

# Georgia Department of Natural Resources

2 Martin Luther King, Jr. Drive, S.E., Suite 1462, Atlanta, Georgia 30334-9000

Lonice C. Barrett, Commissioner

Environmental Protection Division

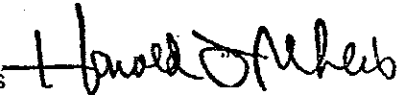
Harold F. Reheis, Director

404/657-8600

April 30, 2003

## MEMORANDUM

TO: Hazardous Site Response Act Facilitated Dialogue Group and persons commenting on proposed amendments to Georgia's Rules for Hazardous Site Response, Chapter 391-3-19, public comment period ending April 4, 2003

FROM: Harold Reheis   
Director  
Georgia Environmental Protection Division

RE: Response to public comment and notice of proposed amendments

---

Enclosed you will find EPD's response to public comments that were received in response to the above referenced notice of proposed amendments.

Because more time is needed to study substantial comment received regarding proposed changes to Rule 391-3-19 - .06(3)(b)(2) relating to the delineation of soil contamination, EPD has decided not to move forward with those changes at this time. However, in an effort to implement the other changes that were recommended by the HSRA Facilitated Dialogue Group, EPD is reissuing the remaining proposed rules changes for a second public comment period. Enclosed is a copy of the public notice announcing the public comment period and a copy of the proposed rules. You will note that the changes originally proposed to Rule 391-3-19 - .06(3)(b)(2) have been struck in their entirety. No other changes have been made to the proposed Rules at this time.

If you have any questions, please call Jane Hendricks or Tim Cash of the Hazardous Sites Response Program at 404-657-8600.

**EPD Response to Public Comment  
Proposed Amendments to  
Georgia's Rules for Hazardous Site Response  
Chapter 391-3-19  
Public Comment Period ending April 4, 2003**

**Commenters**

**Edward A. Kazmarek, McKenna Long & Aldridge  
Charles Hood, Georgia Pacific Corporation  
Christine Morgan, Hunton & Williams  
John Johnson, Troutman Sanders, representing Georgia Power Company  
Gregory Blount, Troutman Sanders, representing Association of Georgia's  
Textile, Carpet, and  
Consumers Products Manufacturers  
Richard Horder, Kilpatrick Stockton  
Charles Tisdale, King & Spalding, representing HSRA dialogue clients  
Patricia Barmeyer, King & Spalding, representing Honeywell, Inc.  
Randall Quintrell for John Poole, Georgia Pulp and Paper Association, Inc.  
Joan Sasine, Powell Goldstein Frazier & Murphy  
Jeffery Knight, Shaw Pittman  
Katie Kirkpatrick and Darahyl Dennis, Georgia Industry Environment Coalition**

**Comment:** These commenters claim that the last two sentences in the proposed changes to Rule 391-3-19 -.06(3)(b)(2) dealing with delineating the extent of contaminated soil will result in an improper intrusion by the Board of Natural Resources into Georgia tort law because plaintiffs in civil litigation could argue that a nuisance or trespass action for injury resulting from contamination may be maintained even when the contamination is below levels deemed safe by the Board. They request that the last two sentences be struck.

**Response:** Taken as a whole, the proposed change to Rule 391-3-19 -.06(3)(b)(2) represents a consensus recommendation by the facilitated dialogue group. Without the last two sentences, this proposed rules change would not have been advanced as a consensus item and issued for public comment. Because additional time is needed to study and respond to the commenters' concerns, EPD is withdrawing the proposed changes to Rule 391-3-19 -.06(3)(b)(2) in their entirety for further study.

**Commenter**

**Jeffery A. Knight, Shaw Pittman representing Emerson Electric**

**Comment:** EPD "interprets" the current rules to require delineation to background which results in significant costs with no commensurate gain in protecting human health and the environment and that the majority of other states do not require this.

**Response:** The rules adopted by the Board *require* delineation to background; it is not simply EPD's *interpretation* of the Board's rules. EPD cannot agree with Mr. Knight's characterization that requiring delineation to background is an unnecessary cost that has no benefit and that most other states do not require the same since Mr. Knight failed to provide EPD with any data to support his claims and since delineation is necessary to ensure that all threats posed by the site have been adequately characterized.

**Comment:** The on-site burial of contaminated soil to achieve compliance with the Type 1- 4 cleanup standards should not be prohibited by the proposed rule change.

**Response:** The Type 1- 4 standards require removal or treatment of all source material and contaminated soil and prohibits contaminated soil from simply being covered over if it can be removed or treated. EPD is not proposing that this requirement be changed. The Type 5 standard allows the use of engineered caps and other devices to contain, stabilize or control exposure to wastes if compliance with the Type 1- 4 standards is not appropriate.

**Commenter**

**Mitch Lawson, Coosa River Basin Initiative**

**Comment:** The comment period should be extended one month.

**Response:** Because of significant changes to the proposed rules, they are being reissued for a second public comment period.

**Comment:** No rules changes should be adopted that would weaken standards for groundwater and soil cleanup.

**Response:** EPD does not believe that the proposed rules changes will weaken state cleanup requirements.

**Comment:** Exposure area averaging for soil should not be used because of the difficulty and expense of using it, the potential for abuse, and because its not very useful in determining if a site meets cleanup standards.

**Response:** Because of similar concerns expressed by dialogue group members, the use of exposure area averaging will be limited only to Type 5 cleanup sites where cleanup to the Type 1- 4 standards is not appropriate.

**Comment:** Parties responsible for contaminated sites should be required to pay for any increased costs associated with rules changes.

**Response:** A consensus recommendation of the dialogue group was that responsible parties seeking Type 5 cleanup should provide supplementary funding to EPD to offset review costs. This supplementary funding will require statutory authority to be implemented. To that end, in its response to the final report of the dialogue group, EPD proposed to initiate discussions during 2003 with legislative leadership and potential fee payers to develop a legislative package in support of this statutory authority. These discussions will focus on the amount of the fee to be assessed on parties seeking new and more flexible groundwater and area averaging provisions EPD will propose to make available in connection with Type 5 actions, the appropriation of that fee to support EPD staffing, and other related matters. EPD proposes to seek passage of that legislation by the 2004 General Assembly.

**Commenter**

**Jennifer Giegerich, Georgia Public Interest Research Group**

**Comment:** Ms Giegerich expressed concern about the proposed rules change creating a Type 5 cleanup standard for groundwater and added that the state should do everything it can to restore water quality and prevent future problems caused by leaving contaminated groundwater.

**Response:** The proposed Type 5 cleanup standard for groundwater could only be used when removing or treating groundwater to the Type 1- 4 cleanup standards cannot be accomplished. Even though contamination could be left in place, it would not be allowed to migrate and potential exposure to the release would have to be eliminated through engineering and institutional controls. If the source of the contamination is also left in place, the responsible parties would be required to remove and treat the groundwater at the source of contamination. EPD believes that the proposed rules changes will be protective while at the same time recognizing the possibility that bringing all contaminated groundwater into compliance with the Type 1- 4 cleanup standards may not be practicable.

**Commenter**

**Winston Smith, Director, Waste Management Division, Region IV, United States Environmental Protection Agency (EPA)**

**Comment:** The Director should not have the *discretion* as to whether a site should be reclassified from Class V to Class I, but instead should be *required* to reclassify Class V sites a Class I if a site is not in compliance with its approved corrective action plan because the first part of the paragraph containing this proposed rule changes requires

that sites shall be reclassified as Class I if they are found not to be in compliance with the cleanup standards.

**Response:** This paragraph deals with reclassifying two different types of sites from their current classification to Class I: those that are not in compliance that *are not* performing corrective action, and those that are not in compliance that *are* performing corrective action. Sites that are not in compliance with the cleanup standards and not performing corrective action are some of EPD's highest priorities for enforcement action or cleanup and should be Class I. Class V sites are sites that have already been found not to be in compliance with the cleanup standards, and have already been designated Class I, but are redesignated as Class V when they are cleaning up under an EPD-approved corrective action plan. This change was made to destigmatize sites that are getting their sites cleaned up. If the responsible parties are not complying with their corrective action plan, then EPD should have the authority to reclassify them as Class I, but have the discretion to postpone, delay, or even forgo such a decision if circumstances warrant, particularly when non-compliance with the corrective action plan might result from non-substantive issues. Because of the need to have flexibility in administering this requirement, EPD does not believe that a change to the proposed rule change is needed.

**Comment:** The Director should not rely on a responsible party's certification alone that they are performing corrective action in accordance with a corrective action plan that will bring the site into compliance; the Director should make this determination independently.

**Response:** This proposed rule change does not say what EPA has interpreted it to say. It says that if the responsible party admits they are not in compliance with any of the cleanup standards, and the Director has approved a corrective action plan that will bring the site into compliance, then the site may be redesignated as a Class V. The responsible party is not certifying that they are in compliance with the approved corrective action plan; they are certifying that they do not meet any of the cleanup standards. The Director approves the corrective action thereby independently making the determination that the corrective action will bring the site into compliance.

**Comment:** The state, not the responsible party, should make the final decision as whether Type 1-4 standards are appropriate.

**Response:** EPD does make the final decision as to whether Type 1-4 standards are appropriate. The rules also require the horizontal and vertical delineation of all source, soil, and groundwater to background concentrations.