

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: OAC Chapter 3745-300, Voluntary Action Program

Rule Number(s): OAC Rules: 3745-300-01, 3745-300-02, 3745-300-03, 3745-300-04, 3745-300-05, 3745-300-06, 3745-300-07, 3745-300-08, 3745-300-09, 3745-300-10, 3745-300-11, 3745-300-12, 3745-300-13, 3745-300-14

Date: April 7, 2014

**Rule Type:**

<input type="checkbox"/> New	<input checked="" type="checkbox"/> 5-Year Review
<input type="checkbox"/> Amended	<input type="checkbox"/> Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117  
[CSIOhio@governor.ohio.gov](mailto:CSIOhio@governor.ohio.gov)

## **Regulatory Intent**

### **1. Please briefly describe the draft regulation in plain language.**

**Please include the key provisions of the regulation as well as any proposed amendments.**

The rules in OAC chapter 3745-300 govern the Voluntary Action Program (VAP) and outline in detail the process for taking a property through the program. These rules specify eligibility for the VAP, fees associated with the program, qualifications for certified professional and certified laboratory certifications, criteria for property assessment and remedies, risk assessment procedures, ground water response requirements, the content and scope of a no further action letter, the VAP audit process, and clarify sufficient evidence requirements.

The Division of Environmental Response and Revitalization has conducted a review of the VAP rules in their entirety, in accordance with ORC 119.032. It is proposed that the regulations be amended to clarify eligibility for participation, revise program fees to more closely match costs actually incurred by the Agency, revise the generic numerical risk standards, update the property specific risk assessment procedures, clarify ground water classification and potable use response requirements, better define where an urban setting designation may be applied, create a remediation modification process, revise variance protocol and include case-by-case determinations, incorporate a new no further action letter (NFA) review process, include new audit selection guidelines for NFA letters, and update other program procedures.

### **2. Please list the Ohio statute authorizing the Agency to adopt this regulation.**

<b>Rule Number</b>	<b>Authorizing Statute</b>	<b>Proposed Action</b>
3745-300-01	3746.04	Amended
3745-300-02	3746.04	Amended
3745-300-03	3746.04	Rescind
3745-300-03	3746.04	Adopt
3745-300-04	3746.04	Amended
3745-300-05	3746.04	Amended
3745-300-06	3746.04	Rescind
3745-300-06	3746.04	Adopt

3745-300-07	3746.04	Amended
3745-300-08	3746.04	Amended
3745-300-09	3746.04	Amended
3745-300-10	3746.04	Rescind
3745-300-10	3746.04	Adopt
3745-300-11	3746.04	Rescind
3745-300-11	3746.04	Adopt
3745-300-12	3746.04	Rescind
3745-300-12	3746.04	Adopt
3745-300-13	3746.04	Rescind
3745-300-13	3746.04	Adopt
3745-300-14	3746.04	Amended

- 3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.**

No, the proposed regulations do not implement a federal requirement, nor are the proposed regulations being amended to enable the state to obtain approval to administer and enforce federal law, or participate in a federal program.

- 4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

The rules in this chapter do not exceed federal requirements, as they do not implement any federal requirements. The proposed rule amendments are intended to simplify, clarify, and streamline the VAP. This program and participation in it is voluntary and depends on the need for civil liability relief for hazardous substance and petroleum cleanup that a person voluntarily performs on a former industrial, commercial, or blighted property.

**5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

The rules in OAC chapter 3745-300 establish criteria for certification and standards of conduct within the VAP for certified professionals and certified laboratories, and outline specific standards and procedures used for participation in the VAP. The rules govern the voluntary remediation process, which allows property owners and developers to voluntarily evaluate and cleanup environmentally contaminated property and get a release of liability from the state. Without regulation in these areas, parties would be reluctant to assess, cleanup and redevelop properties due to liability uncertainty, hence, sites that enter into the VAP would not be remediated or cleaned-up to standards at safe levels for both human health and the environment.

**6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

The proposed rule changes in chapter 3745-300 will allow for shorter review times for NFA letter submittals and better contain program costs for the division, both of which will be tracked via excel spreadsheet and through employee time accounting, making the VAP a more efficient program. These changes will provide for the ability to review more NFA letter submittals and keep cost overages to a minimum, and ultimately creating sustainability within the program. Ultimately success is gauged by the level of participation and external satisfaction with the program.

**Development of the Regulation**

**7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

**If applicable, please include the date and medium by which the stakeholders were initially contacted.**

Ohio EPA, DERR established a 30 day early stakeholder comment period and requested comments from both interested and potentially affected parties. The comment period ended as of April 30, 2013. Ohio EPA DERR sent notice of our request for comments electronically to the various VAP Certified Professionals, VAP Certified Laboratories, and other members of Ohio EPA's Interested Parties list for DERR rulemaking. Interested parties include developers, municipalities, environmental professionals and lawyers, as well as citizens and environmental groups. The notice was also posted on the DERR webpage.

DERR also chose to hold several stakeholder meetings to gather input and provide information on the proposed rule changes to all parties that wished to attend. Five public meetings were held throughout the state; the first was on November 21, 2013 and the last was

on December 17, 2013. All of the above mentioned interested parties were notified of the stakeholder meetings via listserv message and a DERR web posting.

**8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?**

Ohio EPA DERR received significant input from interested parties at various outreach events, particularly at the Ohio Brownfield Conference. DERR also met with developers, certified professionals, and groups such as the NAIOP to gain an understanding of various perspectives during the formal early stakeholder outreach period.

One email with comments compiled from Partners Environmental Consulting, Inc. was received in regard to the Early Stakeholder Outreach period, and changes were made to the draft language where appropriate. All comments received from Partners Environmental Consulting, Inc. were considered, and the following were included in the proposed rule changes: clarification of rule language within the remedy rule; elaboration in regard to qualifications and boundaries for urban setting designations; and ground water rule sampling clarifications.

**9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?**

Rules 3745-300-08 and 3745-300-09 were revised with the use of scientific toxicity data, which was used to develop the generic numerical standards to be applied within the VAP. This data supports the regulation being proposed, as it allows for a predetermined set of standards to be followed when bringing a property through the program.

Rules 3745-300-06, 3745-300-07 and 3745-300-10 incorporate administrative procedures, lessons learned and current environmental assessment practices as reflected by USEPA and similar peer reviewed guidance.

The rest of the rules in OAC chapter 3745-300 are developed using scientific data, rather, they establish an administrative program and processes through which blighted properties can be remediated and cleaned up voluntarily.

**10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?**

A workgroup was created to review potential rule changes and regulatory suggestions for the five year rule review. Prior to convening the workgroup, a spreadsheet was created to capture all of the ideas and suggestions that were brought up within the division and from outside parties in regard to rule changes that should be considered. Each suggestion was reviewed

and considered by the workgroup, and then the workgroup as a whole opted to either include the suggested changes or to reject them. Once the spreadsheet was narrowed down, the large workgroup was broken down into smaller ones, and each group assigned to a specific rule. Each of the regulatory suggestions were considered by the specific rule workgroups, and ultimately incorporated into the rule.

Regulatory suggestions that the larger workgroup opted out of were due, largely because they were either too cumbersome to oversee and manage, or did not fit into the overall goals of the program. However, it is important to note that the majority of suggestions were incorporated into the proposed rule language in one form or another.

**11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.***

The rules in OAC chapter 3745-300 establish an administrative program through which blighted properties can be remediated and cleaned up voluntarily. The process each volunteer chooses to clean up the property is not necessarily dictated in rule; however, the outcome is always the same for each VAP property: they are required to maintain and meet applicable standards before a covenant not to sue will be issued by the director. Essentially, the VAP is a performance based program, as properties that enter into it must achieve applicable standards. The steps that are taken under the rule procedures to remediate a property in order to reach and meet those applicable standards, however, are left up to the certified professional in cooperation with the volunteer performing the work on the property.

**12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?**

Ohio EPA is the only agency within Ohio to have a program such as the VAP. The rules in this chapter are unique within Ohio EPA and do not duplicate the rules of this or any other agency within the state of Ohio.

**13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.**

Ohio EPA's voluntary action program was originally implemented in September 1994, and the rules in OAC chapter 3745-300 have existed since December 1995. The proposed amendments to the rules will be implemented once the amended rules are adopted and become effective. All of the proposed rule changes will be implemented through policy and guidance written within the division in compliment to the rules which will be adhered to by the division in its entirety, allowing for consistency and predictability within the VAP.



### **Adverse Impact to Business**

**14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:**

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

**The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.**

Participation in the VAP is completely voluntary. Associated fees are based on a “cost incurred” model for the agency and are not intended to create a profit for the agency; however, they are necessary to keep the program afloat. The impacted business community for the rules in this chapter is any party that wishes to voluntarily clean-up a property through the VAP. This can range from property owners, volunteers, townships, cities, etc.

The cost of compliance with the rules can vary with the scope of remediation required for a particular property, as more time, money and effort will be required to clean-up a larger property vs. a smaller one.

The changes in this rulemaking do not have an adverse impact on the business community nor do the current effective rules within chapter 3745-300.

**15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

The agency does not feel that there is an adverse impact to the regulated business community, as the voluntary action program (VAP) is, as the name implies, entered into completely voluntarily. We believe the proposed changes can make the program more user (business) friendly, which was ultimately our goal. Once a property has gone through the VAP and received a covenant not to sue (CNS), the value of the property increases and can be placed back into productive service within the community. This ultimately benefits the community through the remediation of a property that was once an eyesore. Cleanup often leads to property redevelopment, allowing the property to return to productive use within the community.

### **Regulatory Flexibility**

**16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

[CSIOhio@governor.ohio.gov](mailto:CSIOhio@governor.ohio.gov)

Any volunteer, including a small business, has the same compliance points to meet standards in order to receive a covenant not to sue.

**17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

These rules are not subject to fines or penalties.

**18. What resources are available to assist small businesses with compliance of the regulation?**

The following resources are available:

- Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) is a non-regulatory program that provides information and resources to help small businesses comply with environmental regulations. OCAPP also helps customers identify and implement pollution prevention measures that can save money, increase business performance and benefit the environment. Services of the office include a toll-free hotline, on-site compliance and pollution prevention assessments, workshops/training, plain-English publications library and assistance in completing permit application forms. Additional information is available at <http://www.epa.ohio.gov/ocapp>.
- Ohio EPA also has a permit assistance web page ([http://www.epa.ohio.gov/dir/permit\\_assistance.aspx](http://www.epa.ohio.gov/dir/permit_assistance.aspx)) that contains links to several items to help businesses navigate the permit process, including the Permit Wizard, Answer Place, Ohio EPA's Guide to Environmental Permitting and eBusiness Center.
- Ohio EPA maintains the Compliance Assistance Hotline 1-800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.
- U.S. EPA Small Business Gateway also has information on environmental regulations for small businesses available at <http://www.epa.gov/smallbusiness/> and a Small Business Ombudsman Hotline 1-800-368-5883.
- Ohio EPA's Division of Environmental Response and Revitalization (DERR) offers grant funded technical assistance to eligible local public entities including counties, cities, villages, townships, port authorities, etc. More information is available at: [http://epa.ohio.gov/derr/SABR/Grant\\_Assistance.aspx](http://epa.ohio.gov/derr/SABR/Grant_Assistance.aspx).

Ohio EPA's DERR rules coordinator, Emily Patchen, is the primary contact for any rules relating to the division, and is available to answer any questions. She can be reached by calling (614) 728-5441 or by email at [Emily.Patchen@epa.ohio.gov](mailto:Emily.Patchen@epa.ohio.gov).

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