

2. Oversight through Audits in the MOA Track

For all sites in both the MOA and Classic VAP Tracks, Ohio EPA will conduct audits at a minimum of 25 percent of the properties where NFAs were issued each calendar year. This means that at least one out of four sites will be audited. The purpose of the audits is to ensure the following:

- The sites meet applicable standards and are protective of human health and the environment.
- To review the qualifications of certified professionals and certified laboratories and to determine whether their performance has resulted in the issuance of NFA letters that are not consistent with applicable standards.

OAC 3745-300-05 and ORC 3746.21 permit Ohio EPA to examine any and all documents related to a voluntary action during an audit, be they housed at the site, the volunteers office, the laboratory or the certified professional's office. This document review is called a Tier I audit. Certified Professionals must comply with all document requests. The agency may conduct on-site sampling (termed a Tier II audit) in order to verify compliance with the applicable standards. Certified Professionals and Certified Laboratories can also be investigated under a Tier II audit if their performance is called into question as a result of information discovered during the Tier I audit. Under the VAP statute, Ohio EPA has the authority to suspend or revoke certifications of Certified Professionals and Certified Laboratories if it is determined that VAP rules have been violated.

If the audit findings show deficiencies, the following actions may be taken by the VAP:

- The volunteer (or current owner) will be provided a reasonable opportunity to cure the deficiencies or the failure of the site to safeguard human health, safety and the environment. If the volunteer or current owner (i.e., a successor to the original volunteer) fails to cure the deficiencies, then the director will revoke the covenant. After the covenant is revoked, Ohio EPA has the authority to initiate, if appropriate, an enforcement action at the site.
- If the certified professional, certified laboratory, or both have failed to maintain proper qualifications within the VAP, or their performance has resulted in the issuance of an NFA Letter that fails to meet applicable standards, then civil actions may be taken against them.

Certified professionals and certified laboratories may face criminal sanctions for falsifying site information or data.

3. Oversight through Operation & Maintenance Agreements

Volunteers that complete a voluntary action that relies on the ongoing operation and maintenance (O&M) of an engineered control to make the site protective (e.g., cap systems and ground water treatment systems) must enter into a legally binding agreement with the Ohio EPA before the director issues a covenant not to sue. This O&M Agreement must describe how the remedy is constructed and how it will be monitored, maintained and repaired. It also lays out inspection opportunities for the agency. Companies must document that they have the financial capability to operate any remedy relied on, before the agency will agree to enter into the O&M Agreement. The statute requires that the agency be notified of any change in ownership of a site with a covenant not to sue. All future owners of the site must sign onto the agreement or lose the covenant not to sue. Ohio EPA will revoke the covenant not to sue if the volunteer or future owner fails to maintain the engineered controls as required by the O&M Agreement. Covenant revocation leaves the property open to Ohio EPA's arsenal of enforcement activities (see pages 16-17).

For MOA Track sites, the agency will have reviewed and approved the volunteer's proposed O&M plan for maintaining the remedy before construction occurs.

4. Oversight through Institutional Control Inspections

By law, the Ohio EPA, must visually inspect each VAP covenant recipient relying on institutional controls at least once every five years. This 5 year review is to determine whether the property is being used in compliance with the applicable institutional controls. The agency will also investigate the county records of the subject property to determine if the property is being used in compliance with the applicable institutional controls. Use of the site in a manner inconsistent with the institutional controls automatically voids the covenant.

5. Oversight through Opportunity to Cure/Compliance Agreements

As indicated above, the release provided by a covenant not to sue is not absolute. Ohio EPA can reopen the covenant and compel volunteers to do additional work under certain circumstances. If a property which has been issued a covenant not to sue under the VAP is found not to meet applicable standards, Ohio EPA will require the volunteer to take action at the site to

meet applicable standards. If such actions are not taken, the covenant not to sue will be revoked. Specifically, if it is found that the voluntary property no longer meets applicable standards, Ohio Revised Code Section 3746.12(B) requires the director of Ohio EPA to provide notice to the person responsible for maintaining applicable standards. Once the recipient receives the above-mentioned notice, they must notify the director of his intention to return the property to compliance with the standards within 30 days or the covenant not to sue will be revoked.

If the volunteer responds within 30 days, the person responsible for maintaining applicable standards must enter into a compliance agreement with Ohio EPA to return the property to applicable standards. The compliance agreement, among other things, must contain a time line to return the property to applicable standards which the person responsible must adhere to. Failure to adhere to the schedule contained in the agreement or return the property to applicable standards can result in revocation of the covenant not to sue.

VAP covenants run with the land, therefore the responsibility for maintaining applicable standards passes to subsequent owners.

6. Revocation of Covenant Not to Sue and Enforcement

Ohio EPA can revoke covenants and then use other state authorities to ensure that response actions at sites in the MOA Track are completed if the volunteering parties fail or refuse to complete the necessary response actions. Once a covenant has been revoked or determined void, Ohio EPA can take action to require the investigation and cleanup of sites under several statutory authorities:

- Ohio EPA can take action to address air, water or soil pollution. Specifically, Ohio Revised Code Section 3734.20(B) authorizes the director of environmental protection, through officers, employees or contractors, to perform necessary measures to abate or prevent air or water pollution or soil contamination or to protect public health or safety. Further, the attorney general is authorized, at the written request of the director, to initiate a civil action to recover costs.
- Ohio EPA can also compel responsible parties to address air, water and soil pollution. Specifically, ORC Section 3734.13(A) authorizes the director to issue enforcement orders directing the abatement or prevention of violations of ORC Chapter 3734 (solid & hazardous waste laws). Emergency orders, which are effective immediately, can be issued by the agency where the existence of an emergency

requiring immediate action to protect public health or safety or the environment is found.

- ORC Section 3734.10 authorizes the attorney general, at the request of the director, to prosecute actions against any person who has violated, is violating or is threatening to violate ORC Chapter 3734 (solid & hazardous waste laws). This includes injunctive relief.
- ORC Section 6111.03(H) and (K) authorizes the director to issue orders to prevent, control, or abate water pollution and to cause to be instituted proceedings to compel compliance with such orders. Case law in Ohio makes it clear that ORC 6111 includes protection of both ground waters and surface waters (Heiby Oil Company, Inc., Appellee v. Schregardus, Dir., Appellant, 92 Ohio App3d. 46, 634 NE 2d 973).
- ORC 3704.06(A) and (B) authorizes the attorney general, at the written request of the director, to prosecute any person who violates ORC Section 3704.05 (air pollution violations) or to bring actions for injunctions, civil proceedings or other appropriate actions against persons who violate ORC Section 3704.05.
- ORC Section 6111.07(B) authorizes the attorney general, at the written request of the director, to prosecute persons who violate ORC Sections 6111.01 through 6111.08 (water pollution violations) or any order, rule or condition of a permit issued by the director and to bring an action for injunction against persons violating or threatening to violate ORC Chapter 6111.

• The Division of Emergency and Remedial Response uses the above authorities to compel companies to perform Superfund-like cleanups and more discreet removal actions. The division has issued over 70 state consent orders and 13 unilateral state orders and has entered into over 30 consent decrees to compel investigation and cleanup. Ohio EPA also maintains a level of effort contract with remediation firms who are available to conduct removals at sites.

Public Participation in the MOA Track

Under the MOA Track, volunteers will notify Ohio EPA of entry into the program by submittal of a notice of intent to participate in the MOA Track before they begin activities under the program. The public notice process that follows the submittal of the notice of intent includes:

- Publication, by the volunteer, of the notice of entry in the local newspaper.

- Publication, by Ohio EPA, of the notice of entry in the agency's Weekly Review.
- Making the notice of entry available for public inspection in the area where the site is located (e.g. local public library.)
- Publication, by the volunteer, indicating that the Proposed Remedial Work Plan is available for public review and comment. The comment period will be for 30 days from the date of the notice.

Additional notice activities may be conducted as necessary and appropriate. The information volunteers submit to Ohio EPA on the notice of entry will include not only basic information regarding the location, certified professional and volunteer, but also information regarding what the investigation and potential remediation will involve (i.e. risk assessment, operation and maintenance plan, use restrictions, etc.) This information will allow the public to be adequately informed about the voluntary investigation and cleanup activities planned for the site and will also allow the VAP to keep track of the number of MOA Track voluntary actions being completed throughout the state and more accurately budget our review resources. Ohio EPA will provide the list of sites participating in the MOA Track to U.S. EPA on a regular basis and maintain the list on the VAP Web page.

Once a site enters the MOA Track and notice is made to the public, all documents which are required to be submitted to Ohio EPA for review and approval under the MOA Track will be held in a public repository in the vicinity of the site. Additionally, all interested parties may contact Ohio EPA at any time and request and receive copies of or access to any document pertaining to the site. These documents include:

1. Phase I Property Assessment Report;
2. Initial Eligibility Determination;
3. Phase II Sampling Plan;
4. Phase II Property Assessment Report;
5. Risk Assessment Report;
6. Proposed Remedial Action Work Plan;
7. Documentation of any Significant changes to the Voluntary Action; and
8. NFA Letter and request for a covenant not to sue (CNS).

In order to obtain or review these documents, interested parties need only contact the VAP's records management officer. Copies of MOA Track documents can be mailed to interested parties or they may visit Ohio EPA's offices to conduct a file review. Therefore, interested parties can follow the progress of an MOA Track site

from initial investigation to cleanup. While Ohio EPA technical staff review and comment on the above-mentioned documents, interested parties can co-review and provide comments to Ohio EPA on work performed by the volunteer.

Ohio EPA will notify volunteers that public meetings need to be conducted when a request is made or Ohio EPA determines that there is sufficient public interest. The scope of the public meetings will vary depending upon the level of public interest. For example, if one or two individuals express interest in meeting with Ohio EPA and the volunteer, a one-on-one meeting might be held near the site location; if interest is expressed by several citizens or a group representing its membership (e.g., a non-profit organization), a more formal public meeting might be held. Ohio EPA staff will attend all public meetings, provide assistance to volunteers and certified professionals in setting up meetings and provide agency facilitators and presenters as needed.

Implementation

Implementation of the MOA and Classic VAP Tracks will be done administratively without modification of any statutory or regulatory provisions. Ohio EPA proposes to seek stakeholder input to ensure that each track will be used and to help gauge the level of interest in each track.

1. Funding

The VAP is primarily a self-funded program; however, the program also relies upon state general revenue funds and federal grant dollars. The document reviews which will be conducted under the MOA Track as well as any meetings that are held with the volunteers and CPs to discuss technical oversight issues or facilitate public involvement will be subject to billing in the same manner as current VAP technical assistance reviews or will be subsidized utilizing federal grant dollars.

For work billed to the volunteer, the VAP regulations, specifically paragraph (E) of OAC rule 3745-300-03, contemplate charging both direct and indirect costs for such services to the beneficiary of those services. For federal grant subsidized document reviews under the MOA Track, Ohio EPA plans to set up criteria and procedures for evaluating applicants for subsidized technical assistance, awarding grant-funded assistance and adequately tracking and reporting on the assistance provided.

Ohio EPA proposes to continue using the current billing process for the two program tracks, which is similar to how other states recoup their up-front review costs. For the MOA Track, the fees charged for technical assistance and NFA reviews, along with federal grant dollars, should be adequate to

cover program costs. For those volunteers who do not receive grant funded technical assistance, Ohio EPA will obtain a commitment in writing from the volunteer to pay the State's costs, direct and indirect, at the time they provide notice of their participation in the MOA Track.

2. Resources

Ohio EPA recently conducted a survey to establish the potential number of volunteers who might use the MOA Track and to determine expectations for reasonable review time frames. This information is being used to determine the number and type of staff to hire or dedicate to carrying out the two tracks of the VAP. Additional staff will be needed to conduct the MOA Track document reviews and the results of the survey have allowed Ohio EPA to develop projections concerning the staff resources needed. Additional staff will be funded through the fees described above and federal grant dollars. Additional necessary staff will be hired or shifted from other DERR work to ensure the MOA Track work is completed.

3. Development of Procedures for Implementing the MOA Track

Once the MOA between Ohio EPA and U.S. EPA is finalized, Ohio EPA will begin developing procedures to implement the program. The operation of the MOA Track will be significantly different and much more resource intensive than the current Classic VAP. As a result, new procedures and protocols to guide both internal staff and volunteers through the MOA Track oversight and public participation will need to be developed before volunteers can be accepted into the MOA Track.

In order to provide the oversight and facilitate the public participation necessary to operate the MOA Track, additional staff will need to be hired or diverted from other DERR programs to work on VAP projects. Since most, if not all, new staff will have little or no experience working on voluntary cleanup projects, detailed training will be necessary before MOA Track sites can begin to be shepherded through the program.

Significant lead time will be needed in order to ensure that Ohio EPA has adequate procedures and properly trained staff available under the MOA Track. It will take approximately 6 to 8 months from the time additional staff are hired to have a fully operational MOA Track program.