

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, 3745-300-15

Date: _____

Rule Type:

New

5-Year Review

Amended

Rescinded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.

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.

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

CSIOhio@governor.ohio.gov

The Voluntary Action Program (VAP) is governed by rules in OAC Chapter 3745-300. The VAP was created to give individuals a way to investigate possible environmental contamination, clean it up if necessary, and receive a promise from the State of Ohio that no more cleanup is needed, known as a covenant not to sue (CNS). 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 (NFA) 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 revise the requirements for laboratory certification, revise the renewal process for VAP Certified Professionals, revise the procedures for conducting environmental site assessments, revise the generic numerical risk standards, update the property specific risk assessment procedures, clarify ground water classification and potable use response requirements, revise requirements for remedies, and update other program procedures.

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

Section 3746.04 of the Revised Code authorizes the director to adopt the VAP rules.

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?

No, these rules do not implement any federal requirement. They are not being amended to administer or maintain any federal program.

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

These rules do not exceed federal requirements, as they do not implement any federal requirements.

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)?

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

CSIOhio@governor.ohio.gov

The rules in Chapter 3745-300 of the Administrative Code allow property owners and developers to voluntarily evaluate and clean up environmentally contaminated property and get a release of liability from the state. Without regulation in these areas, parties would be reluctant to assess, clean up and redevelop properties due to liability uncertainty, hence, sites that enter 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 of the Administrative Code will improve the quality of NFA submittals, improve program efficiency measured by the number of days it takes to receive a covenant not to sue, and provide stronger protections for human health. Ultimately, success of the VAP program is gauged by the level of participation by property owners wishing to mitigate their properties and external satisfaction with the program, including the value of the CNS to property owners who have utilized 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.

The Division of Environmental Response and Revitalization (DERR), Ohio EPA established a 30-day early stakeholder comment period and requested comments from both interested and potentially affected parties. The comment period ended as of February 5, 2018. DERR sent an electronic notice of our request for comments to 1,833 people, including VAP Certified Professionals, VAP Certified Laboratories, and other members of Ohio EPA's Interested Parties list for DERR rulemaking. Interested parties included developers, municipalities, environmental professionals and lawyers, as well as citizens and environmental groups. The notice was also posted on the DERR webpage. In addition, VAP Certified Professionals were invited to provide comments and suggestions during several training sessions in 2017 and 2018. Stakeholders were also invited to participate in the workgroups. External stakeholders on the groups had an opportunity to discuss their concerns and provide suggestions.

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

Ohio EPA accepted comments through February 5, 2018. During the ESO period, 15 work groups were formed consisting of Ohio EPA staff and external stakeholders. Each group worked in cooperation to draft VAP rules. External stakeholders on the groups had an opportunity to discuss their concerns and provide suggestions.

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 of the Administrative Code were revised with the use of scientific toxicity data, which was used to develop the generic numerical cleanup 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 of the Administrative Code incorporate administrative procedures, lessons learned, and current environmental assessment practices as reflected by U.S. EPA and similar peer reviewed guidance. The rest of the rules in OAC chapter 3745-300 are not 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?

Fifteen workgroups, each consisting of consisting of both Ohio EPA staff and external stakeholders, were created to review potential rule changes and regulatory suggestions for the five year rule review with each group assigned to a specific rule. Prior to convening the workgroups, suggestions 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 workgroups, which then opted to either include the suggested changes or to reject them. Each group worked in cooperation to draft VAP rules.

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. Overall, the VAP is a performance-based program, as properties that enter it must achieve applicable standards. 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. The steps that are taken under the rule procedures to remediate a property to reach and meet those applicable standards, however, are left up to the Certified Professional in cooperation with the entities wanting to clean up 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. The proposed amendments to the rules will be implemented once the amended rule is adopted and becomes effective. Evaluation of requests for a covenant not to sue, urban setting designation, and to defer or exclude a risk assessment for an exposure pathway present at a VAP site will be reviewed by one centralized group in Ohio EPA's Central Office, Columbus. The Director makes the final decision.

Ohio EPA will inform the stakeholders through announcements on our listserv. The amendment will be published on the DERR web page. DERR also plans to conduct multiple training events for both Ohio EPA staff as well as external stakeholders.

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

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

CSIOhio@governor.ohio.gov

“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 funded. 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. Adverse impact, associated fees: Fees are imposed on entities who submit an NFA seeking a CNS. Costs are also billed for review of TAs, USDs, and risk pathway exclusion requests.

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

Once a property has gone through the VAP and received a covenant not to sue, 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 blighted. 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.

The entire VAP program is an alternative means of cleanup. 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?

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

CSIOhio@governor.ohio.gov

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) 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.

Ohio EPA's DERR-VAP rules coordinator, Sydney Poole Funk, is the primary contact for any rules relating to VAP and is available to answer any questions. She can be reached by calling (614) 644-3751 or by email at Sydney.Poole@epa.ohio.gov.