

Guidance Number VRP 02-2001

Guidance for the Voluntary Remediation Program Certification of Satisfactory Completion of Remediation

Background and Purpose

Upon successful completion of the Voluntary Remediation Program (VRP) (9 VAC 20-160-100(A)(1)), a Certification of Satisfactory Completion of Remediation (Certificate) is issued by the Director of the Department of Environmental Quality (9 VAC 20-160-110). The Certificate grants immunity to the participant, owner, and future owners of the site for enforcement actions under state law. The immunity is limited to the site conditions at the time of issuance of the Certificate, which are described in the Voluntary Remediation Report (Report), and it is conditional upon completeness and accuracy of the information in the Report.

The purpose of this Guidance is to aid VRP participants and Department of Environmental Quality (Department) staff in developing Certificates for each site. The following procedure provides directions for drafting a Certificate. A model Certificate has been developed to facilitate the process and is attached to this Guidance.

Authority

Va. Code ' 10.1-1429.1A

Va. Code ' 9-6.14:1, *et seq.*

9 Virginia Administrative Code (VAC) 20-160-110

Procedure for Issuing a Certification of Satisfactory Remediation

When a voluntary cleanup achieves the applicable remediation levels or when the Department determines that no further action is required at a site the Director will issue a Certificate based on current conditions and available information. A model Certificate is found at the end of this Guidance. The standard format of the model Certificate is to be followed for all sites. There are prompts provided for the participant to fill in relevant site information on the front page and in the “Conditions of Issuance,” “Other Encumbrances on Site,” and “Discussion of Relevant Information” sections. The other sections of the Certificate, “Authority,” “Determination,” and “Reservation of Rights,” include language that has been previously approved by counsel. Any deviation from this language, except where site specific information is requested, may destroy the effectiveness of the document.

On the first page of the Certificate, the participant should enter site information in the spaces provided. The current owner of the site’s name should be inserted in the “Grantor” and “Grantee” spaces at the top of the first page. This information directs the circuit court clerk to

record the completed Certificate in both the grantor index and the grantee index under the owner's name. If the VRP site covers only a specific portion of a facility and not the whole facility, the participant and the Department must agree on what the site boundaries are. For example, a facility may encompass many acres, but the VRP site may be limited to a specific production area. The "Description of Property" section must then clearly define those site boundaries through a surveyed metes and bounds description and the attached plat must clearly reflect the site.

Declaration of Restrictive Covenants

If land use restrictions are specified in the Certificate, they must be included in a Declaration of Restrictive Covenants (Declaration) and attached to the Certificate. The Declaration is a legally binding document that is recorded with the deed of a site to restrict the use of the site. The current owner and all future owners of the site will be obligated to comply with the recorded land use restrictions. Examples of land use restrictions include but are not limited to prohibiting the use of groundwater at a site and prohibiting a site from being used for residential purposes.

A sample Declaration is included with the model Certificate at the end of this Guidance. Please note that a metes and bounds description of the site must be included in the Declaration along with the attached plat to clearly identify the site. All land use restrictions must also be listed in the Certificate under the "Conditions of Issuance" section and explained within the "Discussion of Relevant Information" section. The participant and current owner must sign both the Certificate and the Declaration.

Encumbrances

Any party with property interests in the site that are affected by the land use restrictions must be listed on the Certificate under the "Other Encumbrances on Site" section of the Certificate and sign the Declaration. Encumbrances are legal claims against a property, held by a party other than the current owner, such as a mortgage, site access, site use, or right-of-way easements. It is critical that a qualified individual thoroughly research a site to identify all existing encumbrances. An undisclosed encumbrance that is affected by any land use restriction proposed in the Certificate, could render the certificate invalid. Encumbrances may include, but are not limited to, utility easements for buried or overhead power lines, and water and sewer easements for pipelines and drainage ditches.

As an example, if a participant wants to prohibit excavation in an area because soil contamination exceeds risk based levels for direct contact, and a utility easement for buried cable exists beneath that area, the encumbrance (easement) must be listed under the "Other Encumbrances on Site." The easement holder must sign the Declaration because his right to excavate has been restricted. The easement holder's signature on the Declaration constitutes acknowledgment and concurrence with the land use restriction.

If there is a deed of trust on the property, the mortgage holder must also be identified and listed under the “Other Encumbrances on Site” section of the Certificate. Because of their legal rights to the site, the mortgage holder must be notified and agree to the restrictions on site use. The mortgage holder’s property interests in the value and use of the property may be affected by the land use restrictions. The mortgage holder must therefore also sign the Declaration.

Recordation

After all of the appropriate parties have signed the Declaration it must be attached to the deed and recorded with the land records in the office of the clerk of the circuit court for the jurisdiction in which the site is located within 90 days. The participant must also record either an explanation for the land use restrictions or the signed Certificate together with the Declaration. If the participant desires to record an explanation of the land use restrictions, prior approval of the explanation must be attained from the Director. Recording of the Certificate is preferred because it contains pertinent information about the site, the VRP process, and includes the “Discussion of Relevant Information” section with details of the site’s land use restrictions. A certified copy of the Certificate as recorded must be submitted to the Department to verify that the certificate was recorded.

If no use restrictions are imposed on a site, the participant is not required to record the Certificate. The immunity accorded by the Certificate applies not only to the participant and current owner of the site but also to future site owners and their successors-in-interest. Because the immunity runs with the land, it may be useful for the participant to record the Certificate to benefit future owners. Unless new issues are discovered, the Certificate provides assurance that the remediated site will not later become the subject of an enforcement action under state law.

The attached model Certificate represents the standard format and language to be used for all sites in the Virginia Voluntary Remediation Program. The format and the language have been reviewed and approved by the Virginia Attorney General’s Office. No site owner, participant, or Department staff should expect any deviation from the model. Should unique circumstances exist, the project manager must obtain written approval from the Director of Waste Division for deviations from the model. This must occur at the initiation or early stages of Certificate preparation.

Further Information, Limitation of Guidance; Revisions

A general description of the VRP can be found on the Department’s Website, <http://www.deq.state.va.us>, under **Waste Programs**. Contacts at the Regional Offices are identified at the same Website, under **Regional Offices**.

This guidance document is intended for the use of the public, applicants for, and participants in the VRP, and Department staff. It creates no rights, legal or equitable, in any person, and is

Certification of Satisfactory Completion of Remediation Guidance
Page 4 of 4

subject to change without notice as circumstances may require. This Guidance document is intended to help minimize delay and expense in remediation, while continuing to protect human health and the environment. Any suggestions or questions should be sent to:

Virginia Voluntary Remediation Program
Virginia Department of Environmental Quality
P.O. Box 10009
Richmond, VA 23240

Suggestions or questions concerning this Guidance can also be sent by e-mail to Kevin L. Greene, VRP Program Manager, at klgreene@deq.state.va.us.

Approved: _____(date)

By Karen J. Sismour, Director
Waste Division

Attachments:

Attachment 1: Model Certificate