the purposes of this section, institutional controls may include: (3-13-97)

a. Physical measures, such as fences and signs, to limit activities that may interfere with the cleanup action or result in exposure to hazardous substances at the site; and (3-13-97)

b. Legal and administrative controls, such as zoning restrictions, restrictive covenants, or equitable servitudes used to ensure such measures are maintained. (3-13-97)

04. Legal Use Restrictions. Institutional controls may be described in an equitable servitude, restrictive covenant, or similar legal mechanism executed by the property owner and recorded in the county in which the site is located. The use of such legal use restrictions may be addressed in the voluntary remediation agreement, the certificate of completion, or the covenant not to sue. (3-13-97)

05. Legal Use Restriction Requirements. Where appropriate, the legal use restriction requirement should: (3-13-97)

a. Prohibit activities on the site that may interfere with a cleanup action, operation and maintenance, monitoring, or other measures necessary to assure the integrity of the cleanup action and continued protection of human health and the environment; (3-13-97)

b. Prohibit activities that may result in the release of a hazardous substance or petroleum which was contained as a part of the remediation; (3-13-97)

c. Require notice to the Department of the owner's intent to convey any interest in the site. Conveyance of title, easement, lease, or other interest in the property may be conditioned upon easement, lease, or other interest in the property for the continued operation, maintenance and monitoring of the cleanup action, and for continued compliance with this subsection; (3-13-97)

d. Require notice and approval by the Department of any proposal to use the site in a manner which is inconsistent with the legal use restriction. (3-13-97)

e. Grant the Department and its designated representatives the right to enter the property at reasonable times for the purpose of evaluating compliance with the voluntary remediation work plan and other required plans, including the right to take samples, inspect any remedial actions taken at the site, and to inspect records. (3-13-97)

f. Contain other restrictions appropriate under the circumstances. (3-13-97)

06. Compliance With Other Laws. It shall be the applicant's responsibility to comply with any applicable zoning authorities or other local, state, or federal law, in implementing the voluntary remediation work plan. (3-13-97)

07. 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. (3-13-97)

08. Removal Of Restrictions. If the residual hazardous substances or petroleum remaining at the site are subsequently reduced in concentration such that risk-based health standards are met, then the owner may request the restrictive covenant or other restrictions be voided. The restrictive covenant or other restrictions may be removed, if the Department, after public notice and opportunity for comment, concurs. (3-13-97)

028. -- 999. (RESERVED).