
OHIO EPA PROPOSES RULE CHANGES TO INDUSTRIAL PROPERTY CLEANUP PROGRAM

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Ohio EPA is moving forward with substantial changes to the rules for the Voluntary Action Program (VAP) which governs the procedures and standards for voluntary cleanup of industrial sites and brownfields. The Agency provided an overview of the changes and its response to public comments on April 11 at the Ohio Brownfields Conference in Columbus.

While the Agency describes the changes as mostly providing greater clarity or streamlining processes, many of the changes are significant.

Click [here](#) for Ohio EPA's detailed overview of the proposed rule changes.

REVISED GENERIC CLEANUP STANDARDS

The VAP rule change proposes a major overhaul to the methodology for calculating VAP generic cleanup standards. Ohio EPA is moving toward the use of U.S. EPA Regional Screening Levels.

In some cases the standards become more stringent and in other cases more lax. At the Brownfield Conference, Ohio EPA stated the only dramatic change is to the cleanup value for trichloroethylene (TCE). At the conference, the Agency stated it notified all sites that to its knowledge were currently performing a VAP cleanup where TCE was a constituent of concern of the proposed change.

In order for the current generic cleanup standards to apply to your VAP cleanup, the volunteer must submit a "No Further Action Letter" (NFA) to the Agency before the rules are finalized.

URBAN SETTING DESIGNATIONS: EXPANDED USE

[Urban Setting Designations](#) (USDs) are an important tool under the VAP. Cleanup of contaminated groundwater can often be the most costly portion of the cleanup. Ohio EPA recognized that there may be little benefit to requiring cleanup of contaminated groundwater in urban areas where the population is served by public drinking water systems.

Requiring cleanup of groundwater in those situations may result in avoidance of reuse of brownfield properties. With a USD designation, a volunteer can avoid a costly cleanup of contaminated groundwater.

Under the proposed VAP rule changes, Ohio EPA proposes to expand the eligibility of areas for USDs. For example, a village that meets certain geographic requirements can request a USD.

OFF-PROPERTY CLEANUP REQUIREMENTS

It has been unclear under the current VAP program what cleanup requirements apply to contamination that may have already left the volunteer's property. Under the proposed rule, Ohio EPA clarifies the obligations to address off-property releases.

Ohio EPA states that a volunteer is required, even under current VAP rules, to clean up off-property releases of contamination that exceed VAP standards. Under the proposed rule change, this requirement is made explicit. Some may consider this to be a major program change.

The proposal does include new provisions to provide some flexibility in addressing off-property releases. A volunteer can attempt to make a demonstration to Ohio EPA that it "used best efforts" to address the release, but that something made it impossible or impractical.

Examples:

- If a neighboring property owner uses a drinking water well and refuses to allow access to his property to address the contamination, this may be grounds for an exemption from Ohio EPA.
- A release from the property contaminates sediment in an adjacent river that exceeds applicable standards. The volunteer would need to address the sediment unless it can demonstrate that it is contaminated from multiple sources.

However, it is important to note that if an exemption to address an off-property pathway is granted, the CNS (legal release) will not extend to that pathway (i.e., the volunteer could be required to clean it up in the future if circumstances change).

WHEN A PROPERTY MUST MEET VAP STANDARDS

The proposed rule changes intend to clarify that a volunteer only has to construct the remedy prior to issuance of the CNS, so long as the volunteer demonstrates the property will meet VAP cleanup standards within five years (or some other time agreed to by Ohio EPA). This allows flexibility where remedy involves ongoing treatment.

POST CNS CHANGES TO REMEDY

The proposal also establishes a process for modification of a remedy post-CNS. For example, if institutional controls (e.g., fences or protective barriers) are used to demonstrate the property meets standards, the volunteer can remove those controls without the property losing its CNS status during implementation of the new remedy.

SUFFICIENT EVIDENCE: VAP ELIGIBILITY POST-ENFORCEMENT

A volunteer is eligible for the VAP until it receives notice of enforcement from Ohio EPA. If a volunteer had initiated a VAP cleanup prior to receiving notice of enforcement, the volunteer can continue if it makes a so-called “sufficient evidence demonstration.”

The proposed rules clarify what must be demonstrated and how quickly the cleanup must be completed in order to avoid enforcement. Under the rules, the volunteer must initially demonstrate that it:

- Completed a Phase I assessment
- Retained a VAP certified professional
- Developed a schedule of activities for completing the VAP

Under the proposed changes, if the volunteer is deemed to have satisfied the requirement for sufficient evidence, it must adhere to the schedule and complete the VAP cleanup within three years.

PROCESS CHANGES: FASTER TURNAROUND BUT GREATER RISK OF SURPRISES

Under the current VAP process, when the volunteer is ready to seek concurrence that the property meets VAP cleanup standards, it requests that its consultant submit a NFA. The consultant must submit the NFA along with all of the supporting documentation, including the Phase I property assessment and the Phase II property assessment as well as any risk assessment work. The supporting documentation can be hundreds – if not thousands – of pages.

Under the proposed change, a volunteer would submit just the NFA letter (the executive summary of the Phase I and Phase II property assessments, operation and maintenance documentation, and draft environmental covenant). After the “covenant-not-sue” (CNS) is issued, the volunteer would be required to file the supporting documentation.

While the supporting documentation must be submitted, the Agency would not review it immediately. Rather, the documentation would be maintained in Ohio EPA’s public files.

Through this process change, the Agency is attempting to speed up its review process by reducing the amount of paperwork that must be reviewed prior to issuing a CNS. Less review means faster turnaround – good news for developers whose projects or transactions have been delayed waiting for the CNS to be issued.

However, as with everything, there are tradeoffs. Ohio EPA plans to revise its audit protocols. A VAP audit is similar to a tax audit. Under a VAP audit, the project is thoroughly reviewed by Ohio EPA, including the NFA and all supporting documentation. The probability of an audit is highest after the first year the CNS is issued, but can occur anytime. Under the process change, Ohio EPA proposes to increase the frequency of its audits. If through the audit the Agency identifies issues with the investigation or cleanup, a notice is sent to the volunteer. If those issues are not addressed, the volunteer could lose its CNS.

This process change may result in uncertainties for property owners after they thought a project was finished. For example, two years after the CNS is issued, Ohio EPA could audit the project, find deficiencies, and require more investigation and/or cleanup. This may come as a major surprise to a new owner who bought the property after the CNS was issued. While this can occur under the current process, it is less likely that an audit will identify issues with an NFA because all the supporting documentation was reviewed by Ohio EPA prior to issuance of the CNS.

SCHEDULE

Ohio EPA indicated the final rules would be filed with JCARR on April 15. Under that timeline, JCARR jurisdiction would end on June 16th, and Ohio EPA has stated the effective date would be no sooner than July 1.

However, this assumes that no significant objections are raised during the JCARR process. If such objections are made, the Agency could be forced to pull the rules, resulting in delays.

ADDITIONAL INFORMATION

For additional information, please contact:

[JOSEPH P. KONCELIK](mailto:joseph.koncelik@tuckerellis.com) | 216.696.2373 | joseph.koncelik@tuckerellis.com

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