

Response Action/Operation and Maintenance Failure

Effective Date: June 3, 1999

Prior to issuance of a Conditional Certificate of Completion (CCOC), the project manager's approval should be based on complete and adequate investigation data and the placement of institutional and/or engineering controls which will effectively protect human health and the environment. However, in spite of the best intentions by both the applicant and the Texas Commission on Environmental Quality, remedies sometimes fail after CCOC issuance. Therefore, an important issue which must be decided in determining the adequacy of a response action prior to CCOC issuance, is the consideration of the implications of its failure and the actions planned to correct a possible future failure. The purpose of this policy is to define response action failure and operation and maintenance failure, describe the persons or entities responsible for correcting response action and/or operation and maintenance failure and the VCP project managers' responsibilities, once response action and/or operation and maintenance failure has been identified.

STATUTORY/REGULATORY BASIS

In researching the VCP law and the rule and its preamble, the issue of response action failure at a VCP site is only indirectly addressed. The following bolded and underlined phrases from these sources form the decision-making basis regarding response action failure:

Texas Health and Safety Code §361.609(c):

If the executive director determines that **the person has not successfully completed a voluntary cleanup** approved under this subchapter, the executive director shall **notify the person who undertook the voluntary cleanup and the current owner of the site** that is the subject of the cleanup of this determination. §361.610(b):

A person who is not a responsible party under §361.271 or §361.275(g) at the time the commission issues a certificate of completion under §361.609 **is released, on issuance of the certificate**, from all liability to the state for cleanup of areas of the site covered by the certificate, **except for releases and consequences that the person causes.**

§361.610(c):

The release from liability provided by this section **does not apply to a person who:**

(1) **acquires a certificate of completion by fraud, misrepresentation, or knowing failure to disclose material information;**

(2) **knows at the time the person acquires an interest in the site** for which the certificate of completion was issued **that the certificate was acquired in a manner provided by Subdivision (1);**

or

(3) changes land use from the use specified in the certificate of completion if the new land use may result in increased risk to human health or the environment.

The preamble to the proposed rules issued on November 7, 1995 established that “Once all remediation or monitoring systems **are properly installed and adequately meet the performance standards, a CCOC would be issued.**

The preamble to the final rules which became effective on April 19, 1996 further states that “**A future owner who does not maintain compliance with the terms of the certificate of completion will be changing the use of the site and will lose his release of liability. Since the situation that led to the certificate of completion may not be restorable after such a change in use, subsequent purchasers also do not receive a release of liability.** However, they may re-enter the VCP prior to purchase and receive liability protection due to their own actions which may include additional response actions.

The preamble also states that “. . . a released party cannot **ever** be held responsible by the State of Texas for existing contamination at the site, **unless the conditions stated under §361.610(b) exist or the previously released person changes the land use from that in the certificate of completion if the new use may result in increased risk to human health and the environment as stated in §361.610(c).** A non-responsible party may become liable in spite of the liability release if he **changes the land use to one which may result in increased risks. A change in use includes not maintaining an engineering control, remediation system, or post-closure care, or nonpermanent institutional controls.**

The VCP rules state only one regulation relating to this issue in 30 Texas Administrative Code §333.10(a) “If the applicant is **satisfactorily maintaining** the engineering controls, remediation systems or post-closure care, or if non-permanent institutional controls are utilized pursuant to an agreement, the executive director shall certify such facts by issuing the applicant a CCOC.

Given these phrases and some further interpretation, we can therefore define the following terms:

Operation and Maintenance Failure - non-compliance with the terms of a CCOC as described in an approved Response Action Work Plan (RAWP) due to negligent or intentional failure to properly operate and maintain a long-term response action (e.g., engineering control, remediation system or post-closure care, or non-permanent institutional controls) which has caused a change in land use which may result in increased risk to human health and the environment.

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The following are some examples of operation and maintenance failure: continual failure to report monitoring data according to the agreed upon schedule; failure to perform scheduled maintenance as specified in the approved RAWP, necessary for optimal performance of the response action; failure to include results of all scheduled maintenance and monitoring data in the monitoring report; failure to provide power to active remediation systems; failure to provide access for performance of monitoring or maintenance activities; and failure to complete repairs to engineering controls which are due to normal wear or deterioration.

In cases where negligence or intentional acts have caused non-compliance with the terms of the CCOC, the person primarily responsible for correcting the negligence or intentional act is the current owner of the site. If the operation and maintenance activities described in the RAWP are not restored within time frames specified in the RAWP, the liability release for the site contamination must be removed for the person responsible for the negligence or intentional acts and all subsequent site owners. In these cases, the VCP project manager should file a notice in the county property records for the site which states that due to non-compliance with the terms stated in the CCOC, the person responsible for the negligence or intentional acts and all subsequent site owners are no longer released from liability for existing site contamination. The notice should also indicate that the liability release remains in effect for all non-responsible parties for the site previous to the date of this notice. The VCP project manager will then refer the site to the TCEQ regional office for enforcement action.

Response Action Failure - non-compliance with the terms of a CCOC as described in an approved RAWP due to failure in the design and/or construction of a response action.

To determine if response action failure has occurred, the VCP project manager should first establish whether non-compliance is only due to operation and maintenance negligence or intentional acts. If the performance standards described in the approved RAWP are not being met despite reports indicating that all scheduled operation and maintenance activities are completed satisfactorily, the VCP project manager should consider that response action failure has occurred. Response action failure also occurs during operation and maintenance when monitoring reports reveal that the response action is inadequately addressing the remediation or containment of site contamination. In these cases, the original applicant who is a responsible party should modify the RAWP immediately to include activities which will reestablish compliance.

When failed design and/or construction alone is causing non-compliance with the performance standards, the original applicant who is a responsible party who gained approval of the response action is responsible for addressing the contamination to ensure that the terms described in the RAWP are restored in a timely manner. In these cases, the original applicant rather than the subsequent owner, is responsible because they did not design and/or construct a response action which could achieve the goal of providing long-term effectiveness in protecting human health and

the environment. If monitoring reports indicate that inadequate design and/or construction is causing response action failure, the VCP project manager should immediately notify the original applicant who installed the response action. The notification letter should inform the original applicant that in order to remain protected from liability under the certificate of completion, they must provide revisions to the RAWP which will achieve compliance with the terms of the CCOC, including the design and construction of an alternate response action, if necessary. If the original applicant is also a responsible party for the contamination, they may be subject to future enforcement actions if revisions to the RAWP and compliance with the terms of the CCOC are not achieved in a timely manner.

Response action failure also occurs when the original applicant for a site does not replace a response action which fails after its approved life expectancy. In these cases, the original applicant alone will be held responsible for implementing a new response action only if operation and maintenance reports throughout the life of the response action indicate that no negligence or intentional failure to properly operate and maintain the response action has occurred. If after the end of the stated life span the response action fails to meet the performance standards in the RAWP, the original applicant must submit a new or revised RAWP to the VCP project manager which describes plans for the design and construction of a new response action.

For each of the above examples, if the applicant cannot be located or is unwilling to revise the RAWP, then the VCP project manager will issue a Notice of Violation (NOV) to each applicant who is a responsible party. The NOV letter should state that if revisions to the RAWP which will achieve compliance with the terms of the CCOC are not submitted to TCEQ within 30 days of the date of notice, the VCP agreement will be terminated. The VCP project manager should then file a notice in the county property records for the site which states that due to non-compliance with the terms stated in the CCOC, the person who did not modify or replace a failed response action and all subsequent site owners are no longer released from liability for existing site contamination. The notice should also indicate that the liability release remains in effect for all non-responsible parties for the site previous to the date of this notice. The VCP project manager may then refer the site to the TCEQ regional office for enforcement action.

If both operation and maintenance and response action failures are identified or where it is uncertain which is the cause of the failure, then the VCP project manager should inform both the current owner and the original applicant who is a responsible party that both parties will be responsible for restoring compliance with the RAWP.